American Immigration Lawyers Association
EOIR Spring, 2015 Liaison Meeting Minutes

Executive Action

1. During a November 20, 2014 briefing on the President's "Immigration Accountability Executive Actions," White House staff indicated that a package of immigration court reforms that would address qualification of accredited representatives and ineffective assistance of counsel issues would be forthcoming.[1] Does EOIR have any updates on efforts related to accredited representatives and ineffective assistance of counsel issues? Are there any other initiatives related to the executive actions that EOIR is planning to announce?

EOIR Response: *A proposed regulation on accredited representatives is in the final stages at OMB, and EOIR hopes to move the rule through the remainder of the regulatory process as quickly as possible. There will be public meetings for stakeholders to provide feedback on the proposed rule. EOIR is currently working on finalizing the proposed rule on separate appearances for custody and bond proceedings, published in the federal register on September 17, 2014. EOIR is also working on a proposed rule on ineffective assistance of counsel issues. Although there is no specific timeline for issuance, the rule is a priority and EOIR hopes to move it through the remainder of the regulatory process as quickly as possible.*

EOIR Procedural Issues

2. In *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), the court held that ICE is required to provide non-confidential A-file documents under INA §240(c)(2)(B) to the respondent. In pro se cases, respondents often are not aware of their ability to request such materials, and in some immigration courts, counsel for respondents have to deny alienage in order to receive documents such as the I-213, Record of Deportable Alien. Additionally, criminal records are particularly important in bond proceedings, but are often not available to counsel in such a short timeframe. In some states, there is no central agency to request a criminal report, making it particularly difficult to have timely access to the criminal records. Delays in obtaining critical documents such as this result in an inability to properly prepare and represent detained respondents. In light of these problems, would EOIR consider implementing a policy that requires ICE Office of Chief Counsel to file the I-213 and other documents such as criminal records and database search results to the court at the outset of the case, so that respondents have timely access to them?

EOIR Response: *EOIR is not considering such a policy. EOIR considers this decision to be within the purview of the Department of Homeland Security.*

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[1] "Updated Summary of the President's Immigration Accountability Executive Actions," AILA Doc. No. 14112446 (posted 11/24/14), available at http://www.aila.org/infonet/wh-summary-of-the-presidents-exec-action.

3. Attorneys are often retained by a respondent for the sole purpose of reviewing the respondent's EOIR file. Would EOIR consider allowing attorneys to review A-files on active cases if the attorney provides a disclosure form signed by the respondent authorizing the attorney to do so without also filing an EOIR-28?

EOIR Response: *EOIR understands the issue as raised by AILA and appreciates the concerns attorneys have. EOIR is reviewing this issue.*

4. On September 17, 2014, EOIR published a notice of proposed rulemaking titled "Separate Representation for Custody and Bond Proceedings."[2] The notice proposes a change to the regulation that would allow a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the alien's proceedings before the immigration court.

    a. When does EOIR expect a final rule to be published implementing this regulatory change?

EOIR Response: *EOIR hopes to publish a final rule soon.*

    b. While we support the proposed rule, we also believe that an attorney should be able to provide representation that is limited in scope or purpose, if the limitation is reasonable under the circumstances and the client gives informed consent. Toward that end, the proposed rule should be expanded to allow representation that is limited to a specific purpose or proceeding, such as a motion to reopen, motion to change venue, motion to remand, motion to recalendar, and other limited purposes. As noted in our comments to the notice of proposed rulemaking,[3] we do not believe that *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986) prevents this type of limited representation. Is EOIR considering expanding the proposed rule to encompass this type of limited representation?

EOIR Response: *EOIR appreciates AILA's concerns, and will respond formally through the rule-making process.*

5. Administratively closed cases can remain on an immigration court's inactive docket for years. However, respondent's counsel may not wish to remain the attorney of record for an undetermined, lengthy period of time. Likewise, respondents may wish to retain new counsel either while proceedings are administratively closed or in order to recalendar the case. Once an immigration judge administratively closes a case, attorneys should be able to file a motion to withdraw their representation. Similarly, attorneys should be able to file a joint motion to substitute counsel without recalendaring the case. Please confirm

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[2] 79 FR 55659 (9/17/14); "EOIR Notice of Proposed Rulemaking on Custody and Bond Proceedings Representation," AILA Doc. No. 14091741 (posted 9/17/14), available at http://www.aila.org/infonet/eoir-79-55696-09-17-14.

[3] "AILA Comments on EOIR Proposed Rule on Separate Representation for Custody and Bond Proceedings," AILA Doc No. 14111845 (posted 11/17/14), available at http://www.aila.org/infonet/comments-eoir-proposed-rule-separate-rep.

that a case does not need to be on the active docket in order for an immigration judge to adjudicate a motion to withdraw or motion to substitute counsel.

EOIR Response: *In order for EOIR to take action on a motion, the case must be active on the court's docket. Without an active case, EOIR has no mechanism for a court to rule on a motion. Withdrawing from an administratively closed case would require three motions: (1) motion to recalendar; (2) motion to withdraw; and (3) a pro se motion to administratively close the case again.*

EOIR Hearing Dates

6. According to a January 28, 2015 article in the Wall Street Journal, EOIR has been using "parking dates" in order to move scheduled hearings off of the current docket to make room for priority cases. AILA members received notices which state that the new hearing date is not a date certain and that the hearing may be rescheduled again to a sooner date at some point in the future. In many courts, cases were rescheduled with a November 29, 2019 hearing date.

    a. Which courts have implemented the use of "parking dates" to reschedule hearings? What criteria were used to determine which courts would use this system to reschedule hearings and to determine which cases were rescheduled?

EOIR Response: *In order to make room on court dockets for priority cases, EOIR selected the Friday after Thanksgiving in 2019 (November 29, 2019) as a "parking date." It is very unlikely that any parked case will have a hearing on that day; it was selected because very few hearings take place on that day at all.*

The parking date is a mechanism created so courts could take cases off their docket to make times for priority cases. EOIR offered it to all immigration courts nationwide as a tool to manage their dockets. Not all courts have used this tool. EOIR expects courts to reschedule these cases for hearings either prior to or after November 29, 2019 and the parties should be notified by their respective court of the new hearing date.

    b. What should an attorney do when a case that has been rescheduled to a "parking date" involves a time-sensitive issue such as aging out of potential relief or the one-year asylum filing deadline that necessitates a hearing date in the near future? Will EOIR consider establishing a specific expedite procedure for these time-sensitive cases?

EOIR Response: *Attorneys can file a motion to advance a hearing at any time. See Chapter 5.10 of the Immigration Court Practice Manual.*

    c. In the future, would EOIR consider giving AILA and its members advance notice when such a practice will be instituted?

EOIR Response: *EOIR's Office of Public Affairs does not give advance notice on EOIR practices, but anyone can contact EOIR's office at pao.eoir@usdoj.gov, 703-305-0289 to inquire*

about any EOIR practice and procedures. People can also join our listserve by emailing pao.eoir@usdoj.gov and asking to be added.

d. What code is entered into the EOIR system to account for asylum cases with a rescheduled "parking date"? Does the EOIR clock stop for cases which are given a 2019 "parking date?" Likewise, does the clock restart if it had previously been stopped due to applicant-caused delay?

EOIR Response: *The code used for this process is 25, and it is considered a "run code." In other words, if the clock was already running, it will continue to run. If the clock was already stopped, it will restart as of the date of the previously scheduled hearing. The restarting will be automatic. For an explanation of how the clock is managed by EOIR please refer to OPPM 13 - 02, section 7.*

e. In the event the court injunction temporarily barring the implementation of expanded DACA and DAPA is lifted, we expect that many cases will be administratively closed.[4] If this happens, and a large number of hearing times become available, how will EOIR determine which cases will be advanced and how much advance notice of the new hearing dates will be provided?

EOIR Response: *EOIR declines to comment due to pending litigation.*

Update on IJ Assignment and Hiring

7. Please provide a current time line for the hiring of new Immigration Judges (IJs), both permanent and temporary. At which immigration courts will the new judges be posted?

EOIR Response: *IJs will be hired in phases – 23 will be hired pursuant to fiscal year 2014 and 35 more will be hired pursuant to fiscal year 2015. EOIR hopes to have 319 total IJs by the end of fiscal year 2015, including continued hiring to take into account attrition.*

Regarding FY2014 hires, EOIR hopes to hire 14 new IJs by the end of May: 4 in San Francisco; 2 each in Houston, Las Vegas, and Los Angeles; and 1 each in New Orleans, Newark, New York, and Salt Lake City. These new IJs will begin training by July of this year. EOIR also hopes to hire 9 more IJs pursuant to the FY2014 authorization by late summer 2015: 2 each in Memphis and Newark, 1 each in Buffalo, Houston, Las Vegas, New York, and San Francisco. Assignments for the additional 35 IJs to be hired for the 2015 fiscal year have not yet been determined.

8. How does EOIR determine the courts to which new IJs are assigned, which IJs are assigned to video hearing locations, and which IJs are temporarily or permanently reassigned to a different court?

[4] "District Court Grants Preliminary Injunction in Lawsuit Challenging DAPA and DACA Expansion," AILA Doc No. 15021762 (posted 2/16/15), available at http://www.aila.org/infonet/dist-ct-state-of-texas-v-usa-02-16-15.

EOIR Response: *This is a very challenging process and there are no set guidelines. IJs are assigned to courts based on needs in each court. All IJs are generalists and must be prepared to hear all cases before the courts. There is no time limit for how long IJs will be detailed; the new docket priorities have affected different courts in different ways. Detailing will likely continue until more IJs are hired.*

9. We appreciate EOIR's efforts in hiring and assigning new IJs to courts around the country. However, some courts continue to suffer from a shortage of IJs. For example, in Detroit one IJ recently retired, two of the remaining three were temporarily assigned to the detained docket, and one will soon be transferring to Miami. According to the partial hiring freeze policy instituted in 2011, we understand that Detroit was supposed to receive one replacement judge for every three judges who depart. In addition, Detroit was to receive one of the 31 judgeships announced during the summer of 2014. Can EOIR provide an update on IJ hiring in Detroit and other jurisdictions that are particularly struggling with a lack of judicial resources?

EOIR Response: *Four IJs have been allocated for Detroit, but the date of hire has not been determined yet. These IJs will most likely be part of the fiscal year 2015 group to be hired.*

Follow Up Questions from Previous Meeting:

10. **Credible Fear Procedures in the UDSM.** 8 CFR §1003.42(a) requires DHS to file a copy of the Asylum Officer's written record of determination with Form I-863, Notice of Referral to Immigration Judge when the alien has requested review of an adverse credible fear finding.[5] INA §235(b)(1)(B)(iii)(II) defines the written record of determination as "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the alien has not established a credible fear of persecution." It goes on to note that a "copy of the officer's interview notes shall be attached to the written summary."[6]

    The Uniform Docketing System Manual (UDSM) lists the documents that comprise the written record of determination as follows: Form I-863; Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867AB); Notice of Expedited Removal (Form I-860); Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (Form I-869); and Record of Determination/Credible Fear Worksheet (DHS APSO Form E).[7] However, the UDSM states, "The I-863 can still be

[5] 8 CFR §1003.42(a) ("Jurisdiction for an Immigration Judge to review an adverse credible fear finding by an asylum officer pursuant to § 235(b)(1)(B) of the Act shall commence with the filing by the Service of Form I-863, Notice of Referral to Immigration Judge. The Service ***shall also file*** with the notice of referral ***a copy of the written record of determination*** as defined in § 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.")(emphasis added).

[6] Additionally, 8 CFR § 1208.30(g)(2)(ii) states "The record of the negative credible fear determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based ***shall be provided to the immigration judge*** with the negative determination." 8 CFR § 208.30(g)(2)(ii) (emphasis added).

[7] *See UDSM* at I-5.

accepted even if it is not accompanied by the I-860, I-869 or the DHS APSO Form."[8] During the October 23, 2014 AILA/EOIR liaison meeting,[9] we asked whether EOIR would amend the UDSM at X-4 to reflect that clerks may not docket or schedule a credible fear review hearing until the complete "written record of proceeding" has been filed with the immigration court, as required by the statute and regulations. EOIR stated that it would review the issue further. Does EOIR have any updates on this issue?

EOIR Response: *EOIR is considering the question and expects to issue a response in the near future.*

Non-LPR Cancellation of Removal

Age-out of the Qualifying Relative Child. Under *Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012), a child who ages out may no longer serve as a qualifying relative for cancellation purposes. As a result, in some cases, particularly those where the child is the only qualifying relative, relief will be completely eliminated. Unlike situations where the qualifying relative suddenly dies, the date a child will age-out is known and can be predicted well in advance of the age-out date. During the October 23, 2014 AILA/EOIR liaison meeting,[10] we asked whether EOIR would consider revising OPPM 12-01 to allow judges to prioritize cases where it is clear that the qualifying relative will age-out if the case is put into the queue pending issuance of a visa number. EOIR said that it would take AILA's comments under consideration. Does EOIR have any updates on this issue?

EOIR Response: *EOIR is currently considering this issue and expects to provide AILA a response in the near future.*

EOIR Strategic Plan

During the April 10, 2014 AILA/EOIR liaison meeting,[11] EOIR stated that it was in the process of developing a strategic plan for FY2014-19, and that it would host a stakeholder meeting to provide a means for public input into the plan. Does EOIR still plan to host this meeting and if so, what is the estimated time frame for the meeting?

EOIR Response: *EOIR expects to have this meeting at the end of the summer and welcomes AILA's attendance and input.*

Asylum and Refugee Liaison Committee Question

11. An individual who is granted asylum is eligible for a range of federal and state benefits. However, many asylees are unaware of this and fail to access these often critical benefits.

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[8] *See UDSM* at X-4.
[9] "AILA/EOIR/OCAHO Liaison Meeting Minutes (10/23/14)," AILA Doc No. 15022663 (posted 10/23/14), available at http://www.aila.org/infonet/eoir-ocaho-liaison-minutes-10-23-14.
[10] Id.
[11] "AILA/EOIR Liaison Meeting Minutes (4/10/14)," AILA Doc No. 14082243 (posted 4/10/14), available at http://www.aila.org/infonet/eoir-liaison-minutes-04-10-14.

As a partial remedy, USCIS asylum offices offer "Asylee Benefits Orientation" sessions, in cooperation with local NGOs. USCIS provides the space and invites the new asylees to the session, and the NGOs conduct the presentation. However, with only eight asylum offices nationwide, only a limited number of asylees are receiving this information.

Would EOIR coordinate with USCIS and arrange to distribute the materials developed by the Asylum Division to individuals who are granted asylum in immigration court? In addition, would EOIR provide AILA with a point of contact to explore the possibility of a pilot in select immigration courts?

EOIR Response: *EOIR is willing to work with the AILA and USCIS on asylee benefits matters.*

E-Registry

12. Members report problems being recognized as attorney of record when an EOIR-28 is filed via e-Registry and there is a change of venue in the case. For example, one member filed new EOIR-28s to reflect a change in his law office address. In three separate cases, venue changed from the detained docket to a non-detained docket at a different court after the clients were granted bond. In each of these cases, the EOIR-28s were erroneously sent to the original court where the client was detained, instead of the non-detained docket at the court where venue was for the remainder of the proceedings.

    a. Does E-Registry recognize a change of venue? In other words, will E-Registry automatically forward new EOIR-28s to the new court after a change of venue?

EOIR Response: *Usually, the E-28 forms are auto-processed and will be linked directly to a case after the filing. In this case, the attorney's address will be associated with the alien's case and Change of Venue will not impact the attorney's ability to receive EOIR notices in the mail. However, sometimes the system is unable to process the form automatically and leaves it as a pending form (e-Registry displays as "Submitted") for OCIJ staff to manually process, for instance when the attorney filed as the primary attorney but there has already been a primary attorney for the case. The pending form is associated with the EOIR court that has jurisdiction over the case at the time of filing.*

The e-Registry system does not automatically switch the pending E-28 forms to the new court after Change of Venue, since it is not clear whether those attorneys still seek to represent the alien. Those forms are still displayed under the previous court's listing.
In this situation, the attorney needs to initiate the request to the new EOIR court that took over the case to process his/her previously filed E-28 form. Then, OCIJ staff can look for the form under the old base city's listing and manually process it.

Or the attorney can simply file a new E-28 form either electronically or in paper. The new form will go to the new court for processing.

    b. ICPM 2.3(h) gives an attorney the option to file a new electronic *or* paper EOIR-28 to notify the court of an address change. If E-Registry does not account for a change of

venue, will EOIR update the system to do so? Alternatively, will EOIR amend ICPM 2.3(h) to reflect that attorneys must file both an electronic *and* a paper EOIR-28?

EOIR Response: *See Response to Question 12a above.*

Filing Rejection Notice

13. A copy of a rejected filing notice from the Tacoma Immigration Court is attached. Page 2 includes a box for "Other" reasons for rejection, which is sometimes used to reject filings due to minor, non-substantive violations of the ICPM. Is the notice from the Tacoma court based on a standard national notice used across all courts or does each court have its own version of a rejection notice? If the latter, would EOIR adopt a single national standard rejection notice and omit the "Other" category, so that attorneys have a clear, documented reason for a rejected filing?

EOIR Response: *The "other" box is necessary for a variety of reasons, but courts should provide an explanation for the rejection.*

Televideo Testimony

14. Is it possible to present witness testimony in individual hearings through the EOIR televideo system instead of the phone?

EOIR Response: *Televideo testimony is possible, at the immigration judge's discretion, provided EOIR equipment is available for use in the court where the hearing is scheduled and the court where the witness will be for his/her testimony. See Chapter 4.15(o)(ii) of the Immigration Court Practice Manual. However, due to security concerns and requirements, outside equipment cannot be used to connect with EOIR equipment.*

Scheduling Master Calendar Hearings

15. Some of our members have expressed concerns that OCC attorneys are able to schedule initial master calendar hearings. Toward that end, we note that in a brief filed in the Ninth Circuit in 2010, government counsel reported:

> *EOIR has confirmed that the only input capability DHS has into its database is the ability to schedule a future hearing before an immigration judge. Specifically, DHS users– using the Interactive Scheduling System (ISS, a subsystem of the ANSIR database) – can enter a new case (i.e., by entering an alien number and the date the charging document was filed) in order to schedule an initial master calendar hearing before the immigration judge and only that information is carried over to EOIR's database, "CASE." DHS users do not have the capability to enter such data for detained courts. Further, DHS users do not have direct input access onto CASE.*[12]

[12] *See* attached PDF titled "Zabadi govt opp brief excerpt," dated 3/1/10. *Zabadi v. Holder*, No. 05-76565 (9th Cir. 2010).

In at least some jurisdictions, immigration judges have a routine schedule for master calendar hearings in detained and non-detained cases on specific days of the week. In at least one jurisdiction, this schedule is publicly available on the court's website.[13] Generally, the judge who holds the master calendar hearing will hear the case on the merits. Consequently, in jurisdictions where judges have such a schedule, we are concerned that DHS attorneys would be able to choose the judge for a particular case by choosing the day upon which to schedule the master calendar hearing.

Does the system still work in the manner described in the 2010 government brief? If so, which jurisdictions have the ability to schedule initial hearings in this manner? Please explain in more detail the mechanics of how this scheduling system works, and specifically what DHS attorneys have access to when scheduling a master calendar hearing.

EOIR Response: *No agency is permitted to choose an IJ or a particular date for a case. Hearing dates are assigned randomly. There are some users within the Department of Homeland Security that can have access to the system, but the system assigns IJs and it is not possible for any agency other than EOIR to assign cases to specific IJs.*

Regulatory Update

16. Please advise on the current status of regulatory updates that affect EOIR, including the status of the ineffective assistance of counsel regulation, allowing for separate appearances in bond proceedings, and any other regulatory updates that are in process.

EOIR Response: *See above answer to Question 1.*

[13] *See* http://www.justice.gov/eoir/sibpages/sfr/MasterCalendarSchedule.pdf.

OCAHO Agenda

1. Please provide an update on the status of the hiring and training of new OCAHO judges.

    a. How will new OCAHO cases be divided among the two ALJs? Will any of the existing OCAHO cases on the docket be transferred from Judge Thomas to Judge Paddock?

    b. If so, what process will be used to transfer these cases?

OCAHO Response: OCAHO's new Administrative Law Judge (ALJ) entered on duty in December of 2014. She has received the statutorily-required employment discrimination training, as well as on-the-job training. A number of pending cases have been transferred from Judge Thomas to Judge Paddack through a Notice of Reassignment issued by the Chief Administrative Hearing Officer. New OCAHO cases are assigned by rotation, except where there may be conflicts of interest or other business reasons, such as subsequently filed related cases, balancing the caseload, etc.

2. With the appointment of a second judge, is OCAHO considering implementation of a settlement conference option?

    a. Please describe current plans, if any.

    b. If a party in OCAHO litigation desires a settlement conference, how should the request be made? Is it possible to request a settlement conference when opposing counsel does not join in the request?

OCAHO Response: Now that OCAHO has more than one ALJ on board, we are exploring implementation of a settlement judge procedure. As the first step in this process, the ALJs are scheduled and registered for mediation training. Currently, if a party in OCAHO litigation desires a settlement conference, such a request should be made by motion to the ALJ. Those requests would be decided on a case-by-case basis by the presiding ALJ.

AILA: Is there a timeframe on when mediation will be available?

OCAHO: To offer mediation to parties, we will likely have to amend our regulations, so the timeframe will depend on that. We welcome further comments and suggestions.

3. Please provide the statistics of the current case loads of each judge.

OCAHO Response:

a. Please provide a breakdown of the following pending cases:

    i. Number of 1324a cases: **38**

    ii. Number of 1324b cases: **23**

        1. Number of 1324b cases brought by OSC: **3**

2. Number of 1324b cases brought by private litigants: **20**

iii. Number of 1324a and 1324b cases initiated by the filing of a complaint in the last 6 months: **18** 1324a cases; **12** 1324b cases. ***(9/1/14 to 3/26/15)***

AILA: Do you have any 1324c cases?

OCAHO: No.

4. What are the trends in types of cases and caseloads, and timeframes from complaint to hearing or settlement?

OCAHO Response: Our case receipts have decreased slightly over the last two fiscal years, which included the period in which the government was shut down. However, our completions were substantially higher over the last two fiscal years than in the previous two fiscal years (41% increase). Section 274A cases continue to comprise most of our caseload. In terms of timeframes from complaint to hearing or settlement, we do not track these statistics, so we are unable to provide trends in timeframes from complaint to hearing or settlement. Generally speaking, the timeframe for an OCAHO case (from complaint through adjudication or resolution) will depend on a variety of factors, such as the complexity of the case, the length of discovery, the filing of contested motions, the duration of negotiations, etc.

5. During the October 23, 2014 meeting with AILA and OCAHO, AILA asked whether Alternative Dispute Resolution (ADR) could be used before or in lieu of a hearing. OCAHO responded that, while currently it does not have a process or funding for ADR, OCAHO is very supportive of ADR and is open to looking into it. For your information and discussion purposes, attached are examples of ADR programs for the National Labor Relations Board (NLRB) (Appendix A) and the Internal Revenue Service (IRS) (Appendix B). Has OCAHO taken any additional steps toward evaluating and implementing an ADR process?

OCAHO Response: Thank you for providing the information on other agencies' ADR programs in the Appendices to the meeting agenda. As previously mentioned, we are in the process of exploring implementation of a settlement judge procedure for OCAHO cases; toward this end, our ALJs are currently scheduled to attend mediation training. We are also in the process of researching the settlement judge procedures used by other federal government agencies. In order to implement such a procedure, we will likely need to amend our rules and regulations through a rulemaking. We welcome AILA's continued input on this issue.

AILA: Do you see a need for a third Judge?

OCAHO: Not at this time.

6. During the November 6, 2014 AILA Liaison meeting with the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), OSC stated that OCAHO's rules and procedures prohibit a litigant from citing to or relying on unpublished decisions (opinions, orders, etc.) as persuasive authority. If both

parties are aware of an unpublished decision, does OCAHO's position as stated above change in any way?

OCAHO Response: In addition to OCAHO rules prohibiting citation to or reliance on unpublished decisions, the Administrative Procedure Act provides that an order or opinion that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if it has been published or if the party has actual and timely notice of the terms of the decision or order. 5 U.S.C. § 552(b)(2). Therefore, only published decisions are considered precedential, and only published decisions should be relied upon by parties in OCAHO cases. Any exceptions to these rules in a particular case would be considered on a case-by-case basis by the presiding ALJ in an exercise of discretion based on the facts of the case and the totality of the circumstances.
AILA: We would like to mention that the indexing is much better and we have noticed the new topics that have been added. Adding the names of attorneys on decisions has also helped us get more information. What is the process for determining the topics?

OCAHO: We are glad the index is more user-friendly. In terms of our process, once a decision is issued, the topics and subtopics are generated by the law clerk, then reviewed and approved.

AILA: Can we provide suggestions for topics or subtopics in the index?

OCAHO: Although we have revamped the index, we are limited by resources and IT constraints. A new case management system in the future could allow greater functionality with the index.

AILA: Do Freedom of Information Act (FOIA) requests still take approximately 18 days?

OGC: For a simple request, yes. Complex requests can take longer.

7. On October 23, 2014, OCAHO informed AILA that its e-filing pilot was underway and encouraged participation in an effort to explore options for a permanent electronic filing program. Can OCAHO provide AILA with an update on the e-filing program?

OCAHO Response: The e-filing pilot program has been extended until May 29, 2015. We have tweaked some pilot program procedures based on input from participating parties. For instance, we now allow each party to register more than one email address in order to accommodate cases in which there may be multiple attorneys of record or where the primary email address holder has a colleague file and serve pleadings on his or her behalf. In these instances, filings from the additional email addresses will be accepted as long as the additional email address is registered with OCAHO and the pleading is signed by the attorney or party of record. We will also permit third parties seeking to intervene or file amicus briefs in a case to register for electronic filing in that case. We welcome further feedback on the operation of the pilot.
We have also been working on developing a permanent e-filing program, including conducting extensive research on different e-filing systems, attending demonstrations by

various software vendors and researching information technology and electronic privacy and security requirements.
Other new OCAHO initiatives include revising our 274B complaint form to update it and make it more user-friendly. Notice regarding the revised form will be published in the Federal Register. We are also in the process of developing a Notice of Appearance template that representatives may use as an exemplar when entering a notice of appearance in an OCAHO case. Finally, we recently revised our Notice of Case Assignment to highlight the need for attorneys to file notices of appearance in OCAHO cases and to clarify that other representatives must seek ALJ approval to represent parties before OCAHO.

AILA: Is there functionality to redact documents and/or publish pleadings through the electronic filing system?

OCAHO: These are two separate issues. Our electronic filing pilot allows parties to send and receive case documents by email. However, we are still bound by the Privacy Act, so you still have to go through FOIA for requests for pleadings and other documents that may contain personally identifiable information. We do not envision that kind of functionality for our e-filing program at this time.

AILA: Is the pilot open to everyone?

OCAHO: Yes. Invitations are sent out in every case once the answer is received. Cases are enrolled in the pilot once we receive certification forms from both parties.

AILA: Do you have enough administrative back up?

OCAHO: Yes, we do. A new e-filing program may change those requirements.

AILA: How many clerks are there to each Judge?

OCAHO: Each ALJ has one law clerk and one paralegal.

AILA: Thank you for all of the changes you have made. They really make a difference.