IMMIGRATION **JUSTICE** CAMPAIGN

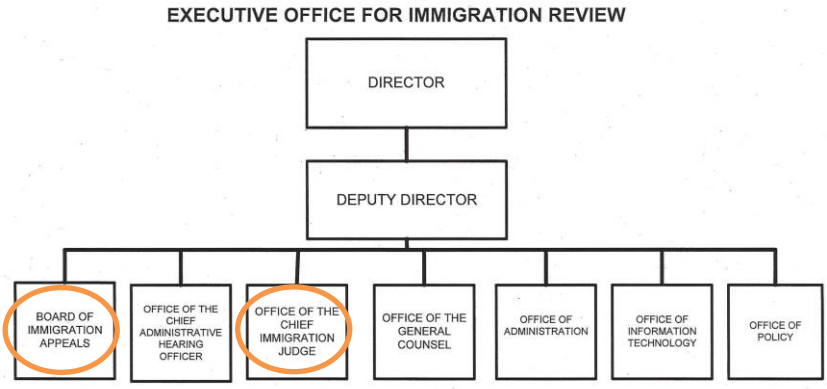
Overview of Immigration Court Proceedings

The immigration court system is a vast, federal network comprised of approximately 700 immigration judges throughout 71 immigration courts and three adjudication centers nationwide.[1] Generally, the immigration judges within the immigration court system conduct several discreet categories of court proceedings: Negative credible fear review (NCFR) proceedings to determine whether an Asylum Officer's negative credible fear determination should be upheld or vacated; custody redetermination proceedings to determine whether an individual in Immigration and Customs Enforcement (ICE) custody should be released on bond; withholding-only proceedings to determine whether an individual should be granted limited humanitarian protection from deportation in the form of withholding or deferral of removal; and removal proceedings to determine 1) whether a noncitizen has violated immigration laws, 2) whether the noncitizen is removable from the country, and 3) whether the noncitizen qualifies for a form of protection or relief from removal.[2]

This document provides an overview of information about the structure of the immigration court system, procedures when representing an individual in immigration court, and what to expect throughout the life of the case. We focus primarily on removal proceedings, though some of the information in this Overview is relevant to NCFR and custody redetermination proceedings as well.

1. Structure of the Immigration Court System

Under the power of the Attorney General, the U.S. Department of Justice's Executive Office for Immigration Review (EOIR) administers the entire immigration court system. The Board of Immigration Appeals (BIA), as the highest administrative body for interpreting and applying immigration laws under EOIR, reviews appeals of decisions rendered by immigration court judges in



[1] *See* latest statistics from the Office of the Chief Immigration Judge.
[2] *See* EOIR: An Agency Guide, page 1.

removal and custody redetermination proceedings (there is no review of NCFR proceedings). The BIA commonly hears appeals involving orders of removal and decisions related to applications for protection or relief from removal. The BIA designates certain decisions as precedent which then become applicable to all immigration court cases nationwide. BIA decisions are binding on all immigration judges unless they conflict with federal Circuit Court of Appeals law of the judicial circuit in which the proceedings are conducted.[3]

EOIR also oversees the Office of the Chief Administrative Hearing Officer (OCAHO), which broadly hears immigrant-related employment disputes like illegal hiring, unfair employment practices, and employment verification violations.[4]

2. Representation in Immigration Court

The noncitizen who is the subject of the removal proceedings, referred to as the "respondent," may seek an attorney or otherwise authorized representative to provide representation before the immigration court. Unlike the criminal court system in the U.S., noncitizen respondents in immigration court are not entitled to a free, government-appointed lawyer. Any representation secured for the purpose of immigration proceedings must be arranged through the independent means of the respondent. As a practical matter, this means that many people, including children, proceed *pro se* throughout the course of their immigration court proceedings. The Department of Homeland Security (DHS) is represented by attorneys in the ICE Office of the Principal Legal Advisor (OPLA), who serve as prosecutors in immigration court proceedings.

Federal regulations define who can represent a noncitizen respondent in immigration court proceedings. Only attorneys, accredited representatives, recognized organizations, other qualified representatives, and free legal service providers can appear on behalf of a respondent in immigration court.[5] Other professionals involved in the immigration process who are not enumerated in the regulations, like notaries ("notarios") and visa consultants, are not authorized to represent respondents in immigration court incident to that profession.[6]

a. *Appearances in Immigration Court*

Attorneys or other professionals authorized to represent a respondent in immigration court must enter an appearance with the immigration court using one of two forms: Form EOIR-28 or Form EOIR-61, depending on the scope of representation. Note that the immigration courts and the BIA require different forms (for example, a notice of entry of appearance before the BIA is a Form EOIR-27). Determining which form is appropriate depends on whether the scope of representation is limited to preparation of certain documents or unlimited for full representation throughout the entirety of the case.

[3] *See* EOIR information page on the BIA.
[4] *See* EOIR's OCAHO Fact Sheet for more information.
[5] 8 C.F.R. § 1292.1.
[6] *See* EOIR'S Who Can Represent Aliens Fact Sheet for more information.

i. *EOIR-28: Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*

Form EOIR-28 is used when the attorney entering an appearance intends to extend representation throughout the entire case, or until subsequent action approved by the court releases the attorney from the case. Upon entering an EOIR-28, the attorney is required to appear before the immigration court on behalf of the respondent, file all documents on behalf of the respondent, and accept service of process of all documents filed in the designated proceedings.[7] The attorney is only relieved of these responsibilities upon an immigration judge's grant of motion to withdraw, motion to substitute counsel, or the conclusion of the case.

An EOIR-28 can be filed either by mail or, in most cases, electronically after completing eRegistry with EOIR.[8]

In all instances where a notice of entry of appearance is filed, the attorney must also serve DHS with a copy. If the attorney files the EOIR-28 electronically through EOIR's Courts & Appeals System (ECAS), the system automatically sends DHS notice of the filing and service is considered complete, and no separate service is required.[9] Regardless of the method of filing, attorneys must continue to include a certificate of service. The certificate of service should state, for example, "This document was electronically filed through ECAS and both parties are participating in ECAS. Therefore, no separate service was completed."[10]

ii. *EOIR-61: Notice of Entry of Limited Appearance for Document Assistance Before the Immigration Court*[11]

Form EOIR-61 is the result of a 2022 finalized rule permitting practitioners to provide document assistance to pro se individuals by entering a limited appearance using the Form EOIR-60 (for the BIA) or Form EOIR-61 (for the immigration courts).[12] Entering a limited appearance carries no obligation or responsibility for the practitioner beyond providing document assistance in the specific proceeding.

Document assistance, for the purpose of entering a limited representation, is defined as "the drafting, completion, or filling in of blank spaces of a specific motion, brief, form, or other document or set of documents intended to be filed with the immigration court [or BIA]."[13] Examples of documents with which a limited-representation practitioner could assist include change of address, motion for change of venue, filing of asylum application, etc. Further, a

[7] 8 C.F.R. §§ 1003.17(a)(2), 1003.38(g)(1)(ii).
[8] A paper entry of appearance is required for motions to recalendar proceedings which are administratively closed, and in situations involving disciplinary proceedings. Immigration Court Practice Manual (ICPM), Chapter 2.
[9] ICPM, Chapter 3.
[10] *Id.*
[11] *See* Immigration Justice Campaign's *Practice Advisory on Limited Representation Before the BIA and Immigration Courts* for more information.
[12] The Rule defines practitioners as "individuals authorized to provide representation" – *i.e.* attorneys, law students, law graduates, reputable individuals, accredited representatives, and accredited officials. This differs from "practitioners of record" who have filed an EOIR-27 or EOIR-28 to appear for a specific proceeding. Unlike practitioners identified by The Rule for limited representation, the practitioner of record is authorized *and required* to appear before the BIA or immigration court on behalf of the respondent, file all documents on behalf of the respondent, and accept service of process of all documents filed in the designated proceedings.
[13] 8 C.F.R. §§ 1003.17(b), 1003.38(g)(2).

practitioner who provides document assistance in the form of translation, even without exercising professional judgment or providing legal advice, must also file an EOIR-61.[14] A practitioner who chooses to extend representation beyond document assistance must continue to use Form EOIR-28 for full representation before the immigration courts.

The Form EOIR-61 must be filed in conjunction with the prepared document or set of documents.[15] Because unrepresented respondents' cases are not eligible for ECAS (EOIR's electronic records and online filing platform), Form EOIR-61, along with the prepared documents, must be filed in person or by mail. Either the practitioner or the pro se respondent may file the Form and documents with the immigration court.

Note that a practitioner must also file a new EOIR-61 for each document with which they assist.[16] In other words, practitioners must complete a Form EOIR-61 each and every time they provide document assistance to a pro se respondent. However, if a practitioner is assisting a pro se respondent with several documents filed simultaneously on the same day, they may all be included on one EOIR-61.[17]

iii. ***Remote Appearances***

In the beginning stages of the COVID-19 pandemic, EOIR began routinely holding virtual hearings via videoconferencing app, Webex. Due to the evidenced convenience and safety of virtual hearings, many Immigration Judges across the nation have continued to utilize internet-based hearings, even today, despite the changing landscape around the pandemic. However, because the decisions to facilitate internet-based hearings rest with the Immigration Court,[18] there is no guarantee that virtual hearings will continue as a matter of practice. Some Immigration Judges have already resumed exclusively in-person proceedings for individual merits hearings, and may only be willing to grant a virtual appearance in very limited circumstances. Guidelines for virtual hearings are as follows:

- The decision whether the immigration judge appears in court or remotely rests with the court and is made in accordance with agency policy and operational needs.
- The decision whether the respondent and counsel appear in court or remotely also rests with the court, but an immigration judge should accommodate a respondent's request to appear in court or remotely where appropriate and practicable. For example:
    - Where the respondent is represented, the immigration judge should generally grant requests for the respondent, counsel, or both to appear in court or remotely
    - The court will not direct an unrepresented respondent to appear remotely. However, an unrepresented respondent may request to do so, and an immigration judge should generally grant such a request.
- An immigration judge should accommodate a request for a witness to appear remotely where such a request is reasonable.
- A request for a remote or in-person appearance must be made in writing, fifteen days

[14] *See* Limited Appearance FAQ's-Department of Justice; note a "non-practitioner" providing translation does not need to file a limited appearance. See definition of "practitioner" above.
[15] 8 C.F.R. §§ 1003.17(b)(1), 1003.38(g)(2)(i).
[16] *Id.*
[17] *See* Limited Appearance FAQ's-Department of Justice.
[18] *See* EOIR Guidance on Internet-Based Hearings.

before the hearing, unless waived by the immigration judge.[19]

- If a respondent and counsel are both appearing remotely, they may appear either together or from different locations. There is no requirement that a respondent and counsel appear together from counsel's office.
- An immigration judge conducting an internet-based hearing must confirm that everyone appearing remotely is clearly visible on-screen and that all participants, whether appearing remotely or in the same location as the judge, can hear everything that is said.[20]

Each immigration court has designated Points of Contact to assist with issues that may arise while using Webex. EOIR provides Webex login information and instructions for each immigration court and specific judge on their Find an Immigration Court webpage. Guidance states that if participants expected to appear via Webex do not do so by the scheduled start time or connectivity is lost during the hearing, the judge should wait a reasonable time to allow the participant to regain connectivity. If the participant does not join, the judge should then ask the court's Point of Contact for any update from the participant regarding connectivity. Only after discussing with the Point of Contact should the immigration judge determine how to proceed in the participants' absence. Guidance also acknowledges the likelihood of connectivity issues and importance of effective communication during a hearing, so hearings cancelled due to connectivity should be rescheduled with no negative impact on the respondent's case.[21]

3. Obtaining Case Information and Records

Basic information about cases before the immigration court can be found using EOIR's Automated Case Information online tool. This tool does not require registration to use and asks for only the respondent's A-number to search for case information. The search results include any scheduled hearings, the specific immigration court where the case is venued, the immigration judge before which proceedings will occur, and limited details about decisions, motions, or case appeals. Alternatively, interested parties can call the specific immigration court or the EOIR Automated Case Information System at 1-800-898-7189 to also obtain information by entering the respondent's A-number.

At the start of any immigration case, it is important to review any documents that have previously been submitted to or issued by the immigration court. The compiled history of documents, filings, and/or decisions the immigration court maintains for each case is called the "record of proceedings". Many cases are eligible for electronic filing using ECAS and therefore have an electronic record of proceedings (eROP) associated with the case. If the case is ECAS eligible, the eROP will be made available to the attorney for immediate download once the appearance has been entered and accepted by the court. Immigration Courts and the BIA will also generally accommodate requests by attorneys of record to review EOIR's file in person. To make arrangements to go in to review a physical file, contact the relevant court's clerk's office.

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[19] As a matter of practice, many Immigration Judges across the country are amenable to, or even prefer virtual or remote appearances for Master Calendar Hearings and will not require a written motion to appear remotely in those instances. However, it's always best to consult with the specific court and your judge's clerk to understand current practice and procedure in the court or before the specific judge presiding over your client's case.

[20] *See* EOIR Guidance on Internet-Based Hearings.

[21] *Id.*

Alternatively, several routes are available to obtain records of proceedings, depending on the status of the attorney's representation and the case's eligibility for electronic filing.

i. ***FOIA Requests with EOIR***

Submitting a Freedom of Information Act (FOIA) request with EOIR is the best way to obtain a record of proceedings for a case where the requestor has not yet entered an appearance as the attorney of record. The subject of the records requested must give consent for the requestor to receive the records, or the subject of the records can independently submit the request.

Although the statute requires EOIR to issue an initial response to FOIA requests within 20-30 working days, in practice responses take many months.[22] Regardless, submitting the FOIA request electronically, rather than via mail, remains the most efficient way to obtain records.

To submit a FOIA request electronically:

1. Complete the EOIR-59, Certification and Release of Records and obtain the client's signature to allow you to receive the records.
2. Register with EOIR's FOIA Public Access Link (PAL) site: PAL is the most efficient way to submit the request and track its processing.
3. As a registered PAL user, attorneys can electronically submit the FOIA request either using the provided text box as part of the form or by uploading a letter. If you choose to upload a letter, make sure to include the client's full name, aliases, immigration court (or last known court), and A-number.
    a. The request form will ask how you'd like to pay fees - note that the first 100 pages are free and there is a charge of 5 cents for each page after that. There will be no charge issued for any services under $25.00.
    b. Upload the EOIR-59 into the "Proof of Identity" section of the form.
4. Using the PAL site, attorneys can check on the progress of the request.
5. Helpful Resources:
    a. EOIR FOIA How-To-Page
    b. EOIR FOIA Homepage
    c. DOJ FOIA Reference Guide

Although it is advisable to submit a FOIA request to EOIR electronically whenever possible, submitting via mail is also an option.

To submit a FOIA request by mail:

1. Complete the EOIR-59, Certification and Release of Records and obtain the client's signature to allow you to receive the records.
2. Write a letter requesting a copy of the client's record including the client's full name, aliases, immigration court (or last known court), and A-number.
3. Mail the EOIR-59 and letter to:

[22] 5 U.S.C. § 552(a)(6)(A)(i).

Office of the General Counsel Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2150
Falls Church, VA 22041

ii. Requesting the Record of Proceedings Directly from EOIR

If an attorney has already entered an appearance in a case, a request for a copy of the record of proceedings can be sent directly to EOIR. ***This option is best and likely, the quickest, for cases where an appearance has been filed, but an electronic record of proceedings (eROP) is unavailable for the case***.[23] This process differs from submitting a FOIA request as the response will come directly from the immigration court rather than the general counsel's FOIA service center.

To request the record of proceedings for a case where an appearance has already been entered:

i. Complete the EOIR-59, Certification and Release of Records and obtain the client's signature to allow you to receive the records.
ii. Write a letter indicating whether you are requesting the entire file or identify the specific portions of the ROP requested and state the preferred method of delivery once the copy is made:
    a. If you want to pick up the copy in person, provide a telephone number.
    b. If you want the copy emailed, provide an email address.
    c. If you want the copy mailed to you, provide a mailing address.
iii. *To submit the request via email:*
    a. Be sure to direct the request to the immigration court where the last hearing was scheduled for the case.
    b. Follow the additional instructions and locate the appropriate court's email address on EOIR's ROP by Email page.
iv. *To submit the request via mail:*
    a. Submit the ROP request by mail to the immigration court where the last hearing was scheduled for the case. Use the EOIR Immigration Court Listing to find the specific court's address.

If the ROP is not fulfilled, make sure the information submitted is accurate and re-submit if necessary. Only file a new request once determining the original request contained an error. A duplicate request that does not address an error will not serve to receive the ROP more quickly.

4. *Filing in Immigration Court*

At several points throughout representing a respondent before the immigration court, attorneys may file various motions, forms, or documents into the case. Filing in immigration court is completed

[23] To determine if a case has an eROP, look for an active "upload" button by the case in ECAS. For ECAS eligible cases, attorneys will find the eROP on ECAS after entering their appearance with the immigration court.

either electronically, by mail, or in person at the court. Consider the following information along with the Immigration Court Practice Manual for the most updated, thorough filing requirements.

Many examples of common filings are available to view on the Immigration Justice Campaign's Get Trained page. Additionally, EOIR's List of Downloadable Forms page provides PDFs of forms relevant to many cases. This list also indicates which forms may be uploaded and filed using the ECAS case portal and which must be filed by mail or in person.

i. *Electronic Filing using ECAS*

As of February 11, 2022, EOIR requires representatives to file all documents electronically for cases before the immigration court that are eligible for electronic filing.[24] All cases initiated at the immigration court after the establishment of ECAS at that immigration court are eligible for electronic filing.[25] Generally, cases that were initiated prior to the establishment of ECAS and have a paper ROP will remain in paper and are not eligible for electronic filing, though some courts are working on converting paper ROPs to electronic ROPs, though progress is slow. Attorneys can determine which of their cases are eligible for electronic filing by viewing cases in ECAS. If an active upload button is visible as a filing option, the case is eligible for electronic filing.[26]

Registered ECAS users complete electronic filing through the ECAS Case Portal. Reference the ECAS User Manual for information regarding format of electronic filings, filing requirements, filing deadlines, and additional information about the filing process.

Generally, electronic filing with the immigration court is a three-step process. Until each step is complete, the document is not considered filed. The three steps are as follows:

1. Upload the document in accordance with the Filing Requirements outlined in the ECAS User Manual (p. 3-5),
2. Receive an email from EOIR confirming successful upload of the document(s), and;
3. Receive an email from EOIR confirming official inclusion of the document into the electronic record of proceedings (eROP).[27]

If all parties to a case that is eligible for electronic filing use ECAS, parties do not need to separately serve any electronically filed documents on the opposing party. The ECAS system automatically sends service notifications to both parties and service is considered complete. Note that DHS is always assumed to be participating in ECAS, so no additional service is needed for cases where DHS is a party to an electronic-filing eligible case. Regardless, attorneys must continue to include a certificate of service. The certificate of service should state, for example, "This document was electronically filed through ECAS and both parties are participating in ECAS. Therefore, no separate service was completed."[28]

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[24] *See* ECAS Frequently Asked Questions.
[25] *See* 8 C.F.R. § 1001.1(cc).
[26] ECAS User Manual, page 1.
[27] EOIR sends confirmation emails with the domain @usdoj.gov.
[28] ECAS User Manual, Page 3.

ii. *Paper Filing in Cases Ineligible for Electronic Filing*

Alternatively, if a case is not eligible for electronic filing, hand-delivering or mailing paper copies to the immigration court remain the appropriate methods of filing. The filing location for paper documents is typically the same as the hearing location. Hand-delivered filings should be brought to the immigration court's public window during operating hours. Addresses and operating hours for each immigration court can be found on EOIR's Immigration Court Listing page.[29]

EOIR encourages parties to use courier or overnight delivery services in the interest of timely filing. However, despite diligent efforts to arrange for timely filing, failure of any service to deliver a filing on time does not excuse an untimely filing.[30] Further, the immigration court does not follow the "mailbox rule" meaning a document is not considered filed because it has entered the postal system. Rather, a document is only considered filed once received by the immigration court. All filings received by the immigration court receive a date stamp, indicating the time at which the document is considered filed.[31]

iii. *Filing Fees*

The EOIR Forms List Page indicates which filings require a fee to submit. Filings requiring a fee must be submitted simultaneously with the fee, unless a fee waiver is requested. Parties interested in requesting a fee waiver for qualifying individuals do so by submitting Form EOIR-26A. If the individual does not qualify for a fee waiver or a fee waiver is not requested, the EOIR Payment Portal is used to pay fees to both the immigration courts and BIA; EOIR does not accept checks or money orders.

5. *Hearings in Immigration Court*

Immigration judges preside over courtroom proceedings in removal, deportation, exclusions, among other kinds of proceedings.[32] This practice advisory focuses on removal proceedings and the hearings associated with that process. Reference the Immigration Court Practice Manual[33] for detailed information about other kinds of hearings in immigration court.

i. *Initiation of Removal Proceedings and Master Calendar Hearing*[34]

Removal proceedings begin when DHS files a Notice to Appear (Form I-862) with the immigration court and serves it on the non-citizen who is the subject of those proceedings (referred to as the "respondent").[35] The Notice to Appear (NTA) includes the following information:

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[29] Note that the immigration courts do not routinely accept faxed filings, unless specifically authorized by the court staff or judge. Further, as of late-2021, immigration courts no longer accept filings by email.
[30] ICPM, Chapter 3.
[31] *Id.*
[32] *See* ICPM, Chapter 4.
[33] *See* Chapter 7: Other Proceedings before Immigration Judges, Chapter 9: Detention and Bond, and Chapter 10: Discipline of Practitioners.
[34] Reference IJC's Get Trained page for additional resources.
[35] *See* 8 C.F.R. §§ 1003.13, 1003.14.

- The nature of the proceedings
- The legal authority under which the proceedings are conducted
- The acts or conduct alleged to be in violation of the law
- The charge(s) against the noncitizen and the statutory provision(s) alleged to have been violated
- The opportunity to be represented by counsel at no expense to the government
- The consequences of failing to appear at scheduled hearings
- The requirement that the noncitizen immediately provide the Attorney General with the written record of an address and telephone number.[36]

The immigration court schedules a Master Calendar Hearing (MCH) following issuance of the NTA described above, which serves as the first step in the removal proceedings. The respondent receives notice of the time, date, and location of the hearing either within the NTA or later via a mailed notice.

The judge conducts an MCH to address various issues related to the case like pleadings, scheduling, and other similar matters.[37] As outlined in the Immigration Court Practice Manual, the purpose of the MCH is to:

- Advise the respondent of the right to a practitioner at no expense to the government
- Advise the respondent of the availability of pro bono legal service providers and provide the respondent with a list of such providers in the area where the hearing is being conducted
- Advise the respondent of the right to present evidence
- Advise the respondent of the right to examine and object to evidence and to cross-examine any witnesses presented by the Department of Homeland Security
- Explain the charges and factual allegations contained in the Notice to Appear (Form I-862) to the respondent in non-technical language
- Take pleadings to the allegations and charges in the NTA
- Identify and narrow the factual and legal issues
- Set deadlines for filing applications for relief, briefs, motions, pre-hearing statements, exhibits, witness lists, and other documents
- Provide certain warnings related to background and security investigations
- Schedule hearings to adjudicate contested matters and applications for relief
- Advise the respondent of the consequences of failing to appear at subsequent hearings
- Advise the respondent of the right to appeal to the Board of Immigration Appeals[38]

ii. ***Format of Master Calendar Hearing***

The master calendar hearing (MCH) allows the judge, attorneys, and respondents a forum to discuss administrative issues related to the forthcoming proceedings. The MCH generally follows a standard list of topics to be addressed by the immigration judge including scheduling, filing of applications, pleadings to the charges outlined on the NTA, confirmation of counsel, and any other issues relevant to the movement of the case. Although respondents typically communicate very little

[36] ICPM, Chapter 4.2.
[37] ICPM, Chapter 4.15.
[38] *See* INA §§ 240(b)(4), 240(b)(5), 8 C.F.R. §§ 1240.10, 1240.15.

with the judge during the MCH, they must attend, or the judge may enter a removal order in absentia. Attorneys should also be aware that if their client is represented by counsel, the court may not provide interpretation for this hearing.

It is important to note that the immigration judge likely conducts many MCHs in a short span of time and are custom to speaking with experienced immigration attorneys who practice immigration law every day. If the immigration judge is using unfamiliar terminology or speaking too quickly for the pro bono attorney or respondent to understand, the attorney should respectfully notify the judge and request clarification on anything stated that was unclear. Although speaking up in such a way may feel awkward, it's vital to the respondent's case that everything communicated during the hearing is clearly understood.

- ***Initiating the MCH:*** Most immigration judges will call the case using the last three digits of the respondent's A-number. Alternatively, if attending virtually, the attorney and respondent may be required wait in the Webex waiting room until the judge is ready to hear the case, at which point parties will be let into the Webex courtroom when the judge calls the case. The judge will likely ask the attorney if there is anything to be discussed prior to going on the record. If the attorney is not confident about MCH proceedings, it is appropriate at this time to notify the judge you are pro bono counsel and do not routinely attend immigration hearings.

- ***Confirming counsel:*** Once on the record, the immigration judge will confirm with the respondent that they consent to representation by the attorney present. This is likely the only interaction the judge will have directly with the respondent during the MCH.

- ***Pleading to the Notice to Appear (NTA):*** Allowing the respondent to either admit to or deny the charges in the NTA is a vital step in the MCH. Before attending the hearing, the attorney should review the charges with the respondent to confirm they are accurate or identify if an error was made. If the information on the NTA is accurate, the attorney will respond to the judge that the respondent admits to the charges. If the information is inaccurate, the attorney should deny the charges and identify the error for the court.

  The judge will also ask if the respondent wishes to designate a country of removal, should no relief be granted. Of course, asylum seekers should state they do not want to return to their country of origin under any circumstance, and therefore should "decline to designate a country for removal." If the respondent declines to designate a country for removal, the judge will ask the OPLA attorney for the Department's suggestion or the judge will designate the country.

  Recent EOIR policy guidance on case flow processing[39] has oftentimes led to judges vacating MCHs when an attorney has filed an appearance on the case at least 15 days before the master hearing. In such cases, the judge will issue a scheduling order requiring submission of written pleadings instead of oral pleadings at the hearing. For additional

[39] *See* EOIR PM 21-18, Revised case Flow Processing Before the Immigration Courts.

information on pleading to the NTA and sample written and oral pleadings, please refer to the Immigration Court Practice Manual and relevant appendices.

- ***Stating intentions for the case:*** The judge then gives the attorney an opportunity to state what form of relief the respondent is seeking. For example, in cases where the respondent is seeking asylum, the attorney will respond "asylum, withholding of removal, and relief under the Convention Against Torture."

- ***Scheduling:*** The judge will set dates for any additional filings or evidence that need to be submitted to the court (often referred to as a "call-up date"), schedule subsequent master calendar hearings if needed, and schedule the individual hearing. In non-detained cases, the individual hearing will probably be scheduled out many months in advance, but it is possible to request a continuance if additional time is needed to gather and submit evidence or filings prior to that date. The judge should also ask what language the respondent prefers as the court supplies interpretation for the individual hearing.

iii. *Individual Hearing*

The individual hearing, often referred to as the merits hearing, is the trial; a bench trial at which the parties present evidence, testimony, and legal arguments. Prior to the hearing, the immigration judge should have reviewed all documents submitted related to the case and will be prepared to ask questions about these filings (though due to the backlogged court system and overwhelming dockets, there are instances where the judge has not thoroughly reviewed the filing prior to the hearing). Throughout the hearing, the respondents' story is told through direct examination, cross examination, questions elicited by the judge, witness testimony, and additional evidence presented.[40] Based on responses to the questioning and evidence presented, the judge will determine if the requested relief should be granted.

iv. *Decisions in Immigration Court*

Following the closing statements at the individual hearing, the immigration judge issues a decision either orally to conclude the hearing or through a written decision issued at a later time. In most cases, the respondent can "reserve appeal" to file an appeal of an unfavorable decision within 30 days, in writing, to the BIA. Alternatively, DHS can also reserve appeal to file an appeal to the judge's decision within 30 days.

The judge's decision becomes final when one of two things happen; 1) both parties waive appeal or otherwise verbally accept the decision as final, or 2) the time in which either party can make an appeal runs out.[41] The decision to appeal does not have to be made at the time of the judge's decision.

If the respondent and attorney need additional time to consider appealing, the attorney will "reserve appeal" thus providing 30 days in which to file the appeal following the decision. Even if the respondent is unsure if they will be filing an appeal, it is best practice to reserve the right to

[40] Reference Immigration Equality's Asylum Manual at Chapter 26.4 for detailed information about each step of the individual hearing.
[41] 8 C.F.R. § 1003.39.

appeal as a decision to waive at the hearing cannot be reversed later (except in some very limited circumstances). Appeals must be filed on Form EOIR-26 (a "notice of appeal") with the relevant filing fee or an application for a fee waiver on Form EOIR-26A. There is no mailbox rule; if the notice of appeal is not received withing 30 days of the IJ's decision, the party loses their right to appeal, and the immigration judge's decision becomes final.

As alternative methods to compel the judge to reevaluate the case, respondents can file either a motion to reopen or a motion to reconsider. A motion to reopen is appropriate in cases where after the immigration judge's unfavorable decision, new facts or evidence arise that the judge did not consider during the initial hearing. Alternatively, if the respondent and their attorney believe the judge made a mistake in the ruling, or a change in the law has occurred since the decision that would have resulted in a favorable outcome for the respondent had the revised law been applied, a motion to reconsider should be filed.[42] Similar to appeals, timing within which a respondent can file a motion to reopen or reconsider is also defined by regulation.[43] Note that whereas the filing of a notice of appeal has the legal effect of staying the respondent's removal from the United States, the filing of a motion to reopen or reconsider generally does not (with some limited exceptions).

[42] Reference IJC's materials on Motions to Reopen on our Get Trained page for more information.
[43] Reference IJC's Motions to Reopen in Immigration Court Flowchart for additional information about filing timelines.