

OFFICIAL LIAISON QUESTIONS AND ANSWERS
Office of Chief Counsel of Chicago and AILA Chicago, Indiana and Wisconsin Chapters
November 6, 2013 at 10:30am

1. Staffing

Are there any planned staffing or supervisory changes at OCC? Have there been any changes since May, 2013?

There have been no attorney staffing changes. The sequester, however, is affecting the office. Previously, the Office of Chief Counsel employed five students working approximately 40 hours per week and now, the office only has one student working 20 hours.

2. Fingerprinting

The chapter would like to commend OCC for reaching out to USCIS Chicago Field Office and working together to allow Respondents to request ASC appointments 90 days in advance of an Individual Hearing, rather than just 60 days. We appreciate the Office's willingness to work across agencies.

OCC also appreciates that USCIS is now providing ASC appointments up to 90 days in advance of individual hearings. The 90 day window appears to be working.

- a. The latest guidance from OCC indicates that if the respondent has an FBI record (or IDENT) then the attorney can call OCC and request that a new rap sheet be pulled. Is there a preferred method of contact or a designated point person who should be contacted? Who should the attorney ask for when attempting to make this request?

For respondents who have an FBI record (FBI Official RAP sheet or IDENT), there is no need to call OCC to request that a new rap sheet be pulled. OCC is making every effort to ensure the new rap sheet is pulled for all respondents with an IDENT.

If an attorney is unsure if the respondent has an IDENT, the attorney may call OCC and press "0" to ask the front desk. The front desk staff person will be able to advise if the respondent has an IDENT or not.

- b. When calling, attorneys are sometimes being told not to rely on this process and to just get their clients re-printed, which is counter to the instructions. In which situations, if any, would this be the proper response? If it is improper, can OCC please remind staff and attorneys of the process?

There were problems with OCC obtaining the new rap sheet in the past because OCC had to rely upon a point person at a separate agency who was not always available. This issue has been resolved and OCC can now pull the new rap sheet. This problem may have led to the communication issues described above. OCC will send a reminder to OCC staff so that everyone is aware of the process for pulling a new FBI rap sheet.

- c. On the other hand, when the OCC representative (whether attorney or legal assistant) states they will pull a new rap sheet, no confirmation is provided. This latter scenario leaves respondents' attorneys in an awkward situation – because no confirmation of the request is provided, if the process breaks down and no rap sheet is ordered, the attorney cannot provide proof of the request to the Immigration Judge. Can OCC provide confirmation of the attorney's request to pull the rap sheet? For example, would your office consider receiving emails from respondents' attorneys requesting the pulling of a new rap sheet and inquiring whether further action is required, and responding to these emails to confirm that no further action is required?

OCC will not provide confirmation after obtaining a new rap sheet. OCC created this system of pulling new rap sheets for respondents with IDENT in order to make the process more efficient; providing confirmation in each case would make the process less efficient and more time-consuming. If attorneys are concerned about OCC not pulling new rap sheets for respondents with IDENT, the attorney should request a new fingerprint appointment through Infopass.

- d. The Biometrics Instruction sheets that are served in court only provide instructions as to initial fingerprints. The sheets do not include instructions for either re-printing or requesting a rap sheet when prints have expired. Could the Instruction sheets be updated to include this information? It would be helpful for pro se respondents and attorneys who practice less frequently before the Court.

The instructions provided in court are instructions that were approved by USCIS and DHS at a national level. OCC cannot modify these instructions for the Chicago Immigration Court. The supplemental instructions issued by OCC Chicago for expired fingerprints were drafted for attorneys and OCC is not comfortable issuing these instructions in court for pro se individuals. OCC is not aware of pro se cases not going forward due to expired fingerprints. If AILA wants to pursue this issue, it should be raised at the national level.

- e. Attorneys are sometimes being provided an old OCC form when arriving at USCIS to request fingerprints. Is OCC still using this form? Is it ever provided by OCC, for example, at a master calendar hearing?

The form is an old form. OCC will follow up with USCIS regarding this form.

3. Renewing Applications before Immigration Court

- a. When a respondent renews an application before the Immigration Court, he/she generally is not required to repay the application filing fee. For these cases, is it still necessary to mail the copy of the renewed application to the Texas Service Center?

This is a question for USCIS. If a respondent is renewing an application in proceedings, OCC would not object to proof of payment of the application fee provided

through the previously-issued receipt rather than a receipt issued by the Texas Service Center.

- b. If a respondent does not mail the renewed application to the Texas Service Center and the Immigration Judge approves his/her I-485, will there be any issues with production of his/her green card because he/she did not mail the application to the Texas Service Center?

Please direct your question to USCIS.

- c. As an example, a respondent is renewing an I-485 previously filed with USCIS. The respondent files a copy of the I-485 with the Immigration Court and obtains a new biometrics appointment through USCIS Infopass. If the respondent does not file the I-485 with the Texas Service Center, will there be any future issues with green card production if the Immigration Judge approves the I-485?

See above

4. Prosecutorial Discretion

- a. Are there designated attorneys at OCC reviewing prosecutorial discretion requests?

All attorneys at OCC review cases for prosecutorial discretion.

- b. What is OCC's position on exercising prosecutorial discretion in the context of a respondent who is eligible for relief? Rather than limiting an exercise of prosecutorial discretion to offering administrative closure to the respondent, will OCC consider offering to stipulate to elements of the claim for relief as an exercise of prosecutorial discretion?

Prosecutorial Discretion takes many forms, including non-opposition to a continuance, not filing an appeal, conceding to statutory eligibility for relief, agreeing to termination, agreeing to administrative closure, and not filing a Notice to Appear with the Immigration Court. Please note that OCC does not have discretion to concede eligibility for relief when the respondent does not qualify for that relief.

- c. In the context of a respondent who would be eligible for non-LPR cancellation of removal but for the 10 year presence requirement, would OCC consider moving to terminate proceedings and then re-issuing the NTA, as an exercise of prosecutorial discretion?

OCC will not repaper to issue a new NTA. There is no memo or other guidance that provides for this process. If the respondent is not a priority for removal, please submit a prosecutorial discretion request and OCC will consider whether to issue prosecutorial discretion and move to administratively close.

- d. Does OCC exercise its prosecutorial discretion authority in other ways, such as reviewing decisions denying adjustment applications or decisions denying applications to remove conditions on residency, either prior to serving an NTA on the court or prior to a merits hearing, to ensure the decision is well-founded and worth litigating?

OCC generally will not review decisions issued by USCIS. Sometimes, if there seems to be additional information not included in a decision, OCC may call USCIS to ensure they were aware of all information.

- e. Will OCC considering exercising prosecutorial discretion (administrative closure) for the parents and/or siblings of DACA-eligible and/or DACA-approved young people?

Yes, these are factors that are considered. OCC reviews cases for prosecutorial discretion in accordance with the memos and looks at the totality of the factors.

- f. For the remaining NSEERS cases that are still surfacing, since the “de-listing” of the countries subject to the program and the newest DHS guidance issued in April, 2012, what is OCC’s approach where there has been a failure to register? How is the agency viewing “willful noncompliance”, and the agency’s authority to exercise prosecutorial discretion in these cases?

OCC has not seen many NSEERS cases recently. Each case is reviewed on a case by case basis. If a respondent is eligible for adjustment of status and does not wish to wait for a long hearing date, that respondent may file a motion to terminate in order to pursue adjustment of status with USCIS. In such a request, the attorney should point to the Memo and to the long hearing date.

5. E-filing

- a. When a court filing is served on OCC through the Chicagooccfilings@dhs.gov email address, we understand that the Assistant Chief Counsel can choose whether or not to print the filing. If the filing is not printed, do USCIS adjudicators have access to it? For example, where a *Velarde* hearing is held before the Immigration Judge, and therefore numerous bona fides are submitted to the court and electronically served on OCC, and then the couple attends an I-130 interview at USCIS, does the adjudicating USCIS officer have access to the filing?

OCC does not print efilings, therefore USCIS adjudicators will not have access to documents received electronically by OCC. USCIS adjudicators do not have access to OCC systems which store the e-filings.

- b. The eservice instructions state that by serving documents electronically through this system, the respondent and his representative consent to the receipt of service of ICE submissions by electronic service. Can an attorney opt out of this consent to receive documents electronically from ICE?

The opt-in provisions only apply to the specific case in which the attorney files documents electronically with OCC. OCC would consider allowing an attorney to opt out of receiving documents electronically if there was a legitimate reason. Please note that when OCC files documents electronically on an attorney, the documents are password protected. Electronic service is considered a benefit for both respondents and OCC.

6. Provisional Waivers

As AILA understand the process, once a case has been administratively closed or terminated, OCC transfers the A file to ERO, and then ERO sends the file to the next location, usually either the Chicago Field Office of USCIS or the National Records Center. Does OCC provide input on where the file should be transferred after ERO?

OCC does not provide input on where the file should be transferred, except for very limited circumstances in which there are national policies and specific routing slips created. For example, there is a routing slip for cases that are terminated for adjudication of an adjustment of status before USCIS. OCC uses this routing slip to route cases to USCIS Chicago for adjudication of the adjustment of status application.

OCC cannot currently send files directly to the Department of States. This question should be raised with USCIS at a national level. If appropriate, a routing slip may be established at a national level for these cases.

Our members are repeatedly encountering a problem after a case is administratively closed for filing of a provisional waiver: the file is being sent to the National Records Center rather than the National Visa Center. An attorney is then forced to file Form I-824 to request that the approved visa petition be sent to the NVC. This step should be unnecessary when an I-130 is filed with a consulate designated on the form; it also extends the process by months and adds additional expense.

If OCC does not provide input on where the file should be transferred after ERO, is OCC willing to work with AILA to find a solution to this inter-agency issue?

See above

7. I-9 Investigations

Does OCC have a preference by which negotiations are conducted in the I-9 investigation context? Does OCC prefer written responses to a Notice of Intent to Fine submitted prior to negotiation, or in-person presentations?

OCC prefers a written response to guide negotiations. A team of four or five OCC attorneys work on I-9 cases. The third page of the notice will contain information about how to contact OCC to provide the written response and information about

requesting the hearing. When making a request for a hearing, please use the same OCC address to send email/correspondence about that case.

8. Unaccompanied Minors

- a. What is the current ICE/OCC policy and/or definition in regard to “constructive custody” concerning unaccompanied minors who have been released from HHS Secretary/Office of Refugee Resettlement and seek a dependency order from State court so they may pursue an I-360 petition and Form I-485?
- b. Recently, members have reported that OCC has refused to join in a motion to terminate proceedings (to allow AOS before USCIS) when an unaccompanied minor was released from HHS Secretary/Office of Refugee Resettlement, a state juvenile court executed a dependency order, and the I-360 petition was approved/interview successful. This appears to be contrary to the AAO decisions and DHS policy in *Matter of Perez-Quintanilla*, A97-383-010 (AAO June 7, 2007), *Matter of Saint Preux*, A97-634-322 (AAO June 5, 2007) and Memo, Neufeld, Acting Assoc. Director, Domestic Operations, USCIS HQOPS 70/8.5 (Mar. 2009).

Please bring this case to the attention of John Gountanis or Karen Lundgren, because more facts are necessary to better understand the issue.

9. Other matters

Does OCC have any updates or comments for AILA?

A. eService

Please note that OCC has a decreased number of support staff. As a result, we encourage the AILA Chapters to continue to promote eservice of documents as this is the most efficient way for OCC to receive documents. Please do NOT file both an electronic and paper copy of the filing, as this results in duplication of efforts by OCC.

In addition, please note the following two changes that will take effect December 1, 2013:

- 1) ***Requests to join in Motions to Reopen must be filed electronically with OCC. Paper versions will not be accepted; they will be returned to sender with instructions to submit electronically.***
- 2) ***Requests for prosecutorial discretion must be filed electronically with OCC. Paper versions will not be accepted; they will be returned to sender with instructions to submit electronically.***

OCC will continue to accept paper filings for requests to join in Motions to Reopen and prosecutorial discretion from pro se respondents.

Karen Lundgren is now responsible for reviewing all requests to join in Motions to Reopen and is attempting to respond to requests within 30 days. Receiving the requests in electronic form facilitates OCC responding within 30 days.

OCC wishes to point out the distinction between Joint Motions to Reopen, and non-opposition to Motions to Reopen. Joint Motions to Reopen are otherwise time- or number-barred. OCC requests that attorneys only file requests to join in Motions to Reopen when the Motion would otherwise be time- or number-barred. In all other situations, the Motion to Reopen should simply be filed with the Immigration Court. If the attorney is seeking non-opposition from OCC, the attorney should title it as such (if making a written request) and direct it to the last OCC attorney assigned to the case, whether before the IJ or the BIA. That OCC attorney would be the one assigned to respond to any Motion to Reopen filed in the case. Generally, OCC would consider any Motion to Reopen an in absentia order to be a non-opposition request rather than a request to join in a Motion to Reopen.

Additionally, if an attorney has requested OCC to join a Motion to Reopen, then OCC asks that the attorney not separately file the Motion to Reopen with the Immigration Court. This again causes OCC to duplicate its efforts.

Finally, OCC asks that if a request to join in a Motion to Reopen is made for the purposes of adjustment of status, then the respondent's eligibility for adjustment should be addressed, an application attached, and equities explained in the request.