

## Practicing Before Immigration Courts and Understanding Their Structure

Immigration cases are litigated before the Department of Justice's Executive Office for Immigration Review (EOIR). Any noncitizen who has committed an immigration law violation will be placed before an immigration judge after being served a Form I-862, Notice to Appear (NTA).<sup>1</sup> The Department of Homeland Security (DHS)<sup>2</sup> drafts the NTA and alleges why an individual is inadmissible or deportable under the Immigration and Nationality Act (INA), the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charges against the alien.<sup>3</sup> The grounds of inadmissibility and deportability are found under 8 U.S.C. §1182, INA §212 and 8 U.S.C. §1227, INA §237.

The function of EOIR is to decide whether noncitizens should be ordered removed from the United States or should be granted relief or protection from removal and be permitted to stay.<sup>4</sup> Immigration judges are part of EOIR's Office of the Chief Immigration Judge (OCIJ), which is composed of more than 235 immigration judges who conduct administrative court proceedings, called removal proceedings, in 59 immigration courts nationwide.<sup>5</sup>

Appeals of immigration judge decisions are taken up to EOIR's Board of Immigration Appeals. Certain decisions that the board designates as precedent decisions apply to immigration cases nationwide.<sup>6</sup> The board is the highest administrative tribunal for interpreting and applying U.S. immigration law. However, the attorney general has the authority to certify a board decision to himself and unilaterally overturn a board precedent decision or make a new precedent ruling.<sup>7</sup>

EOIR's third component, the Office of the Chief Administrative Hearing Officer, hears cases that do not relate to removal proceedings; they relate to employer sanctions for illegal hiring of unauthorized workers, document fraud, and unfair immigration-related employment practices.<sup>8</sup>

### The Immigration Judge Function

Immigration judges make factual and legal findings in the

removal proceedings they oversee. Once an NTA is filed with the immigration court, judges control their calendars under strict guidelines imposed by the Office of Chief Counsel via the *Immigration Court Practice Manual*.<sup>9</sup> Prior to the issuance of this manual, deadlines, the manner in which documents were submitted for consideration to an immigration judge, and the general practice before immigration courts were controlled by the local rules of immigration courts and by a judge's own rules. For the most part, there was no uniformity between immigration courts set in different venues. On July 1, 2008, the *Immigration Court Practice Manual*, prepared by the Office of the Chief Immigration Judge, was issued, and it now governs the practice in all immigration courts, regardless of venue.<sup>10</sup> If a lawyer intends to practice before EOIR, he or she must have a command of the manual, which is available on EOIR's website.<sup>11</sup>

Three bodies of law dictate the adjudication of cases before EOIR: the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and of the Federal Circuit Court of Appeals.<sup>12</sup> Generally, immigration judges determine removability and adjudicate applications for relief from removal. Immigration judges conduct 12 types of proceedings: (1) removal; (2) deportation; (3) bond redetermination; (4) asylum-only hearings; (5) credible fear hearings; (6) exclusion hearings; (7) withholding of removal-only hearings; (8) reasonable fear hearings; (9) claimed status review hearings; (10) Nicaraguan Adjustment and Central American Relief Act-only hearings; (11) rescission of lawful permanent residence hearings; and (12) continued detention review hearings.<sup>13</sup>

After the NTA is filed with the immigration court, the judge controls his or her calendar under guidelines established by the practice manual and OCIJ. Call up dates for evidence, status conferences, and individual merits hearings are scheduled within the discretion of the immigration judge so long as they do not run afoul of mandatory deadlines mandated by the practice manual or OCIJ.

An assistant chief counsel, otherwise known as a trial

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attorney, represents DHS, which represents the government. He or she seeks to prove that the individual should be removed from the United States. The individual in removal proceedings may, at his or her own expense, seek an attorney or other authorized legal representative.<sup>14</sup>

Removal proceedings begin with a master calendar hearing, where the immigration judge ensures the individual understands the alleged immigration law violations. Pursuant to regulation and case law, the judge must provide the alien with a list of free or low-cost legal services.<sup>15</sup> Interpreters are provided at individual hearings, at no expense to the individual. Individual hearings are the dates on which applications are considered and decided on the merits. On an individual or merits hearing date, the applicant has the burden to establish that he or she is eligible for relief from removal. The various applications that an immigration judge may consider are cancellation of removal, adjustment of status, asylum, or other remedies provided by immigration law.<sup>16</sup>

### Other Hearings and Reviews

While immigration judges usually conduct removal proceedings, they may also conduct the following hearings and reviews:

- **Bond redetermination hearings** to determine whether to lower or eliminate the amount of a bond for an individual detained by DHS. The detained individual makes a request for a bond redetermination hearing to the immigration judge. These hearings are generally informal and are not part of the removal proceedings.
- **Rescission hearing** to determine whether a lawful permanent resident should have his or her residency status rescinded because he or she was not entitled to it when it was granted.
- **Withholding-only hearing** to determine whether an individual who has been ordered removed is eligible for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act or under the Convention Against Torture.
- **Asylum-only hearing** to determine whether certain individuals who are not entitled to a removal hearing (crewmen, stowaways, Visa Waiver Pilot Program beneficiaries, and those ordered removed from the United States on security grounds) but claim a well-founded fear of persecution in their home country are eligible for asylum.
- **Credible fear review** to determine whether an individual in expedited removal has a credible fear of persecution or torture.<sup>17</sup> Expedited removal allows DHS to remove certain individuals from the United States without placing them in removal proceedings.
- **Reasonable fear review** to determine whether an individual in expedited removal, who has been previously removed from the United States, has a reasonable fear of persecution or torture.<sup>18</sup>
- **Claimed status review** to determine whether an individual in expedited removal has a valid claim to U.S. citizenship, lawful permanent residency, refugee, or asylum status, when the individual claims under oath to have such status.
- **In absentia hearing** to determine whether an individual



who does not appear for a scheduled hearing may be ordered removed in his or her absence, which is called *in absentia*. The immigration judge will order an individual removed *in absentia* if DHS establishes by clear, unequivocal, and convincing evidence that the individual is removable and that DHS served the individual with a written notice to appear for the hearing that included information on the consequences of being absent for a hearing.

### Immigration Judge Decisions

At the conclusion of the case, the immigration judge usually issues an oral decision, but on occasion will issue a written decision sometime after the hearing. Decisions are made on a case-by-case basis according to U.S. immigration law, regulations, and precedent decisions. When the judge grants the individual relief from removal, the individual may remain in the United States, sometimes temporarily and sometimes permanently. When the judge orders the individual removed, DHS may remove the individual from the United States. However, a judge's decision may not be the final decision in the case because both parties have the opportunity to appeal the decision in removal proceedings and in the other hearings and reviews specified above.

### Appeals of Immigration Judge Decisions—Board of Immigration Appeals Review

Within 30 days of the immigration judge's decision, either party or both parties may appeal the decision to the Board of Immigration Appeals. The board decides the appeal by conducting a paper or record review; it generally does not conduct courtroom hearings, though it may hold oral arguments in selected cases. ☉

### Endnotes

<sup>18</sup> U.S.C. §1229(a)(1).

<sup>28</sup> C.F.R. §239.1.

<sup>38</sup> U.S.C. §1229(a)(1).

<sup>4</sup>[www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm](http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>78</sup> C.F.R. §1003.1(h).

<sup>8</sup>[www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm](http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm); citing fact sheet at [www.justice.gov/eoir/press/2012/OCAHOFactSheet05292012.pdf](http://www.justice.gov/eoir/press/2012/OCAHOFactSheet05292012.pdf).

<sup>9</sup>[http://www.justice.gov/eoir/vll/OCIJPracManual/ocij\\_page1.htm](http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm).

<sup>10</sup>EOIR Operating Policies and Procedures Memorandum (OPPM) 08-03 (Amended), "Application of the Immigration Court Practice Manual to Pending Cases" (June 20, 2008), appearing at [www.justice.gov/eoir/efoia/ocij/oppm08/08-03.pdf](http://www.justice.gov/eoir/efoia/ocij/oppm08/08-03.pdf).

<sup>11</sup>[www.justice.gov/eoir/vll/OCIJPracManual/PracticeManual\\_1-27-14.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/PracticeManual_1-27-14.pdf).

<sup>12</sup>Immigration Court Practice Manual, Chapter 1.2(a).

<sup>13</sup>EOIR Uniform Docketing System Manual, Intro. 2 (July 2008).

<sup>14</sup>Fact sheet at [www.justice.gov/eoir/press/09/WhoCanRepresentAliensFactSheet10022009.pdf](http://www.justice.gov/eoir/press/09/WhoCanRepresentAliensFactSheet10022009.pdf).

<sup>15</sup>*Picca v. Mukasey*, 512 F.3d 74 (2d Cir. 2008).

<sup>16</sup>Fact sheet at [www.justice.gov/eoir/press/04/ReliefFromRemoval.pdf](http://www.justice.gov/eoir/press/04/ReliefFromRemoval.pdf).

<sup>17</sup>Fact sheet at [www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf](http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf).

<sup>18</sup>*Id.*

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