



# AMERICAN BAR ASSOCIATION

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**Statement of**

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**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**to the**

**SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER  
SECURITY, AND INTERNATIONAL LAW  
COMMITTEE ON THE JUDICIARY**

**U.S. HOUSE OF REPRESENTATIVES**

**for the hearing on**

**“The Executive Office for Immigration Review”**

**June 17, 2010**

Chairwoman Lofgren and Members of the Subcommittee:

I am Karen Grisez, Chair of the American Bar Association (ABA) Commission on Immigration. I am here at the request of ABA President Carolyn B. Lamm to present the views of the ABA on the Executive Office for Immigration Review's (EOIR) efforts to improve the Immigration Courts and the Board of Immigration Appeals (BIA), as well as challenges EOIR faces as immigration enforcement continues to rise. We appreciate this opportunity to share our views with the subcommittee.

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of *pro bono* legal representation programs.

As an organization of lawyers and the national voice of the legal profession, the ABA has a unique interest in ensuring fairness and due process in the immigration enforcement and adjudication systems. Earlier this year, the ABA released a report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*.<sup>1</sup> The report undertakes a complete examination of the structures and processes of the current removal adjudication system, from the decision to place an individual in removal proceedings through potential federal circuit court review. The findings of this report confirm that our immigration court system is in crisis, overburdened, and under-resourced, leading to the frustration of those responsible for its administration and endangering due process for those who appear before it.

Ultimately the report found, and the ABA believes, that the goals of ensuring fairness, efficiency and professionalism would best be served by restructuring the system to create an independent body for adjudicating immigration cases, such as an Article I court or an independent agency. However, we realize this is an action for which the consideration, adoption, and implementation would take a number of years. Therefore, the ABA also recommends a number of incremental reforms that could be made within the current system, either through policy revision, regulation or legislation, which would make significant improvements in the operation of the current system. While space constraints prevent us from outlining all of our recommendations, we would like to take this opportunity to highlight several important issues.

Many, even those in the legal profession, are unaware of the magnitude of the immigration court system. More than 10,000 appeals from BIA decisions were filed in 2008 with the federal circuit courts. Over the past 5 years, these cases have represented about 17% of all the cases handled by those courts. In the circuits with the largest immigration dockets — the Second and Ninth Circuits — appeals from BIA decisions have comprised 35% to 40% of the entire caseload.

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<sup>1</sup> The full report and executive summary are available at <http://new.abanet.org/immigration/pages/default.aspx>.

These numbers illustrate that the operation of the immigration courts and Board of Immigration Appeals has far-reaching ramifications for our justice system as a whole, and instigating the much needed improvements to this system should be given high priority.

## IMMIGRATION JUDGES AND COURTS

The immigration courts in the United States sit in 57 locations in 28 states and hear several hundred thousand matters each year. The matters include, among others, removal proceedings, asylum petitions, bond redeterminations for noncitizens held in detention, reviews of credible fear determinations, and rescission hearings to determine whether a lawful permanent resident was wrongfully granted permanent resident status. The vast majority of the matters are removal proceedings. With a low rate of appeal from the decisions of immigration courts, most noncitizens' cases end in those courts.

In recent years, the immigration courts have faced harsh criticism — including by federal appellate judges — for inadequate decisions and reasoning, and for improper behavior by some immigration judges. In 2006, then Attorney General Alberto Gonzales announced 22 reform measures designed to improve the functioning of the immigration courts and the BIA. Some of these measures have been implemented, representing a promising start toward improving the performance and reputation of the immigration courts. However, over three years after the announcement, a number of reforms remain incomplete, and numerous problems with the immigration court system remain.

**Large Caseloads and Inadequate Resources.** The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible. In 2008, some 226 immigration judges completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions per judge. To keep pace with these numbers, each judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday, assuming no absences for vacation, illness, training, or conference participation, nor time devoted to calendaring hearings. In comparison, in 2008, Veterans Law Judges decided approximately 729 veterans benefits cases per judge (approximately 178 of which involved hearings) and, in 2007, Social Security Administration administrative law judges decided approximately 544 cases per judge.<sup>2</sup>

A lack of adequate staff support for the immigration judges compounds the problem. On average, there is only one law clerk for every four immigration judges, and the ratio is even lower in some immigration courts. The shortage of immigration judges and law clerks has led to very heavy caseloads per judge and a lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case.

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<sup>2</sup> BD. OF VETERANS' APPEALS, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN 3 (2009), available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>; U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2008, at 2.F (2009), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/index.html>.

We recognize that filling vacant immigration judge positions is a stated priority of EOIR and that the office has undertaken a hiring initiative in order to bring the judge corps to the full 280 authorized positions. However, even if all of those positions are filled and assuming the number of decisions made remains constant at the FY 2009 level, immigration judges would still be deciding about 830 cases per year. In order to bring the caseload down to a level roughly on par with the number of cases decided each year by judges in other federal administrative adjudicatory systems (around 700 cases per judge annually), we recommend hiring approximately 100 additional immigration judges as soon as possible. We also recommend hiring enough law clerks to provide one law clerk per judge.

**Insufficient Training and Professional Development.** Insufficient resources also contribute to inadequate opportunities for judicial training and professional development. Although training of newly hired and existing judges has increased and improved over the past few years, some of the existing training has been cut back due to a shortage of funds. Moreover, heavy caseloads result in a lack of administrative time during which immigration judges could participate in training and interact with other judges. Sufficient funding should be provided to permit all judges to participate in regular, in-person trainings on a wide range of topics in immigration law, and EOIR should designate an administrator to facilitate increased communication among immigration judges, including setting up formal and informal meetings among judges and providing opportunities for judges to observe other judges in their own courts or in other courts.

**Selection and Qualification of Immigration Judges.** The standards used to hire judges are incomplete and opaque, open positions often are not filled quickly, and there is a lack of public input into the hiring decisions. As a result, some judges are hired with inadequate experience, there is a general lack of diversity in the professional backgrounds of judges, and there are problems with inappropriate judicial temperament. EOIR has recently made significant improvements in the process of hiring immigration judges. We generally recommend allowing those reforms time to take effect, while suggesting a few additional improvements. We recommend adding questions to applications, interviews, and reference checks designed to evaluate a candidate's background and judicial temperament, including the ability to understand and consider the effect of cultural differences and treat all persons with respect. In addition, we urge EOIR to allow more public input in the hiring process by permitting organizations within the profession to participate in screening candidates who reach final levels of consideration.

**Adequate Supervision and Discipline.** Inadequate experience and problems with judicial temperament theoretically could be addressed with proper supervision and discipline, but we have found that inadequacies exist in those areas as well. For instance, many observers have noted that there are too few (nine) Assistant Chief Immigration Judges (ACIJs) supervising the more than 220 other immigration judges spread throughout the country. In addition, supervision of immigration judges suffers from a lack of appropriate feedback mechanisms such as performance reviews. In terms of discipline, the standards of ethics and conduct applicable to the judges are currently numerous and unclear, and the disciplinary system lacks transparency. The disciplinary system also lacks independence, since it rests within EOIR and therefore the Department of Justice (DOJ). The lack of independence and clarity raises a concern about the potential for improper political influence on judges' decisions.

We recommend significantly increasing the number of ACIJ's to permit a more appropriate ratio of judges to supervisors, rather than the current 20 to one ratio, and expanding their deployment to the regional courts. This reform would allow ACIJ's more time to give focused attention to each immigration judge while maintaining their own dockets and other administrative duties. In addition, we urge implementation of a judicial model for performance review based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance proposed by the Institute for Advancement of the American Legal System. We also recommend the adoption of a new single, consolidated code of conduct for immigration judges, based on the ABA Model Code of Judicial Conduct and tailored to the immigration adjudication system.

**Removal of Immigration Judges.** Immigration judges serve as career attorneys in DOJ with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. The immigration judges have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. This erodes judicial independence and provides a basis to undermine public opinion regarding the competence and impartiality of immigration judges. This lack of independence may also inhibit some highly qualified individuals from seeking an immigration judge position.

In order to protect against the possibility that judges may be subject to removal or discipline based on politics or for other improper reasons, and to help attract the most qualified candidates, we recommend that they be provided statutory protection against being removed or disciplined without good cause (as is provided for administrative law judges who adjudicate cases in other federal agencies). This will provide the appropriate balance between accountability and independence.

**Problems with Immigration Court Proceedings.** Problems affecting the immigration court proceedings include extensive use of oral decisions made without sufficient time to conduct legal research or thoroughly analyze the issues and evidence and problems with courtroom technological resources and support services for judges (including unreliable recording equipment and the lack of written pre-decision transcripts). We note that EOIR has previously indicated it anticipates completing the rollout of digital audio recording systems to all immigration courts by the end of this year, and hope that that timeline will remain on track.

With additional resources and more time for judges to decide each case, judges should be required to provide more formal, reasoned written decisions, particularly in proceedings, such as asylum cases, where the complexity of the cases requires more thoughtful consideration than can be given during the hearing itself. Immigration judges should at a minimum produce written decisions that are clear enough to allow noncitizens and their counsel to understand the basis of the decision and to permit meaningful BIA and appellate review. If and when the parties in an immigration proceeding decide to proceed with an appeal, this record will also allow more efficient consideration of the cases by the BIA and federal circuit courts.

## BOARD OF IMMIGRATION APPEALS

The Board of Immigration Appeals (BIA or Board) has a unique role and mission. The purposes of the Board's administrative review are to provide guidance to immigration judges below through the interpretation of the law, to achieve uniformity and consistency of decisions rendered by the immigration judge corps, and to ensure fair and correct results in individual cases. In an overwhelming majority of appeals, the Board is the court of last resort. In this context, the quality of the administrative appeal is crucial.

In the last decade, the standards governing the Board and the review process have changed significantly as a result of "streamlining" measures implemented in 1999 and 2002. Those measures were designed to reduce delays in the review process, focus the Board's resources on cases presenting the most significant legal issues, and eliminate a mounting backlog that had reached more than 60,000 cases by 2000. The 2002 streamlining regulations expanded the category of cases in which affirmances without opinion (AWO) and single-member review were treated as appropriate; eliminated the Board's authority to conduct de novo fact finding; imposed time limits for rendering decisions; and reduced the size of the Board from 23 to 11 Members.

The 1999 and 2002 streamlining reforms were successful in reducing backlogs and delays in adjudication by the Board. By the end of FY2009, the number of pending cases had been reduced to 27,969 cases. But this increase in Board efficiency came at a substantial cost, including the reduced likelihood of finding immigration judge error, the lack of precedent guidance coming from the Board, significant burdens imposed on Board Members, and increased burdens on the federal appellate courts as more BIA decisions are appealed. Furthermore, studies have suggested that single-member review and AWOs result in decisions that unduly favor the government at the expense of the noncitizen.<sup>3</sup>

Review of immigration court decisions by the BIA has the potential to reconcile disparities and correct errors in immigration judge decision-making before such cases are appealed, if at all, to the federal circuit courts. In the last several years, the Board has instituted several improvements in its processes — such as issuing fewer affirmances without opinions — that help it come closer to achieving this goal than its past practice allowed for after the two streamlining reforms. In addition, the size of the Board has been increased to 15 members. Nevertheless, the Board's current review process does not appear to have significantly altered the appeal rate to the circuit courts, or significantly reduced the result of adjudication disparities among the decisions of immigration judges. Therefore, to help the Board achieve its purpose of crafting uniformity in immigration law, exercising oversight, and correcting the errors of immigration judges, a number of additional reforms must be put in place.

**Single-Member Review.** Most BIA cases are now decided by a single Board Member. Single-member review precludes the issuance of precedent, makes it less likely that the Board will catch

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<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 49 & fig. 6 (2008), *available at* <http://www.gao.gov/new.items/d08940.pdf>.

errors made by immigration judges, and precludes dissent and the interplay of diverse legal minds. Moreover, the shift to single-member decisions may have affected the outcome of appeals, as single-member review appears to generate fewer decisions that favor asylum seekers. Two academic studies found a sudden reduction in the rate at which the Board issued decisions favorable to asylum applicants after the 1999 and 2002 reforms were adopted.<sup>4</sup> Similarly, a 2008 GAO Report found that only 7% of single-member decisions favored the alien in asylum appeals, compared to 52% of panel decisions.<sup>5</sup> Absent some rational explanation for this discrepancy, these findings support making changes to ensure that the method of review does not impact the outcome of an appeal. We recommend: 1) amending the Board's regulations to make review by three-member panels the default form of adjudication and to allow single-member review only in very limited circumstances; 2) requiring panel review for all non-frivolous merits cases that lack obvious controlling precedent; and 3) allowing single-member review for purely procedural motions and motions unopposed by the Department of Homeland Security (DHS). For these reforms to be implemented, additional staff attorneys and Board Members will be needed.

**Lack of Detailed Decisions.** Following adoption of the 2002 streamlining reforms, the Board relied heavily on AWOs. This practice has declined more recently, with AWOs constituting only about 5% of Board decisions for the first six months of fiscal year 2009, compared to 36% in fiscal year 2003. However, short opinions by single members are now the dominant form of decision-making. Since the Board is not required to issue decisions responding to all arguments by the parties, they can be as short as two or three sentences, even when the issues would appear to merit a longer discussion. This shift from AWOs to short opinions is insufficient as a quality improvement for decisions issued by the Board. The lack of detailed, reasoned decisions denies both the noncitizen and a reviewing court a sufficient explanation of the Board's decision.

We recommend detailed written decisions that address all non-frivolous arguments raised by the parties, thus providing sufficient information to facilitate review by federal appeals courts, to allow participants to understand the Board's decision, and to promote their confidence in the fairness of the decision.

**Standard of Review.** The stricter "clearly erroneous" standard of review in effect at the BIA since 2002 inhibits the Board's ability to correct factual mistakes made by immigration judges, which are increasingly difficult to avoid given the enormous caseload and time pressures imposed on these judges. This standard also inhibits the Board's ability to serve as a check against unwarranted disparities among immigration judges in factually similar cases. The current limitation has impeded the Board's oversight role and increased the chances that an applicant could be harmed by erroneous decision-making. We recommend restoring the Board's ability to conduct a de novo review of factual findings and credibility determinations by immigration judges.

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<sup>4</sup> David Martin, Major Developments in Asylum Law over the Past Year, 83 INTERPRETER RELEASES 1889 (2006); John R.B. Palmer, et al., Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. L.J. 1 (2005).

<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3

**Lack of Precedent.** The combination of single-member review and lack of detailed decisions has given rise to a dearth of Board precedent and guidance for the courts. Since only decisions issued by a three-member panel or the Board en banc may be designated as precedential, the vast majority of the Board's decisions are now unpublished and, although binding on the parties, do not serve as precedent. The number of precedent decisions has recently increased, due in part to a recognition of the need for such decisions, but it still falls short of the percentage of published opinions (over 15%) issued by federal appellate courts. A greater body of precedent is needed to provide an orderly body of law, to facilitate efforts to reduce disparity among immigration judges, to decrease the number of appeals and rates of reversals, and to decrease the frustration and cost of prosecuting and defending noncitizens in the removal adjudication process.

The Board should issue more precedential decisions, expanding the body of law to guide immigration courts and practitioners. Regulations should continue to require that the full Board authorize the designation of an opinion as precedential. In addition, we support making non-precedential opinions available to noncitizens and their attorneys. Currently, the Board maintains an internal database of such opinions. Making this database publicly available would provide additional guidance to those appearing before immigration adjudicators.

**Lack of Independence.** The Board's status as a body created by regulation (not by statute) and subject to the Attorney General's power has led to frequent criticism regarding its lack of political and executive independence. Board Members are appointed by the Attorney General and serve at his or her discretion. Decisions of the Board are reviewable de novo by the Attorney General, who may vacate decisions and substitute his or her own decisions. This structure has generated concern that Board adjudication can be politicized either directly through the firing of members whose decisions the Attorney General disagrees with or indirectly through the threat of reversal of opinions that do not comport with the implied policy direction of the Attorney General. The downsizing of the Board in 2002 reinforced such criticism. Whether the threat of removal may have the potential to affect the decision-making of Board Members or not, even the perception that Board Members are subject to political influence harms morale, impugns the Board's reputation with both noncitizens and practitioners, and undermines the legitimacy of the Board's decisions.

## **REPRESENTATION**

Any examination of the operations of the immigration courts would be incomplete without considering the impact of legal representation, or lack thereof, for noncitizens in the removal adjudication process. EOIR has put in place some measures to provide noncitizens with assistance in obtaining representation. These include a Legal Orientation Program (LOP) for some detainees in removal proceedings; a Model Hearing Program, which provides immigration law training to attorneys and law students who agree to provide a certain amount of pro bono representation annually; an Unaccompanied Alien Children Initiative; and the issuance of a new policy for pro bono activities in immigration courts, designed to facilitate the functions of pro bono counsel.

Despite EOIR's efforts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2008, approximately 57% of these noncitizens

were unrepresented. For those in detention, the figure is even higher — about 84% are unrepresented. Barriers impeding access to representation include the unavailability of the LOP to persons who are not detained, as well as many detainees; the inability of many persons to afford private counsel; and a number of systemic impediments, including remote detention facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another location without notice and with DHS routinely seeking changes of venue.

There is strong evidence that representation affects the *outcome* of immigration proceedings. In fact, a study has shown that whether a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.” For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when they proceeded pro se.<sup>6</sup> More recently, in affirmative asylum cases (which are not before the court), the grant rate for applicants was 39% for those with representation and only 12% for those without it.<sup>7</sup> In defensive asylum cases (which are in immigration court), 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful.<sup>8</sup>

Representation also has the potential to increase the efficiency of at least some adversarial immigration proceedings. Pro se litigants can cause delays in the adjudication of their cases due to lack of knowledge and understanding and, as a result, impose a substantial financial cost on the government. As a number of immigration judges, practitioners, and government officials have observed, the presence of competent counsel on behalf of both parties helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Increased representation for noncitizens thus would lessen the burden on immigration courts and facilitate the more efficient processing of claims. This is particularly true in detained cases.

One means of increasing access to representation and legal information is to expand the Legal Orientation Program (LOP). EOIR established the LOP in 2003 and the program provides individuals in removal proceedings with information regarding basic immigration law and procedure before immigration courts. Depending on the noncitizen’s potential grounds for relief, the LOP also provides a referral to pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state. In addition to ensuring more fair and just outcomes, the LOP contributes to immigration court efficiency and may result in savings in detention costs. A study by the Vera Institute of Justice indicates that cases for LOP participants move an average of 13 days faster through the immigration courts. Immigration judges report that respondents who attend the LOP appear in immigration court better prepared and are more likely

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<sup>6</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007).

<sup>7</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 30. Statistics cited are for the period from 1995 through 2007. An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.

<sup>8</sup> *Id.*

to be able to identify the relief for which they may be eligible, and not to pursue relief for which they are ineligible. Because cases for LOP participants move through the immigration courts more quickly, time spent in detention may be reduced and detention costs saved. The LOP facilitates immigrants' access to justice, improves immigration court efficiency, and saves government resources.

However, the LOP currently does not reach the majority of noncitizens who may need assistance. First, it operates at only 25 of the approximately 350 detention facilities currently under contract with DHS. Second, it does not reach *non*-detained persons and those who might have special need for legal representation, such as persons with mental disabilities and illnesses. Finally, the LOP may not be able to reach those noncitizens who are placed into expedited removal. EOIR should be provided with sufficient resources to expand the Legal Orientation Program nationwide and make it available to all detained and non-detained noncitizens in removal proceedings.

### **IMPACT OF INCREASING ENFORCEMENT ON IMMIGRATION COURTS: The Need for Change in Department of Homeland Security Policies and Procedures**

To a certain extent, EOIR is at the mercy of external pressures that greatly impact the effective operation of the immigration courts. Immigration enforcement efforts have increased exponentially in the last ten years, and continue to expand. The number of noncitizens removed from the United States has increased from 69,680 in FY 1996 to 358,886 in FY 2008 – a more than 400% increase.<sup>9</sup> The number of Notices to Appear (NTA) issued by DHS grew by 36% in just two years, from 213,887 in FY 2006 to 291,217 in FY 2008. These numbers are expected to increase as DHS focuses on apprehending and removing all criminal noncitizens, such as through the Secure Communities initiative. This expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases.

While this imbalance between judges and cases is in part a function of insufficient funding and staffing for the immigration courts, DHS policies and procedures, along with some substantive provisions of immigration law, significantly contribute to the burden. In order to alleviate this burden, we recommend actions not only to increase the resources available but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the system. This will enable the enforcement and adjudication functions to work together effectively to ensure that those the government is most interested in removing are prioritized in the process.

**Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Removal Proceedings and Litigation.** Immigration and Customs Enforcement (ICE) officers' decisions are guided by operation manuals, guidance from supervisors, and training. A 2007 GAO report concluded that ICE lacked comprehensive guidance for the exercise of officer discretion, particularly in determining whether to detain noncitizens with humanitarian circumstances or those who are not

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<sup>9</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 T.36 (Aug. 2009).

primary targets of ICE investigations.<sup>10</sup> In addition, ICE did not have an effective mechanism to ensure that officers are informed of legal developments that may affect decision-making.<sup>11</sup>

The decision to serve an NTA on a noncitizen is an exercise of prosecutorial discretion.<sup>12</sup> If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. Therefore we recommend: 1) communicating to all DHS personnel the view of the DHS Secretary and other senior officials that the appropriate exercise of prosecutorial discretion is not only authorized by law but encouraged; 2) updating existing policies, guidelines and procedures to assist DHS officers and other personnel in appropriate exercises of prosecutorial discretion and; 3) mandating periodic training for DHS officers and other personnel, including senior officials.

### **To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys.**

One additional barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case from one hearing to another, with no single attorney having overall responsibility for the case.

We recommend that, to the extent possible, DHS assign one ICE trial attorney to each removal proceeding. This would permit that attorney to become familiar with the facts and circumstances of the removal cases assigned to him or her, give the attorney a sense of ownership over those cases, and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

**Cease Issuing NTAs to Noncitizens Who Are Prima Facie Eligible to Adjust to Lawful Permanent Resident Status.** On July 11, 2006, Michael L. Aytes, Associate Director for Domestic Operations of the United States Citizenship and Immigration Services (USCIS), issued a memorandum informing USCIS offices that on and after October 1, 2006, upon the completion of the denial of an application or petition, an NTA should “normally” be prepared as part of the denial if the applicant is removable and there are no means of relief available.<sup>13</sup> The memorandum notes that “[d]eciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition.” This represents a shift in prior USCIS policy established in September 2003 under which the issuance of NTAs by USCIS Service Centers focused on: cases in which a noncitizen’s violation of the Immigration

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<sup>10</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE NONCITIZEN REMOVAL DECISION MAKING 20-22 (2007).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet “Type of Immigration Court Proceedings and Removal Hearing Process” (July 28, 2004). The decision to initiate removal proceedings is not subject to judicial review by any court. *See* INA § 242(g), 8 U.S.C. § 1252(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). Prosecutorial discretion is the authority of a law enforcement agency to decide whether to enforce, or not to enforce, the law against an individual.

<sup>13</sup> Michael L. Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Policy Memorandum No. 110: Disposition of Cases involving Removable Noncitizens 7 (July 11, 2006).

and Nationality Act (INA) or other law constituted a threat to public safety or national security; instances where fraud schemes had been detected; and certain applications for temporary protected status where the basis for the denial or withdrawal constituted a ground of deportability or excludability.

While this policy shift did not eliminate the exercise of prosecutorial discretion,<sup>14</sup> practitioners have reported instances in which USCIS has served NTAs on noncitizens that are out of status but eligible to adjust to LPR status pursuant to INA Section 245. For example, in January and February of 2009, the USCIS Texas Service Center reportedly issued NTAs to out-of-status noncitizen beneficiaries following the approval of employment-based immigrant visa petitions (Form I-140) filed for their benefit. The new policy also can reach noncitizens eligible to adjust to LPR status pursuant to INA section 245(i) who have not yet filed to adjust their status or who were unable to adjust their status because of backlogs associated with the relevant employment-based immigrant visa preference category.

Permitting the issuance of NTAs under such circumstances is an inefficient use of adjudicatory resources. Accordingly, we recommend that DHS implement a policy of not issuing NTAs to noncitizens who may be out of status but are prima facie eligible to adjust to LPR status.

## CONCLUSION

Ensuring a fair and effective system for adjudicating immigration cases is in the interest of both the government and individuals within the system. While EOIR has made progress in a number of areas, there is ample evidence that significant problems remain. For example, notwithstanding a recent hiring effort, a recent report noted that the backlog of pending cases in the immigration courts is at an all-time high.<sup>15</sup> The Department of Justice, the Executive Office for Immigration Review and Congress must direct increased efforts to alleviating some of these problems, particularly the need for additional staffing and resources. The American Bar Association looks forward to offering its assistance as a part of this effort.

Thank you again for this opportunity to share our views.

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<sup>14</sup> USCIS has noted that it maintained and had the authority to exercise prosecutorial discretion and that “[t]here will be a number of cases where USCIS will decide not to issue an NTA upon a finding that to do so would be against the public interest or contrary to humanitarian concerns.” USCIS Response to Recommendation #22 (Apr. 27, 2006) [http://www.dhs.gov/xlibrary/assets/CISOmbudsman\\_RR\\_22\\_Notice\\_to\\_Appear\\_USCIS\\_Response-04-27-06.pdf](http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_22_Notice_to_Appear_USCIS_Response-04-27-06.pdf). In addition, USCIS has said there may be situations in which it would be logistically inappropriate to issue an NTA, such as where an application to adjust to LPR status was denied because it was filed prior to the effective date of the preference category priority. *Id.*

<sup>15</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, BACKLOG IN IMMIGRATION CASES CONTINUES TO CLIMB (2010), available at <http://trac.syr.edu/immigration/reports/225/>.