U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge

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TO: ALL OFFICE OF THE CHIEF IMMIGRATION JUDGE PERSONNEL

FROM: Tracy Short TS
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SUBJECT: Pre-hearing Conferences in Immigration Proceedings Program

I. Introduction

Immigration judges have the discretionary authority to schedule pre-hearing conferences to narrow issues, obtain stipulations, exchange information, and organize the proceedings. 8 C.F.R. § 1003.21(a); *see also* PM 21-18, *Revised Case Flow Processing Before the Immigration Courts* (Apr. 2, 2021) (encouraging parties in immigration proceedings to use stipulations and joint motions to resolve cases). Pre-hearing conferences are a resource to resolve cases more efficiently, prepare for merits hearings, and improve the quality of proceedings without formal litigation. *See* 29 C.F.R. § 18.44. This is especially important in the pro bono context, where attorneys may have less experience in immigration court and face unique time and resource constraints. To that end, pursuant to Department of Justice memoranda, "Immigration Judges should therefore actively and routinely encourage parties to engage in pre-hearing communications, both for the efficiency of the court and for the efficacy of the pro bono representation." DM 22-01, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021).

In the Immigration Court context, pre-hearing conferences are especially useful for the following purposes:

(a) Provide parties with an opportunity to resolve cases prior to an individual hearing (*e.g.*, administrative closure, voluntary departure, stipulating to relief, etc.);
(b) Provide parties with an opportunity to narrow issues prior to the individual hearing;
(c) Provide parties with an opportunity to discuss manner of presenting evidence at the individual hearing; and
(d) Ensure applications are complete and cases are ready for a final hearing.

When ordering pre-hearing conferences, immigration judges should be mindful of the staffing difficulties, time constraints, and administrative burdens that pre-hearing conferences may impose on court staff, respondents' counsel, and the Department of Homeland Security (DHS). Whenever possible, the Executive Office for Immigration Review (EOIR) should work with the U.S. Immigration and Customs Enforcement (ICE), Office of the Principal Legal Advisor (OPLA), to ensure that the OPLA attorney who attends a pre-hearing conference also appears on behalf of DHS at any future hearings.

II. Identifying Cases for Pre-Hearing Conferences

Immigration judges have the discretion to order pre-hearing conferences *sua sponte* or at the request of a party. To avoid duplicating workloads, immigration judges should limit pre-hearing conferences to represented cases proceeding to a merits hearing on the non-detained docket. To identify qualifying cases for pre-hearing conferences, the immigration judge should consider the following factors:

(a) Whether the respondent has filed an application for relief from removal;
(b) Whether the respondent has any applications or petitions pending with DHS;
(c) The length of time the case has been pending with the court; and
(d) The complexity of the case.

Immigration judges should pay special attention to long-pending cases, where evidence may be stale, facts may have changed, and new forms of relief may be available to the respondent. The moving party, or the immigration judge when ordering *sua sponte*, should identify the specific issues to narrow, or specific goals to be accomplished, at the pre-hearing conference. A mere statement that the parties should discuss the pending application(s) for relief will not suffice. Pre-hearing conferences should not be scheduled for the sole purpose of issuing or resolving requests for prosecutorial discretion (PD).

Example: Respondent's counsel files a Motion for Pre-Hearing Conference, asking the immigration judge to order the parties to convene to discuss an asylum claim based on female genital mutilation. The parties meet, review the evidence, and DHS stipulates to the facts alleged in the application for relief. The parties make a Joint Motion to Adjudicate Applications without Evidentiary Hearing, asking the Court to issue a written decision on the merits of the respondent's application based on the written record. The immigration judge schedules a brief hearing to take limited testimony and confirm that everything in the respondent's application is complete before issuing a decision.

Example: The morning of a respondent's merits hearing, the Immigration Court announces that the immigration judge assigned to the case is sick and reschedules the merits hearing for a future date to be determined. Because both parties already invested the time and resources to prepare for the hearing, the immigration judge orders the parties to confer for a pre-hearing conference to resolve as many disputed issues as possible to make progress with the case. To the extent practicable, the immigration judge works to schedule the new hearing with the same OPLA trial attorney.

Example: Respondent's counsel moves the Court to order a prehearing conference for the parties to discuss the respondent's eligibility for prosecutorial discretion. Because the respondent failed to articulate a basis for a pre-hearing conference beyond a request for prosecutorial discretion, the Court denies the respondent's motion.

III. Structure of Pre-Hearing Conferences

Pre-hearing conferences are a resource that (1) immigration judges may use to organize their dockets and expedite the resolution of cases; and (2) the parties may use to facilitate communication regarding legal and factual areas that may be in dispute, including evidentiary deficiencies. While the respondent's presence at a pre-hearing conference is optional,[1] counsel for the parties must have the authority to stipulate about all matters, including the possible resolution of proceedings.

[1] Immigration judges can order a respondent to attend the pre-hearing conference, but the presumption is that the respondent's presence is waived.

1. Format

To avoid any detrimental impact on the Immigration Court's backlog, the immigration judge will schedule these cases along with other cases set for a pre-trial conference. This will allow the parties to engage in a candid discussion with each other in the hopes of narrowing the issues in a case. The parties may appear either in person or virtually for the pre-trial conference.

2. Discussion Topics

Pre-hearing conferences will involve case-specific discussions. The parties should make best efforts in pre-hearing discussions to narrow the issues, limit testimony, and stipulate to uncontested issues of law and/or fact. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (stating that the parties' "agreement on an issue or proper course of action should, in most instances, be determinative").

In addition to addressing the specific issues identified by the immigration judge, some items the parties may discuss include:

(a) Whether the respondent is an enforcement priority
(b) Whether the respondent is eligible for prosecutorial discretion
(c) Whether administrative closure is appropriate or being placed off docket is appropriate
(d) Any objections to evidence or stipulations
(e) Deficiencies in the record/application
(f) Eligibility for the relief sought, even if the parties accept all the facts as true.

Pre-hearing conferences are not forums for litigation, and the respondent may not provide testimony or submit to cross-examination.

IV. Outcomes

The immigration judge's order for a pre-hearing conference must set clear expectations for what the parties should achieve at the pre-hearing conference. The immigration judge should identify the specific issues to narrow and goals to accomplish at the pre-hearing conference. This may require parties to file a written work product, describing exactly what transpired at the pre-hearing conference. This filing may take a variety of forms, but should refrain from overburdening the parties. For instance, the immigration judge may order the parties to file a Joint Pre-Hearing Statement, outlining the issues that the parties discussed and any outcomes that the parties achieved. The parties may file any statements or motions that are appropriate based on the pre-hearing conference, such as joint or unopposed motions for docket management or adjudication.[2] And, to the extent permissible under DHS policy, OPLA attorneys may submit a position statement on the case in lieu of attending the final merits hearing.

Example: Six weeks prior to an individual hearing on the respondent's cancellation of removal application, the parties convene for a pre-hearing conference. The parties discuss the case, review the record, and agree that the only disputed issue is whether the respondent provided evidence of the requisite continuous physical presence in the

[2] *E.g.*, an Unopposed Motion for Administrative Closure, Joint Motion to Dismiss, Unopposed Motion to Continue, Joint Pre-Hearing Statement, Joint Motion to Adjudicate Applications without Evidentiary Hearing for the Court to issue a written decision on the merits of the respondent's application based solely on the written record.

United States. The parties also agree that written affidavits from witnesses would be a sufficient substitute to witness testimony. The parties file a Joint Pre-Hearing Statement, explaining that the parties convened, narrowed the issue to physical presence, and anticipate that the case can be resolved in a one-hour hearing.

Example: Four weeks prior to an individual hearing, the Court receives a Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court, from a pro bono attorney appearing under the supervision of a local nonprofit organization. The immigration judge orders a pre-hearing conference for the parties to identify contested issues in the respondent's asylum application. The parties file a Pre-Hearing Conference Statement in which DHS indicates that the only statutory bar to relief is the one-year bar.