Department of Justice

STATEMENT OF

JUAN P. OSUNA
DIRECTOR
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
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FOR A HEARING ENTITLED

"THE 2014 HUMANITARIAN CRISIS AT OUR BORDER:
A REVIEW OF THE GOVERNMENT'S RESPONSE TO
UNACCOMPANIED MINORS ONE YEAR LATER"

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Executive Office for Immigration Review
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Introduction

Mr. Chairman, Senator Carper, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today about the Department of Justice's Executive Office for Immigration Review (EOIR), and our role in the Government-wide response to last year's influx of unaccompanied children and families from Central America on the South Texas border.

EOIR administers the Nation's immigration court system, composed of both trial and appellate tribunals. EOIR's immigration judges decide whether an alien is removable based on the facts and the charges filed by the Department of Homeland Security (DHS) and, if removable, whether the alien is eligible for and merits relief or protection from removal. EOIR is responsible only for civil immigration proceedings, and EOIR's immigration judges have no role in state or federal criminal proceedings. EOIR's immigration judges, for example, do not determine the guilt or innocence of aliens charged with criminal wrongdoing at the border or in the interior of the country.

Current State of the Immigration Courts

The immigration court system is facing many challenges. The largest challenge we face is our growing pending caseload. With a backlog reaching 449,569 cases pending as of May 26, 2015, we are engaged in a focused process to hire many more immigration judges to adjudicate these cases. The 101 percent backlog increase over the past five years is in part due to budget cuts, which left the agency unable to hire immigration judges to replace immigration judges that left the agency, and unable to hire new positions to maintain its adjudicatory capacity. Last year's influx also greatly added to the courts' caseload. The courts received more than 75,000 new cases from July 18, 2014, to May 26, 2015.

Congress and the Administration have responded to these difficulties by allocating significant resources in 2015 to the immigration courts, and we are working vigorously to swiftly and responsibly increase our capacity to adjudicate cases through a robust hiring effort. Hiring adjudicators is my top priority in accomplishing that goal. We are actively working to review the thousands of applications we have received for immigration judge positions to find the best candidates to become judges in the Nation's immigration courts. The hiring process is long because we take great care to screen these Attorney General appointees. We evaluate their temperament, knowledge of immigration laws and procedures, litigation experience, ability to handle complex legal issues and to conduct administrative hearings, and their knowledge of judicial practices and procedures. The new resources appropriated in Fiscal Years (FY) 2014 and 2015 will help us rebuild and increase our adjudicative capacity to better address the pending caseload. Overall, with the 18 immigration judges EOIR brought aboard last month, there are

now 247 immigration judges in 58 courts around the country. This is 7 above our low of 240 during the hiring freeze, but 25 below our pre-sequester high of 272 in 2010. We appreciate the House and Senate appropriations marks for providing for the requested 55 new immigration judges in FY 2016 and will work to bring these judges on board as soon as possible.

Those immigration judges will join the dedicated corps of professionals who have been working tirelessly to keep up with the pace of incoming cases and address the case backlog. Last summer, EOIR realigned its adjudicative priorities, and refocused its immigration court resources. To address the cases of those who crossed our southern border primarily on or after May 1, 2014, EOIR added to its top priority the adjudication of cases of recent border crossers that fall into the following four groups as DHS identifies them: (1) unaccompanied children; (2) families in detention; (3) families released on "alternatives to detention" (ATD); and (4) detained cases of recent border crossers. We are processing these cases as quickly as possible. For unaccompanied children, current agency policy dictates that the first master calendar hearing will be not less than 10 and not more than 21 days following the DHS filing of the charging document with the court. Adults with children released on ATD have their first master calendar hearing not less than 10 and not more than 28 days following such a filing. Following that first hearing, immigration judges are scheduling these cases on the shortest timelines possible without jeopardizing due process.

As anticipated and announced when we identified these new priorities, the focus of EOIR's limited resources on these case groups has had the effect of displacing many of the non-detained, non-priority cases awaiting adjudication further into the future. In some immigration courts, the volume of priority cases has been such that the judges in those courts are working almost exclusively on priority cases, and not on other cases that had already been pending on court dockets but that now must wait for hearings at a future date. Consistent with EOIR's long-standing policy of rescheduling non-priority cases when a priority case requires additional docket time, EOIR announced in February that it is rescheduling some hearings for November 29, 2019, to allow the agency to keep the open cases on the docket, to provide respondents with scheduling information, and to maintain data on the cases. Most, however, are likely to receive other dates, either earlier or later, as docket times become available in the relevant immigration court, depending on available hearing time, the immigration court's priorities, and the level of complexity of the pending cases. We continuously monitor the effects of our prioritization strategy, and work with our stakeholders and federal partners, including DHS, to evaluate those priorities, manage our dockets and look for ways to ease the backlog of cases, while keeping in mind the role of the immigration courts to provide those charged with removal with an opportunity to be heard.

EOIR's Role in the Process

For most removal cases, jurisdiction with EOIR begins when DHS, Immigrations and Customs Enforcement (ICE), files the charging document with the immigration court and ends when an immigration judge completes the case by issuing a final order.[1] Following the filing of

[1] Decisions of immigration judges are final unless a party appeals to the Board of Immigration Appeals (BIA). A BIA decision is binding on all DHS officers and immigration judges unless the Attorney General or a federal court modifies or overrules it.

the unaccompanied child's case with the immigration court, current agency policy dictates that EOIR will schedule a first master calendar hearing not less than 10 and not more than 21 days from that filing. If the respondent does not appear for that scheduled hearing, and the immigration judge is satisfied that the person received proper notice of the hearing and that ICE proved removability, the law provides that the immigration judge may order the respondent removed *in absentia*. When the respondent appears for the scheduled master calendar hearing, the immigration judge reviews the charges ICE has filed against the respondent and provides certain advisals to assist with the processing of the case. The individual hearing is then scheduled for the next available date, taking into account any needs the respondent has for a continuance, including to obtain counsel, and scheduling issues for any counsel already retained, as well as any scheduling needs of DHS counsel. Appearance is similarly required for the individual hearing, the final results of which can be an order of removal, a grant of relief or protection from removal, or a continuance to a new hearing date. Upon completion of the case, EOIR no longer has jurisdiction over the matter unless a party files an appeal or a motion to reopen. If an immigration judge orders the respondent removed, and the respondent waives appeal, the authority to remove the individual rests with ICE. If an immigration judge orders a form of relief or protection, processing of any associated immigration benefits rests with DHS's U.S. Citizenship and Immigration Services (USCIS).

When an unaccompanied child files certain claims, however, the process differs in important ways from what most consider the typical course of adjudication in immigration court. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), USCIS became responsible for initial adjudication of unaccompanied children's asylum applications. USCIS has initial jurisdiction over all asylum applications for unaccompanied children, even those to whom DHS has issued a Notice to Appear in immigration proceedings. Further, the TVPRA also provides an opportunity for such children to have USCIS adjudicate their claim for asylum, even if the child did not previously file for asylum with USCIS and had a pending claim in immigration court, on appeal to the Board of Immigration Appeals, or in federal court.

As such, EOIR may receive a charging document in an unaccompanied child's case, but the immigration judge may continue the case pending USCIS's adjudication of the asylum claim, or may administratively close the case pending such adjudication. Note that an administrative closure does not end the immigration court's jurisdiction over a particular case. Rather, it places the case on hold until a party to the case moves the immigration court to recalendar it.

Another avenue of relief an unaccompanied child may pursue is Special Immigrant Juvenile (SIJ) status. SIJ status requires a three-step process: a finding by a state court, the grant of a petition by USCIS, and a grant of adjustment of status. The procedures for the adjustment of status step differ based on whether DHS has already placed the child in removal proceedings at the time of filing. When the child has already filed the SIJ petition, USCIS has exclusive jurisdiction over adjudication of it, so an immigration judge may continue or administratively close the case upon receipt. Once DHS places the child in removal proceedings, however, EOIR has exclusive jurisdiction to adjudicate applications for adjustment of status.[2] Similar to the pending asylum claim, if a case has been administratively closed pending the adjudication of the

[2] There is an exception for arriving aliens, who almost always must file with USCIS.

SIJ petition, the parties may file a motion to recalendar after USCIS makes a decision on the petition. It is at that point that the immigration judge would be able to fully adjudicate the adjustment of status application, and complete the case.

Unaccompanied Children in Immigration Court

Children who appear in immigration court proceedings without an accompanying adult may require special care and modifications to normal courtroom procedures. In May 2007, to facilitate more efficient immigration proceedings, EOIR developed guidance and suggestions for adjudicating cases where the respondent is a person under 18, without a parent or legal guardian in the United States who is available to provide care and physical custody.[3] The suggestions focus primarily on assisting the judge in evaluating whether the child understands the nature of the proceedings, is able to effectively present evidence about the case , and has appropriate assistance, taking into account the respondent's age, development, experience and self-determination. Circumstances in a particular immigration court may require specialized dockets for children's cases, and responsibility for such dockets may be assigned to certain immigration judges. Following last summer's surge of cases involving unaccompanied children, all immigration courts are equipped to handle a juvenile docket, and 39 of them currently have active juvenile dockets.

All immigration judges are able to handle cases involving unaccompanied children. Immigration judges also receive periodic training, most recently in April of this year, on handling juvenile dockets, including cases that involve unaccompanied children. Immigration judges employ child-sensitive procedures in cases involving unaccompanied children and decide, on a case by case basis, whether special attention is required. Obviously, procedures for a younger child appearing alone in immigration court will likely differ from those procedures employed for an older teenager. Immigration judges take steps to ensure that a "child-appropriate" hearing environment is established and can make common sense adjustments to procedure as appropriate.

Recent Statistics

For the time period of July 18, 2014, through May 26, 2015, EOIR received 31,987 new charging documents for respondents whom ICE has identified as unaccompanied children who crossed the southwest border on or after May 1, 2014. The pending caseload, or the number of these cases that have not had an initial case completion, is 21,999. Of the receipts, 25,777 children have had a master calendar hearing scheduled, the date for which has passed.

Under the law, a respondent's failure to appear at a scheduled hearing may result in the immigration judge ordering the respondent removed *in absentia* when the immigration judge is satisfied that the notice to appear and notice of the time and place of the proceeding was properly provided to the respondent and to any representative on file or adult custodian, and ICE has established that the respondent is removable as charged in the notice to appear. As noted above,

[3] These guidelines may also apply in cases in which children are accompanied by a parent or guardian or in which children testify as witnesses.

EOIR had held 25,777 master calendar hearings in these cases as of May 26, 2015, and immigration judges issued orders of removal *in absentia* in 5,453, or 21 percent, of those cases.

For the same time period, there have been 10,591 initial case completions for unaccompanied children. Of those completions, 6,248 were removal orders (to include those issued *in absentia*); 2,671 were cases that were administratively closed, including 64 due to an immigration judge's decision to close the case following DHS's exercise of prosecutorial discretion; 1,199 were cases that were terminated, including 12 due to an immigration judge's decision to terminate following DHS's exercise of prosecutorial discretion; 422 were voluntary departure orders; 36 were other administrative completions; 9 were other immigration judge decisions; and 6 were decisions granting relief.

Many who are following this issue closely are surprised by how infrequently immigration judges grant children relief from removal. To understand the reason for these infrequent grants of relief from removal, it is important to understand EOIR's defined role in adjudicating unaccompanied children's claims for relief or protection.

Facilitating Efficient Proceedings Involving Unaccompanied Children

By statute, all respondents have a right to representation at no expense to the government. EOIR recognizes that the presence of a representative can increase immigration court efficiencies for respondents of all ages, including resolving those cases in which an individual should be found removable. Immigration judges encourage the use of appropriate *pro bono* resources whenever a child respondent is not otherwise represented. Immigration courts also provide to unrepresented respondents a list of providers who may be available to provide free legal services. In September 2014, EOIR issued guidance concerning the "Friend of the Court" process, which describes the various roles an individual or organization can take to serve the immigration court by assisting with roles often left to children's sponsors or the children themselves.

EOIR, working with its federal partners, has taken numerous steps to support and encourage *pro bono* counsel and non-attorney accredited representatives to provide representation. In cases where individuals lack representation, immigration judges are instructed and trained to conduct removal proceedings in a manner that protects the due process of the individuals appearing before them. Regardless of representation status and in the specific case of children, EOIR operates a Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC), under which custodians of unaccompanied children are provided with important information on these adult sponsors' roles and responsibilities and the immigration court process. While contractors of LOPC do refer children for representation, LOPC does not itself provide representation or funding for representation. EOIR is currently operating 14 LOPC program sites. The LOPC provider in New York is also operating a National Call Center, which assists custodians nationwide in making appointments for LOPC presentations within those 14 sites. The Call Center also provides, and arranges for LOPC sites to provide, telephonic orientation programs for individuals who do not live near, and cannot travel to, an existing LOPC site.

On September 12, 2014, through justice AmeriCorps, the Department of Justice and the Corporation for National and Community Service (CNCS) awarded more than $1.8 million in grants to legal aid organizations for a new direct representation program for certain unaccompanied children. In May 2015, CNCS announced the second Notice of Funding Opportunity for this program's second year. Also, EOIR is currently providing contract funding for attorneys to represent unaccompanied children appearing before the Baltimore Immigration Court through the Baltimore Representation Initiative for Unaccompanied Children. Further, throughout the last several months, EOIR representatives have participated in conversations with stakeholders that focused on increasing access to *pro bono* legal services for unaccompanied children. The meetings fostered creative thinking on ways to improve legal services for unaccompanied children. The meetings involved a wide range of stakeholders, including federal and local government agencies, non-profit legal service providers, the private bar, and key community leaders.

The President's FY 2016 Budget request includes $50,000,000 for the legal representation of unaccompanied children. When unaccompanied children are represented, we expect that courts will be able to reduce the number of continuances granted for the purpose of obtaining counsel, preparing any applications for relief, and gathering evidence. In addition, counsel can facilitate court proceedings, resulting in more efficient hearings and earlier identification of relevant legal issues. All of these factors will assist in reducing EOIR's case backlog while providing fair and efficient adjudicatory proceedings.

Conclusion

Last summer's influx in border apprehensions along the South Texas Border has increased the burden on the immigration courts by more than 40,000 cases from July 2014 to November 2014, and, as noted above, by more than 75,000 as of the end of May 2015. As we work hard to employ the resources Congress has provided, we continue to ask a great deal of sitting immigration judges and staff to process these tens of thousands of cases before them in a continued effort to reduce the impact on the hundreds of thousands of cases that were already in queue. We are continuously aware of the fact that each case involves a person whose future remains uncertain while waiting for the immigration court to schedule and hear their case. EOIR is dedicated to continuing an open dialogue with Congress, our federal agency partners, stakeholders, and the general public to continue to improve upon the efficiencies of the immigration courts and the immigration system as a whole.