To: *Pro Bono* Attorneys with Upcoming Master Calendar Hearings

From: Asylum Representation Program

Re: MASTER CALENDAR HEARINGS

Your Responsibilities Prior to the Hearing

You should carefully review the charging document to determine whether it is factually correct and legally sufficient to support your client's deportation from the United States. There are a variety of charging documents, the Form I-862 Notice to Appear (NTA) in removal proceedings being the most common. [1] Less common is the Form I-863 Notice of Referral to Immigration Judge, which is issued only to stowaways and persons seeking admission to the U.S. under the Visa Waiver Permanent/Pilot Program (VWPP).[2]

If your client's case before the Immigration Judge (IJ) was initiated prior to April 1997, DHS will have issued an Order to Show Cause (OSC) in deportation proceedings or a Notice to Applicant for Admission (Form I-122) in exclusion proceedings.[3] You should also review the provisions of the law under which your client has been charged, as well as the local Immigration Court's operating rules.

If you have an opportunity to meet with the client prior to the Master Calendar hearing, you should discuss the matters referenced below, including: (1) the decision to concede service of the charging document and the charges, (2) the issue of whether to designate a country for deportation, (3) the need for and consequences of requesting an adjournment, and (4) any translation issues.

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[1] Rules for admission under the VWPP are set forth at INA § 217 and 8 CFR § 217. Foreigners seeking admission to the U.S. with a valid passport from a VWPP designated country (e.g. European Union nations, Australia, Japan, Singapore and Switzerland) are admissible to the U.S. without a visa. However, those who are inadmissible to the U.S. and seeking asylum are issued an I-863, regardless of their true nationality or citizenship.

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[3] Under pre-April 1, 1997 law, there were two types of immigration proceedings: (i) deportation proceedings and (ii) exclusion proceedings (for airport arrivals and others who had not technically "entered" the U.S.). Effective April 1, 1997, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (1996 Immigration Act) eliminated this distinction and established one type of proceeding, called a "removal" proceeding, which is initiated by service of a Notice to Appear.

If you have not had the opportunity to interview the client, you should request an adjournment to give you adequate time to discuss these decisions with the client.

Mandatory appearance of the Respondent

Unlike other areas of litigation practice, your client's appearance in court is mandatory.[4] If your client fails to appear in court for a duly scheduled hearing, the IJ is authorized to enter an order of deportation or removal *in absentia* -- even if you the attorney are present in court on the respondent's behalf. In other words, you should make clear to your client the severe consequences of failing to appear, and also make sure that the client is aware of the time and place of the IJ hearing.

In certain cases, the IJ may waive the appearance of the respondent. These cases are extremely unusual, and will only take place under some emergency situation, or where there is a matter of a purely perfunctory nature. If the respondent's appearance is waived in your case, be absolutely certain that the IJ has made this waiver on the record, and speak to the government trial attorney about marking this waiver in the DHS file.

Arrival at the Immigration Court

When you arrive at the courtroom, make sure you have a green Form EOIR-28, Notice of Entry of Appearance as Attorney, which you will need to sign. (If you do not have the form already, they are available in each courtroom and from the court clerk, or maybe downloaded from the EOIR website at http://www.usdoj.gov/eoir/formslist.htm).

You should sign in as soon as possible with the clerk (usually at the front of the courtroom). Useful Hint: the IJ will initially be viewing numerous cases, and you may have to wait some time before your case is called. Since the IJ often calls cases in the order in which attorneys and clients have signed in, it is beneficial to be one of the first on the list. The IJs also tend to call represented respondents before they call *pro se* respondents, even if you have signed in after a *pro se* respondent, but this is not always the case.

The Master Calendar Hearing

While each IJ varies in the way that he/she conducts the hearing, you should be prepared for the following:

1. Conceding service of the charging document and the pleading to the charges

The Notice to Appear (or Order to Show Cause or Form I-122), which should have been served upon your client prior to the hearing, will indicate the charges under which DHS is attempting

[4] INA § 240(b)(5).

to remove (or deport/exclude) your client.[5] DHS has authority to charge the respondent; the Immigration Judge is empowered to determine removability and eligibility for asylum.

However, if your client is a stowaway or VWPP applicant and charged under a Form I-863 Notice of Referral to Immigration Judge, the regulations grant DHS exclusive authority to determine whether your client is inadmissible. The IJ's role is limited solely to consideration of whether your client is eligible for asylum and withholding. Accordingly, the I-863 contains neither allegations nor charge.

You should generally concede service when you are asked to do so by the IJ and waive reading of your client's rights, since the court expects the client's representative to explain those rights.[6] The IJ will then ask you whether your client is prepared to admit to the allegations and concede to DHS' charges.

In many asylum cases, the applicant concedes removability (or deportability/excludability) and the hearing then focuses solely on the merits of the application for asylum and withholding of removal (or of deportation). For instance, if your client does not have proper immigration documents to remain lawfully in the United States, there may be no justification, unless you have evidence to the contrary, to refuse to concede charges related to the lack of such documents.

You should generally not concede charges that include any element of fraud (e.g. attempting to use a fraudulent passport or visa to procure entry into the United States). In almost all cases, there will be a basis for contesting the fraudulent intent of the client. DHS has the burden of proving such a charge. The ramifications of being deported on a fraud charge are more serious and are thus to be avoided.

If your client is charged in removal proceedings as an arriving alien, or is in exclusion proceedings (under pre-April 1997 law) but was not detained by DHS, you should determine whether your client was admitted into the United States or has made an "entry" as defined by the law. It may be to your advantage to argue that your client should properly be charged as alien "present" in the United States, or one who has made an entry, since they enjoy additional rights in IJ proceedings.

2. Requesting Asylum

The IJ will ask you what relief from removal your client is seeking. At this point, you should tell the IJ your client is seeking asylum, withholding of removal (or of deportation) and protection under the UN Convention Against Torture. If the country from which your client is seeking asylum differs from the country or countries to which he/she would like deportation to be withheld, it should be indicated to the IJ.

3. Designating a Country of Removal

[5] *See* INA § 239(a)(1) (or former INA § 242B(a)(1) for deportation or exclusion proceedings).
[6] Those rights are set forth at 8 CFR § 1240.10.

In removal and deportation proceedings, your client has the right to designate a country to which he/she prefers to be deported and he/she will be requested to do so by the IJ. In cases where one will be requesting asylum and withholding of removal/deportation, designating the country from which one is claiming persecution may be considered a concession that one would not face persecution there. An alien generally cannot designate a country for deportation unless the alien has the permission of that country to travel there (e.g. appropriate travel documentation). Most of our clients came to the U.S. because it was the only country where they believed that they would be safe. It is therefore usually advisable to decline to designate a country for deportation. When you do this, the IJ will ask the DHS attorney to designate a country of removal, and proceed from there.

4. Seeking Voluntary Departure in the Alternative

If your client is in removal or deportation proceedings (but not exclusion proceedings), the IJ may ask you if your client wishes to apply for voluntary departure as an alternative remedy. To be eligible for voluntary departure, your client must prove that he/she is of good moral character and has the means with which to depart the United States.[7] This is not a benefit that we generally believe our asylum seeking should request, therefore you should not accept voluntary departure without carefully discussing it with an HRF attorney in advance.

5. Requesting other Relief

If your client will be seeking further alternative relief, such as Special Immigrant Juvenile Status, Cancellation of Removal/Suspension of Deportation, or Adjustment of Status, you should inform the IJ of this request or the right to seek the relief may later be deemed waived.

6. Filing the Asylum Application and Supplemental Materials

If your client was referred from the asylum office, then the Immigration Court will have that application on file, and will deem that to be the pending application unless you inform them otherwise. If you would like to file a new application, you should be prepared to do so at the master calendar hearing but you may filed an amended I-589 at a later date if you determine that to be necessary. You should discuss this with an HRF attorney before appearing at the master calendar hearing.

If your client was not referred from the asylum office, you will need to file a complete I-589 in open court for it to be deemed filed. This is extremely important to do prior to the one year filing deadline, and can also effect the operation of the work authorization clock. Thus, you should carefully review the dates and information provided to you in the HRF client bio document and discuss these issues with the HRF attorney prior to the master calendar hearing.

7. Submitting Original Documents for Forensic Testing

[7] If your client is in removal proceedings, see INA § 240B and 8 CFR § 240.3.

In assessing your client’s asylum eligibility, the Immigration Judge will place significant weight on whether your client has offered corroborating identification documents (e.g. passport, birth certificate, student ID card) in support of the claim. As part of this assessment, The IJ and DHS may require that your client provide original copies of these documents for forensic testing to DHS well in advance of the merits hearing. Depending on what arrangements you have made with the court, original documents are to be dropped off either at a subsequent master calendar hearing, or with the DHS Office of the District Counsel.

However, not every IJ will initiate arrangements for delivery of original documents. It is therefore ultimately your responsibility to make such arrangements, and ensure that the DHS Trial Attorney assigned to your case promptly receives the client’s originals for submission to the DHS forensic document laboratories.

8. Requesting an Interpreter

If your client does not speak or understand fluent English, be sure to notify the IJ that an interpreter will be needed for the Individual Merits hearing, and specify in which language and particular dialect.

9. General Information & *pro bono* Representation

In general, be sure that the IJ is aware that you are representing the client on a *pro bono* basis through Human Rights First. IJs are generally appreciative of the *pro bono* services provided by volunteers and they are aware that many have not previously represented an asylum applicant. If you have questions or are not clear about the judge's instructions, always feel free to ask for clarification.

Also, be aware that only that which is said while the digital recording system is operating is officially "on the record." If something is discussed "off the record" when the tape machine is not recording and you wish the record to reflect that discussion, you will need to state this after the IJ reactivates the tape machine.