



# Department of Justice

## MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS

On January 9, 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. The review team they assembled traveled to nearly 20 Immigration Courts and the Board, conducted more than 200 interviews of stakeholders, administered an online survey to hundreds of participants, and analyzed thousands of pages of material in an effort to assess the strengths and weaknesses of the immigration court system. The Deputy Attorney General and the Associate Attorney General have now briefed the Attorney General on the review team's findings and have provided him with their recommendations for reform.

Based on that advice, the Attorney General is directing the implementation of the following measures.

### *1. Performance Evaluations*

With the assistance of the Director of the Executive Office for Immigration Review (EOIR), the Deputy Attorney General will develop and implement a process to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals. Just as performance appraisal records are used elsewhere in the Department to assess the work of personnel at all levels, EOIR performance evaluations will allow for identification of areas where an immigration judge or Board member may need improvement while fully respecting his or her role as an adjudicator. Given the size and structure of the immigration court system, a formal process to allow supervisors within EOIR to evaluate and improve the work of its adjudicators is appropriate at this time.

### *2. Evaluation During Two-Year Trial Period*

Like many other Department employees, newly appointed immigration judges and Board members have a two-year trial period of employment. The Director of EOIR will use that period both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed. In addition, the Director of EOIR will provide a short report to the Deputy Attorney General on the temperament and skills of each newly appointed immigration judge or Board member roughly four months prior to the expiration of the two-year trial period. The assessment will be done in a way that fully respects the adjudicator's role.

### *3. Examination on Immigration Law*

Immigration judges and Board members should be proficient in the principles of immigration law. To ensure that is true, all immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key principles of immigration law before they begin to adjudicate matters. The Director of EOIR will develop such an immigration law exam and submit it to the Deputy Attorney General. The Director may consider the appropriateness of a training course prior to the administration of the examination.

### *4. Improved Training for Immigration Judges and Board Members*

It is important that training for immigration judges and Board members be comprehensive and up to date. The Director of EOIR will conduct a review of EOIR's current training programs for immigration judges and Board members, develop a plan based on that review to strengthen training, and submit the plan to the Deputy Attorney General. The plan will address, among other things, (i) whether expansion of the training program for new immigration judges and Board members is warranted, (ii) ways to ensure that immigration judges and Board members receive continuing education that is appropriate to their level of experience and instructive about current developments in the field of immigration law, and (iii) ways to ensure that immigration judges are trained on properly crafting and dictating oral decisions. The Director will consult the Director of the Federal Judicial Center with respect to this and other training-related measures.

### *5. Improved Training and Guidance for EOIR Staff*

The Director of EOIR will conduct a review to assess how well Immigration Court and Board of Immigration Appeals staff are performing their functions and provide a plan for improvement, including any additional training the Director deems appropriate in areas such as case management. In particular, the Director's review will consider how well the Board's staff attorneys are performing their screening and drafting duties and develop a plan based on that review to strengthen these areas. The plan will address, among other things, ways to (i) improve the guidance and training provided to staff attorneys—especially on major recurring issues (*e.g.*, correct screening standards, proper standards of review, and how to craft effective draft opinions), and (ii) ensure that Board members provide staff attorneys with appropriate guidance in drafting decisions in individual cases, consistent with the policies and directives of the Director of EOIR and the Chairman of the Board of Immigration Appeals. The Director will submit the plan to the Deputy Attorney General.

### *6. Improved On-Bench Reference Materials and Decision Templates*

Immigration judges should have available to them up-to-date reference materials and standard decision templates that conform to the law of the circuits in which they sit. The Director of EOIR is encouraged promptly to form a committee composed of immigration judges and other EOIR personnel to undertake the task of developing these materials.

## *7. Mechanisms To Detect Poor Conduct and Quality*

While most immigration judges and Board members perform their difficult duties with skill and dedication, as in any large organization, instances of poor conduct and quality can occur from time to time. To ensure that those instances are promptly detected, the Director of EOIR will establish regular procedures (1) for Board members and the Civil Division's Office of Immigration Litigation (OIL) to report adjudications that reflect immigration judge temperament problems or poor Immigration Court or Board quality to him and to the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals; and (2) for the Chief Immigration Judge and the Chairman of the Board to track and report to the Director statistics that may signal problems in temperament or quality (*e.g.*, unusually high reversal rates, unusually frequent or serious complaints, and unusually significant backlogs).

## *8. Analysis and Recommendations Regarding Disparities in Asylum Grant Rates*

A recent study has highlighted apparent disparities among immigration judges in asylum grant rates. The Director of EOIR, in consultation with the Acting Chief Immigration Judge, will review this study and provide an analysis and, if appropriate, recommendations to the Deputy Attorney General with respect to this issue.

## *9. Pilot Program To Deploy Supervisors to Regional Offices*

To test whether the Immigration Courts would benefit from having Assistant Chief Immigration Judges assigned regionally rather than at EOIR headquarters, the Acting Chief Immigration Judge will consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees, on a pilot basis. After the conclusion of this assignment, the Chief Immigration Judge will report to the Deputy Attorney General and the Director of EOIR on whether the assignment improved managerial contact and oversight in those courts. The Acting Chief Immigration Judge will also consider piloting other mechanisms for improving the management of the Immigration Courts.

## *10. Code of Conduct*

The Director of EOIR will draft a Code of Conduct specifically applicable to immigration judges and Board members and, after consultation with the Counsel for Professional Responsibility and the Director of the Office of Attorney Recruitment and Management, submit it to the Deputy Attorney General. Thereafter, it will be available online to counsel and litigants who appear before the Immigration Courts and the Board.

## *11. Complaint Procedures*

The Department takes seriously complaints of inappropriate conduct by its adjudicators. Procedures already exist within EOIR, the Office of Professional Responsibility (OPR), and the Office of the Inspector General (OIG) to address them. In

light of the serious and sometimes sensitive nature of these complaints, the following additional measures will be taken to improve the quality and speed of the Department's complaint-handling processes. The Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, will conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and will develop a plan based on that review to (i) standardize complaint intake procedures; (ii) create a clearance process that will clearly define the roles of EOIR, OPR, and OIG in the handling of any particular complaint; and (iii) ensure a timely and proportionate response. The Director of EOIR will conduct the review and submit a plan to the Deputy Attorney General.

## *12. Improvements to the Streamlining Reforms*

Much commentary has been directed at the reforms that the Department instituted in 1999 and then expanded in 2002 to streamline the Board of Immigration Appeals' procedures for hearing appeals. Critics believe that these reforms have led the Board of Immigration Appeals to dedicate insufficient review to some matters and to produce too few published precedential decisions. Proponents of these reforms, on the other hand, have observed that streamlining brought much-needed efficiency to the review process, enabling the Board to eliminate a large backlog and to provide respondents with a final, reviewable administrative action in a reasonable amount of time. Having carefully considered the existing and predicted caseload, the existing resources, the need to review respondents' claims adequately, and the need to provide respondents with a final decision in a timely fashion, the Department has concluded that it is neither necessary nor feasible to return to three-member review of all cases without recreating unacceptable backlogs. Some adjustments to streamlining, however, are appropriate to allow the Board to improve and better explain its reasoning in certain cases. Accordingly, the following adjustments will be made to the Board's rules.

- The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification; and (ii) allow the limited use of three-member written opinions—as opposed to one-member written opinions—to provide greater legal analysis in a small class of particularly complex cases. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.
- The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board members votes to publish the opinion, or if the Attorney General directs publication. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.
- The Assistant Attorney General for Legal Policy, in consultation with EOIR and the Civil Division, will draft a proposed rule that would return cases to the Board for

reconsideration when OIL identifies a case that has been filed in federal court and, in OIL's view, warrants reconsideration.

From time to time, the streamlining rules may need to be adjusted to meet the exigencies and needs of the Board and the parties who litigate before it. Accordingly, the Deputy Attorney General and the Director of EOIR will monitor the effect of these adjustments closely to ensure that they are appropriate in light of the Board's changing workload, and the Deputy Attorney General will reevaluate the effectiveness of these adjustments after they have been in effect for two years.

### 13. *Practice Manual*

The immigration judges, and the counsel and litigants who appear before them, would benefit from having a Practice Manual that describes a set of best practices for the Immigration Courts. Working with the immigration judges, the Director of EOIR will draft such a Manual and submit it to the Deputy Attorney General. It will be available online to counsel and litigants who appear before the Immigration Courts.

### 14. *Updated and Well-Supervised Sanction Authorities for Immigration Judges for Frivolous or False Submissions and Egregious Misconduct*

Immigration judges should have the tools necessary to control their courtrooms and to protect the adjudicatory system from fraud and abuse. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct, *see* 8 C.F.R. 1003.101–109, and will draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority. Because the authority to impose a civil monetary sanction exists only for conduct "in contempt of an immigration judge's proper exercise of authority" (8 U.S.C. 1229a(b)(1)), its use will require substantial oversight (*e.g.*, approval by the Director of EOIR or another overseeing body), and one would anticipate it would be used sparingly. The Director, after consultation with the Counsel for Professional Responsibility, will submit proposed rules to the Assistant Attorney General for Legal Policy.

### 15. *Updated Sanctions Power for the Board*

Likewise, the Board of Immigration Appeals should have the ability to sanction effectively litigants and counsel for strictly defined categories of gross misconduct. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority to the Board. I ask the Director, after consultation with the Counsel for Professional Responsibility, to submit any proposed revisions to the Assistant Attorney General for Legal Policy.

#### *16. Seek Budget Increases*

With its workload having increased significantly in recent years and still further increases in caseload being anticipated, EOIR has demonstrated a need for additional resources. The Deputy Attorney General and the Director of EOIR will prepare a plan as soon as possible to seek budget increases, starting in FY 2008, for (i) the hiring of more immigration judges and judicial law clerks, focusing on those Immigration Courts where the need is greatest; and (ii) the hiring of more staff attorneys to support the Board of Immigration Appeals.

#### *17. Increase in Size of the Board*

The Director of EOIR will draft and submit to the Assistant Attorney General for Legal Policy a proposed rule to increase the size of the Board of Immigration Appeals from 11 to 15, by adding four permanent members. In addition, the Director is encouraged to continue the use of temporary Board members to fulfill the needs of the Board of Immigration Appeals.

#### *18. Updated Recording System and Other Technologies*

For some time, EOIR has been considering the need to replace the Immigration Courts' tape recording system with a digital recording system. The Director will provide the Deputy Attorney General with a plan and timeline for accomplishing this project. The plan and timeline will include the steps necessary to begin piloting a digital audio recording system during the next fiscal year, and to begin nationwide implementation of that system as soon as feasible.

In general, it is important to ensure that EOIR's use of technology—from the digital recording system to an electronic docket management system—is efficient, innovative, and compatible with the information management systems of users of EOIR's systems.

#### *19. Improved Transcription Services*

The Director of EOIR will conduct a review of EOIR's current transcription services and develop a plan based on that review to strengthen the transcription of oral decisions, including improving the timeliness of transcription to the extent feasible. The Director will submit the plan to the Deputy Attorney General.

#### *20. Improved Interpreter Selection*

Likewise, the Director of EOIR will conduct a review of its current interpreter selection process and develop a plan based on that review to strengthen interpreter selection. The plan will address, among other things, (i) ways to improve the screening, hiring, certification, and evaluation of staff interpreters, and (ii) ways to ensure that contract interpreters meet similar standards of quality. The Director will submit the plan to the Deputy Attorney General.

21. *Referral of Immigration Fraud and Abuse*

The Director of EOIR, in consultation with the Director of the Executive Office for United States Attorneys, will develop a procedure by which immigration judges and Board members may refer cases of immigration fraud and abuse to the appropriate investigative body for appropriate action, including possible future referral to and prosecution by the U.S. Attorney's Offices. The Director will notify the immigration judges and Board members of that procedure.

22. *Expanded and Improved EOIR-sponsored Pro Bono Programs*

The Director of EOIR will consider forming a committee to oversee the expansion and improvement of EOIR's *pro bono* programs. Such a committee will be composed of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar, and any other participants whom the Director deems necessary.