



The Attorney General

Washington, D.C.

August 9, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY
DIRECTOR OF THE EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
ACTING CHIEF IMMIGRATION JUDGE

FROM: THE ATTORNEY GENERAL *ag*

SUBJECT: Measures To Improve the Immigration Courts and the Board of
Immigration Appeals

On January 9, 2006, I 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 me on the review team's findings and have provided me with their recommendations for reform.

Based on that advice, I am directing you to implement the following measures.

1. *Performance Evaluations*

With the assistance of the Director of the Executive Office for Immigration Review (EOIR), the Deputy Attorney General shall 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. The Deputy Attorney General will submit to me a plan for this appraisal system by November 1, 2006.

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 should 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 shall 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 should 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. I ask that the Director of EOIR develop such an immigration law exam and submit it to the Deputy Attorney General by November 1, 2006, for approval. 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. I ask that the Director of EOIR conduct a review of EOIR's current training programs for immigration judges and Board members and develop a plan based on that review to strengthen training. The plan should 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 shall consult the Director of the Federal Judicial Center with respect to this and other training-related directives set forth in this memorandum. The Director shall submit the plan to the Deputy Attorney General for approval by January 1, 2007.

5. Improved Training and Guidance for EOIR Staff

I ask that the Director of EOIR 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 should 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 should 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 should submit the plan to the Deputy Attorney General by December 1, 2006.

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. I recommend that the Director of EOIR promptly 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, I ask that the Director of EOIR 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. By October 1, 2006, 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, I ask that, on a pilot basis, the Acting Chief Immigration Judge consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees. After the conclusion of this assignment, the Chief Immigration Judge should 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 should also consider piloting other mechanisms for improving the management of the Immigration Courts.

10. *Code of Conduct*

I believe that the immigration judges and Board members would benefit from having a Code of Conduct specifically applicable to them. I ask that the Director of EOIR draft such a Code 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 by December 1, 2006, for approval. Thereafter, it should 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. Recognizing the serious and sometimes sensitive nature of these complaints, I am directing the following additional measures to improve the quality and speed of the Department's complaint-handling processes. I ask the Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, to conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and to 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 for approval by December 1, 2006.

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, I believe 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, I direct that the following adjustments 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 by November 1, 2006.

- 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 by November 1, 2006.
- 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. The Assistant Attorney General for Legal Policy will draft the proposed rule by November 1, 2006.

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, I ask that the Deputy Attorney General and the Director of EOIR monitor the effect of these adjustments closely to ensure that they are appropriate in light of the Board's changing workload, and I ask that the Deputy Attorney General reevaluate the effectiveness of these adjustments after they have been in effect for two years.

13. *Practice Manual*

I believe that the immigration judges, and the counsel and litigants who appear before them, would also 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 shall draft such a Manual and submit it to the Deputy Attorney General by April 1, 2007, for approval. It should 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. I therefore ask the Director of EOIR to 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 to 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 by December 1, 2006.

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. I therefore ask the Director of EOIR to 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 by December 1, 2006.

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. I hereby direct the Deputy Attorney General and the Director of EOIR to 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

I also direct the Director of EOIR to draft a proposed rule to increase the size of the Board of Immigration Appeals from 11 to 15, by adding four permanent members. The Director will submit the proposed rule to the Assistant Attorney General for Legal Policy by November 1, 2006. 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

I understand that, for some time, EOIR has been considering the need to replace the Immigration Courts' tape recording system with a digital recording system. By November 1, 2006, the Director should provide the Deputy Attorney General with a plan and timeline for accomplishing this project. The plan and timeline should 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 shall 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 shall submit the plan to the Deputy Attorney General for approval by January 1, 2007.

20. *Improved Interpreter Selection*

Likewise, the Director of EOIR shall conduct a review of its current interpreter selection process and develop a plan based on that review to strengthen interpreter selection. The plan should 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 shall submit the plan to the Deputy Attorney General for approval by January 1, 2007.

21. *Referral of Immigration Fraud and Abuse*

In addition, the Director of EOIR, in consultation with the Director of the Executive Office for United States Attorneys, shall 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 shall notify the immigration judges and Board members of that procedure no later than December 1, 2006.

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

The Director of EOIR should also consider forming a committee to oversee the expansion and improvement of EOIR's *pro bono* programs. Such a committee should 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.

cc: Acting Associate Attorney General
Acting Assistant Attorney General for Administration
Assistant Attorney General for the Civil Division
Director of the Executive Office for United States Attorneys
Inspector General
Counsel for Professional Responsibility
Director of the Office of Attorney Recruitment and Management
Chairman of the Board of Immigration Appeals