PETITION FOR RULEMAKING TO

PROMULGATE REGULATIONS GOVERNING APPOINTMENT OF COUNSEL

FOR IMMIGRANTS IN REMOVAL PROCEEDINGS

SUBMITTED TO

THE UNITED STATES DEPARTMENT OF JUSTICE

JUNE 29, 2009

Catholic Legal Immigration Network, Inc.
National Immigration Forum
National Immigrant Justice Center
Northwest Immigrant Rights Project
Post-Deportation Human Rights Project, Center for Human Rights and International Justice at Boston College

I. STATEMENT OF PETITION

Petitioners, (National Immigration Forum, National Immigrant Justice Center, Northwest Immigrant Rights Project, Post-Deportation Human Rights Project, Center for Human Rights and International Justice at Boston College) hereby petition the Department of Justice ("Department") to initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 533, to promulgate regulations governing the appointment of counsel for indigent individuals in immigration proceedings. The Attorney General has ultimate authority over the administration of Immigration Courts pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1103(g).

II. SUMMARY OF PETITION

While the interests at risk in any immigration proceeding are great, they are especially so when an individual appears without counsel. This is illustrated by the stark disparities in success rates between represented and unrepresented individuals in immigration proceedings. Represented individuals have significantly more success before Immigration Judges and the Board of Immigration Appeals ("Board"), while the unrepresented are sometimes left with little or no chance of winning their case by avoiding a finding of removability, or by showing eligibility for relief.

Congress has mandated by statute that all individuals in immigration proceedings receive a "reasonable opportunity" to present their case,[1] which many courts view as equivalent to the fundamental fairness embodied in our concept of due process.[2] In some cases, fundamental fairness requires appointed counsel because the case cannot be adequately presented without legal counsel. At least one Court of Appeals has recognized that appointment of counsel is required in some cases when the individual is indigent.[3] However, regulations make no provision for an Immigration Judge to appoint counsel. This is likely due, in Petitioners' view, to a misinterpretation of the statutory provisions involved.

This Petition argues that the Attorney General should issue regulations explicitly recognizing an Immigration Judge's power to appoint counsel to indigent individuals. Because this statutory right is limited by the statutory provision regarding costs to the Government, Immigration Judges are necessarily limited (absent statutory changes) to appointing counsel to circumstances where no recompense is offered to the attorney, or where appointment of counsel would result in overall savings to the Government. But while the second type of appointment may be limited by Congressional appropriations, it is not a reason to preclude appointment of

[1] 8 U.S.C. § 1229a(b)(4).

[2] *Rehman v. Gonzales*, 441 F.3d 506, 508 (7th Cir. 2006) ("Aliens have both statutory and regulatory entitlements to present all material evidence at impartial hearings. Any proceeding that meets these requirements satisfies the Constitution as well."); *Zahedi v. INS*, 222 F.3d 1157, 1164 n.6 (9th Cir. 2000) ("The due process standard is supported by the statutory scheme governing immigration proceedings") (discussing 8 U.S.C. § 1229a(b)(4)(B)); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.") (citing *Yamataya v. Fisher* (*The Japanese Immigrant Case*), 189 U.S. 86, 100-01 (1903)).

[3] *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568-69 (6th Cir.1975).

counsel where it can be done consistent with the statute. Because appointment of counsel is sometimes required for fundamental fairness, a rule must be promulgated.

III. STATEMENT OF INTEREST

The Catholic Legal Immigration Network, Inc. (CLINIC) is a non-profit organization comprised of 176 diocesan and other affiliated immigration programs with 290 field offices in 48 states. Its mission is to enhance and expand delivery of legal services to indigent and low-income immigrants principally through diocesan immigration programs and to meet the immigration needs identified by the Catholic Church in the United States. Members of CLINIC's network serve 600,000 low-income immigrants each year.

The National Immigration Forum is a non-partisan organization that advocates for the rights of immigrants and immigration in the national interest. The Forum is dedicated to embracing and upholding America's tradition as a nation of immigrants and does so through building alliances with other national and local organizations, engaging in education and direct advocacy with members of Congress, and effective media and communications outreach.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based non-profit organization that provides direct legal services to thousands of detained and non-detained immigrants and asylum-seekers each year. NIJC also conducts policy-reform advocacy and impact litigation to promote the rights of those individuals on a local, regional, national, and international scale. NIJC is accredited by the Board of Immigration Appeals to provide legal assistance to indigent and low-income immigrants, and has acted as a legal service provider and national policy-reform advocate for immigrants and immigrant detainees for more than thirty years, serving thousands of detainees each year through legal orientation (or "know your rights") presentations, individual representation in immigration proceedings, and impact litigation. NIJC works for just and humane policies regarding individuals born abroad, particularly those individuals detained by the immigration authorities. NIJC represents immigrant detainees at no charge.

Northwest Immigrant Rights Project (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons who are placed in removal proceedings. NWIRP works both by providing direct representation to indigent persons in removal proceedings and by participating in legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation. Thus, NWIRP has a direct interest in the issues presented in this case, though it has no direct interest in this particular case.

The Post-Deportation Human Rights Project, based at the Center for Human Rights and International Justice at Boston College, is a pilot program designed to address the harsh effects of current U.S. deportation policies. The Project aims to conceptualize an entirely new area of law, providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members through research, policy analysis, human rights advocacy, and training programs. Through participatory action research carried out in close collaboration with community-based organizations, the Project addresses the psycho-social

impact of deportation on individuals, families, and communities and provides legal and technical assistance to facilitate community responses. The ultimate aim of the Project is to advocate, in collaboration with affected families and communities, for fundamental changes that will introduce proportionality, compassion, and respect for family unity into U.S. immigration laws and bring these laws into compliance with international human rights standards.

IV. BACKGROUND: THE STATE OF IMMIGRANT REPRESENTATION

An individual has a clear and absolute right to be represented by an attorney of his or her own choosing, where the individual can afford to pay that attorney.[4] This Petition does not argue that every individual in removal proceedings has an absolute right to appointed counsel. It merely argues that the regulations should provide for the appointment of counsel where necessary for the fundamental fairness of the proceedings, to give the respondent a meaningful right to present evidence, cross-examine witnesses, to make complicated legal arguments regarding removability or eligibility for relief, and generally to present their case.

The massive increase in the number of immigration detainees,[5] the increased complexity of the immigration law, and the inability of most immigrants to navigate the legal system without counsel all suggest the reconsideration of the appointment of counsel. Explicitly stating an Immigration Judge's power to appoint counsel for indigent individuals is the first step toward solving this problem.

A. The Interests at Stake

As the Supreme Court has noted, deportation "is a drastic measure and at times the equivalent of banishment or exile," where "the stakes are considerable for the individual."[6] The removal process, "often deals with momentous personal stakes: the ties of citizenship, home, family, and friends."[7] Many if not most respondents have established significant ties to the United States by the time of removal. As noted by Justice Brandeis, removal can "result . . . in loss of both property and life; or all that makes life worth living."[8]

The liberty interests involved will vary with the case. Some respondents have plausible claims to being U.S. citizens. Others may be longtime lawful permanent residents, with legal claims relating to eligibility, or with plausible arguments against removability. Such individuals are likely to have strong, articulable liberty interests, as well as claims to due process protections and constitutional rights. The Department, through the Immigration Judges under its authority,

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[4] *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1105 (9th Cir. 2004).

[5] The population of immigrants in ICE custody has increased from 19,700 in fiscal year 2006 to nearly 27,900 in 2007. *See generally*, www.ice.gov; *see also* Gorman, Anna, "Immigration Detainees Are at Record Levels," *Los Angeles Times*, November 5, 2007, *available at* http://www.latimes.com/news/local/la-me-immig5nov05,0,4892328,full.story?coll=la-home-center.

[6] *Haw Tan v. Phelan*, 333 U.S. 6, 10 (1947); *see also* My Immigration Story Homepage, http://myimmigrationstory.com (last visited July 18, 2007).

[7] Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875, 875 (1961).

[8] *Fung Ho v. White*, 259 U.S. 276, 284 (1921).

should weigh these factors in determining whether to appoint counsel. To do so would avoid the possibility of erroneously removing an individual with constitutional claims. In other cases, even where aliens do not have vested liberty interests, the seriousness of threats to their life and liberty must be considered.[9] Asylum-seekers removed to their homelands may face imprisonment, torture, persecution, and death.

Recognizing the immense interests at stake in any immigration situation, Congress has provided procedural protections for immigrants. The statute requires that in any removal proceeding, a respondent has a right to (a) a reasonable opportunity to examine the evidence against him, (b) a reasonable opportunity to put on evidence on his own behalf, and (c) a reasonable opportunity to cross-examine any contrary witnesses. A respondent also has the privilege of being represented by counsel.[10] The importance of the privilege of representation is protected both by statute and by regulation.[11]

B. The Implications of Under-Representation

Despite the recognized importance of counsel to the fairness of immigration proceedings, immigrants continue to be sorely underrepresented. According to statistics from the Executive Office for Immigration Review ("EOIR"), individuals were represented by counsel in only 48% of Immigration Court proceedings during fiscal year 2006.[12] Commentators have long criticized the structural and practical barriers that limit immigrants' access to counsel. Perhaps the foremost impediment is the cost of representation.[13] Arriving immigrants may lack the means to pay for counsel, and even those who have lived in the United States for an extended period may be unable to pay the steep fees that some lawyers charge. Language and cultural barriers form other significant impediments to acquiring legal representation, especially for those seeking asylum.[14] Detained individuals face unique hurdles to obtaining representation, with detention centers often located in remote areas and detainees frequently shuffled from center to center.[15]

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[9] For example, since World War II, the United States has granted refuge to "peaceful pro-democracy and human rights advocates jailed by repressive regimes; torture survivors from Liberia, Iraq, Tibet and other places; victims of religious persecution from China, Egypt, Iran, and Sudan; women persecuted because of their resistance to restrictive gender-based rules; journalists targeted in Colombia, Haiti, and other countries because of their efforts to expose the truth; and many other victims of human rights abuses from around the world." Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* 5 (2004). Removal in that context would result in a return to conditions where these aliens would suffer persecution, torture, and death.

[10] 8 U.S.C. § 1229a(b)(4)(A).

[11] *See* 8 U.S.C. § 1228(b)(4); *id.* at 1229a(b)(4); *id.* at 1362; 8 C.F.R. § 1003.16; *id.* at 1240.3.

[12] United States Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book* G1 (2007) [hereinafter *FY 2006 Statistical Year Book*]. This figure excludes "failures to appear," inclusion of which would drive the figure down to 35%. *Id.* Petitioners also suspect that the figure excludes *pro se* stipulated removal orders. See 8 C.F.R. § 1003.25(b).

[13] *See* Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immigr. L.J. 739, 747 (2002); *FY 2006 Statistical Year Book*, *supra* note 12, at G1.

[14] *See* Schoenholtz & Jacobs, *supra* note 13, at 747.

[15] *See id.* at 748.

This lack of representation has a significant effect. Of the 273,615 Immigration Judge decisions in fiscal year 2006, over 80% resulted in an order of removal.[16] While this figure is not necessarily troubling in and of itself, it becomes so when viewed alongside the inequitable distribution of relief: represented immigrants are consistently granted relief at a higher rate than unrepresented immigrants. Donald Kerwin's study of EOIR data from fiscal year 2003 clearly demonstrated the importance of representation:

- In adjustment of status cases, 41 percent of detained, represented persons were granted adjustment,[17] as compared to 21 percent of detained, unrepresented persons.[18]

- In asylum cases, 18 percent of represented, detained persons were granted asylum,[19] compared to only 3 percent of unrepresented, detained persons.[20]

- In INA § 212(c) cases, 56 percent of represented, detained persons received 212(c) relief,[21] compared to 34 percent of unrepresented detained persons.[22]

The Kerwin study is a conservative estimate of the importance of representation. Other studies have echoed the critical need of legal counsel. A study of asylum cases in 1998 through the first seven months of 2000 indicated that immigrants were four to six times more likely to be granted asylum when represented by counsel.[23] Based on this data, the study's authors concluded that "it seems clear that those with representation do have some palpable advantage in navigating the system and achieving positive outcomes."[24] In the expedited removal context, a study by the United States Commission on International Religious Freedom found that "[a]sylum seekers in Expedited Removal who have legal counsel tend to be much more successful in applying for asylum than those who proceed without an attorney."[25] According to that study, 25 percent of

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[16] *FY 2006 Statistical Year Book, supra* note 12, at D2.

[17] Donald Kerwin, "Revisiting the Need for Appointed Counsel, *Insight* (Migration Policy Institute, No. 4, April 2005) at 6; Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded*, 04-06 Immigr. Briefings 1 (2004). The 41% figure represents 109 of 269 adjustment of status cases. *Id*.

[18] *Id*. The 21% figure represents 22 of 106 adjustment of status cases.

[19] *Id*. The 18% figure represents 355 of 1,944 asylum cases.

[20] *Id*. The 3% figure represents 29 of 859 asylum cases.

[21] *Id*. The 56% figure represents 254 of 454 212(c) cases.

[22] *Id*. The 34% figure represents 45 of 131 212(c) cases.

[23] Schoenholtz & Jacobs, *supra* note 13, at 743. Immigrants were six times more likely to prevail in affirmative applications for asylum referred to the Immigration Court, and four times more likely when asylum is asserted as a defense to removal. *Id.*

[24] *Id.* at 774.

[25] Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* 2 *Report on Asylum Seekers in Expedited Removal* 232, 239 (United States Commission on International Religious Freedom ed. 2005).

those represented by counsel were granted asylum, compared to only two percent of unrepresented immigrants.[26]

V. LEGAL AUTHORITY TO PROMULGATE RULE

The Attorney General possesses the authority to define the power of the Immigration Courts, and to set forth procedures for Immigration Court, including appointment of counsel.[27] The regulations currently delegate a good deal of that authority to Immigration Judges: "Subject to any specific limitation prescribed by the Act and this chapter, Immigration Judges shall exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases."[28]

There is no express bar to an Immigration Judge appointing counsel, either in the regulations or in the statute. However, the regulations require that the respondent be informed of his "right to representation, at no expense to the Government, by counsel of his or her own choice." 8 C.F.R. § 1240.10(a)(1). This statement, together with INA § 240(b)(4)(A) and INA § 292, is often interpreted as being inconsistent with appointment of counsel by the Immigration Court.[29]

Respectfully, Petitioner disagrees. There is nothing inconsistent with a provision that gives every respondent the right or privilege of being represented by an attorney of their own choosing (at no expense to the Government), and a rule permitting appointment of counsel in a few limited cases where the proceedings would be fundamentally unfair in the absence of counsel. The former is a universal privilege; the latter a limited right. There is no clear statutory prohibition on appointed counsel.

By contrast, the statute clearly requires that a respondent in a removal proceeding be given a "reasonable opportunity" to present evidence, review the evidence against them, and to cross-examine witnesses. These provisions have been treated by the courts as providing procedural protections similar to rights protected under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[30]

Moreover, while the Department lacks power to rule on the constitutionality of the statute or regulations,[31] the Department has both the authority and the obligation to interpret the statute

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[26] *Id.*

[27] *See* 8 U.S.C. § 1103(g)(2) (stating that the Attorney General can "establish such regulations" and "review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out" the immigration laws).

[28] 8 C.F.R. § 1240.1(a)(2).

[29] *See, e.g., Matter of Gutierrez*, 16 I. & N. Dec. 226, 229 (BIA 1977).

[30] *See Djedovic v. Gonzales*, 441 F.3d 547, 550 (7th Cir.2006) ("Reliance on the due process clause is not only unnecessary but also inappropriate.… It is difficult to imagine how an immigration judge could provide the 'reasonable opportunity ... to present evidence' required by statute, yet still violate the due process clause."); *Boyanivskyy v. Gonzales*, 450 F.3d 286, 292-93 (7th Cir. 2006). The Board of Immigration Appeals has also held that hearings must be fundamentally fair. *Matter of Exilus*, 18 I & N. Dec. 276 (BIA 1982).

[31] *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

and regulations so as to avoid "grave doubts" about the constitutionality of those provisions.[32] Indeed, the Board has previously exercised its power to interpret the statute to avoid constitutional infirmity.[33] If there is tension between INA § 240(b)(4)(A), INA § 292, and INA § 240(b)(4)(B), that leaves ambiguous whether counsel may be appointed where necessary to avoid fundamental unfairness, the Department may interpret the statute so as to avoid grave constitutional doubts.

At least one Court of Appeals has ruled that due process will require the appointment of counsel for an indigent respondent where the facts of the case make such appointment necessary to achieve fundamental fairness.[34] This analysis is supported by case law of the U.S. Supreme Court in other civil contexts, finding that – particularly where detention or deprivation of fundamental rights is involved – appointed counsel may be required under the Due Process Clause, even in civil cases.[35]

Petitioners do not request that the Department violate the statutory provisions requiring that counsel may appear only "at no expense to the Government." First, it is clear that the Department could not authorize the expenditure of funds for appointed counsel, in the absence of a Congressional appropriation or an order of a federal court. Petitioners do not seek such a rule, as no rule or regulation could suffice to permit payment to appointed counsel.

Second, while INA § 292 creates a universal privilege of representation by counsel in removal proceedings, it is clear that counsel cannot be provided at Government expense. Nonetheless, a broad rule permitting counsel for every respondent is not inconsistent with a narrow rule that certain respondents may require appointed counsel. Because INA § 292 would simply not apply to such a context, its provisions prohibiting Government payment are likewise inapplicable. If payment to such appointed counsel were authorized, it would violate no statute.

Third, there are some contexts in which courts appoint counsel without payment. These schemes seem ill-advised to Petitioners, particularly where the burden upon the appointed counsel is more than *de minimis*. They have been upheld by the Supreme Court, however.[36]

Finally, and alternately, Petitioners submit that where appointed counsel would be necessary for fundamental fairness, such appointment would generally also result in overall savings to the Government by increasing the efficient functioning of the immigration courts and

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[32] *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

[33] *See e.g., Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) (reexamining eligibility for § 212(c) waivers in light of the Second Circuit's decision on Equal Protection grounds in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)).

[34] *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568-69 (6th Cir.1975).

[35] *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *In re Gault*, 387 U.S. 1 (1967).

[36] *See Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296 (1989). *See also Scheehle v. Justices of the Supreme Court of Arizona*, 508 F.3d 887 (9th Cir. 2007) (finding requirement that Arizona attorneys volunteer two days per year as arbitrators not unreasonable in light of the benefits Arizona attorneys receive as members of the Arizona bar).

preventing undue delay while immigrants are detained at Government expense.[37] In sum, the "no expense" language need not hinder a rule that would permit appointed counsel.

Petitioners do not ask the Department to declare INA § 292 or INA § 240(b)(4)(A) unconstitutional, nor do they ask it to authorize any violation of those statutory provisions. Petitioners ask only that the Department interpret those sections in tandem with INA § 240(b)(4)(B) and broader due process principles. The statute can be fairly interpreted to permit the appointment of counsel. Accordingly, Petitioners assert that the Department has the authority to implement the rule suggested by the Petitioners.

VI. REASONS FOR CREATING RULE

As mentioned above, in recognition of the significant interests at risk in an immigration proceeding, Congress and the Attorney General have explicitly set out an immigrant's procedural and substantive rights in removal proceedings. Among these is the statutory guarantee of "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government."[38] Section 1229a(b)(4)(B) embodies a statutory guarantee of an immigrant's constitutional right to due process in a removal proceeding.[39] Thus § 1229a(b)(4)(B), at the least, guarantees the same due process protections as the Fifth Amendment.[40] Due process is further ensured, in part, through various procedural rules governing notice and hearings,[41] as well as a process of appeal.[42]

The guarantee of due process is also—and perhaps most fundamentally—protected by an immigrant's clear right to be represented by counsel. Both the statutes and regulations explicitly recognize that any individual in a removal proceeding has a right to counsel.[43] The right to

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[37] *See, infra*, note 65 for details on the average cost of detaining immigrants.

[38] 8 U.S.C. § 1229a(b)(4)(B).

[39] *See Rehman v. Gonzales*, 441 F.3d 506, 508 (7th Cir. 2006) ("Aliens have both statutory and regulatory entitlements to present all material evidence at impartial hearings. Any proceeding that meets these requirements satisfies the Constitution as well."); *Zahedi v. INS*, 222 F.3d 1157, 1164 n.6 (9th Cir. 2000) ("The due process standard is supported by the statutory scheme governing immigration proceedings") (discussing 8 U.S.C. § 1229a(b)(4)(B)); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.") (citing *Yamataya v. Fisher* (*The Japanese Immigrant Case*), 189 U.S. 86, 100-01 (1903)).

[40] *Djedovic v. Gonzales*, 441 F.3d 547, 550 (7th Cir. 2006) ("It is difficult to imagine how an immigration judge could provide the "reasonable opportunity . . . to present evidence" required by [§ 1229a(b)(4)(B)], yet still violate the due process clause.").

[41] *See generally* 8 U.S.C. §§ 1229 & 1229a.

[42] *See, e.g.*, 8 C.F.R. § 1003.38.

[43] *See* 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General, the person concerned shall have the privilege of being represented (at no expense too the government) by such counsel . . . as he shall choose."); *see also id.* at § 1228(b)(4)(B) (requiring the Attorney General to issue regulations providing that "the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose"); *id.* at § 1229(b)(1) (requiring 10 days between service of notice to appear and the hearing date "[i]n order that an alien be permitted the opportunity to secure counsel"); *id.* at § 1229a(b)(4)(A) (under the heading "Alien's rights in proceeding," guaranteeing that "the alien shall have the privilege of being represented, at no expense to the

counsel in the immigration context reflects the essential role of lawyers in any litigation involving individual rights, as lawyers have long been central to guaranteeing that every litigant receives their due process right to a fundamentally fair hearing. As eloquently stated by Justice Sutherland in *Powell v. Alabama*,

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[44]

While *Powell* occurred in the criminal context, its discussion of the necessity of counsel is true whenever one's essential liberties are at stake.

The U.S. Supreme Court recognized as much in *In re Gault*.[45] In *Gault*, a child was subject to a Juvenile Court's determination of "delinquency" that would have resulted in a "loss of liberty" that was "comparable in seriousness to a felony prosecution."[46] The Supreme Court held that due process required that "the child and his parents . . . be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[47] The Supreme Court reasoned that "[t]he juvenile needs the assistance of counsel to cope with problems of the law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense to prepare and submit it."[48] As later stated by the U.S. Supreme Court in *Lassiter v. Department of Social Services*, "it is the defendant's interest in personal freedom, and not simply the special

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(continued…)

Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"); 8 C.F.R. § 1003.15(a)(5) (requiring that an Order to Show Cause and Notice to Appear include "[n]otice that the alien may be represented, at no cost to the government, by counsel or other representative"); *id.* at § 1003.16(b) (providing that "[t]he alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice . . . at no expense to the government"); *id.* at § 1240.3 (stating that an immigrant "may be represented at the [removal] hearing by an attorney or other representative"); *see also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (noting that "Congress has recognized [the right to counsel] among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings").

[44] 287 U.S. 45, 68-69 (1932).

[45] 387 U.S. 1 (1967).

[46] *Id.* at 37.

[47] *Id.* at 41.

[48] *Id.* at 37 (footnote omitted).

Sixth and Fourteenth Amendment right to counsel in criminal cases, which triggers the right to appointed counsel."[49]

Lassiter expanded the reasoning of *Gault*. In *Lassiter*, the plaintiffs argued that due process required the appointment of counsel for indigent parents in a hearing to terminate parental status.[50] The U.S. Supreme Court noted that its "precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel."[51] The Court continued, "[O]nly when, if he loses, he may be deprived of his physical liberty" is there a "presumption that an indigent litigant has a right to appointed counsel."[52] The Court held that due process would require the appointment of counsel in some cases, and the necessity of counsel was to be determined on a case-by-case basis.[53] As demonstrated by *Gault* and *Lassiter*, concepts of due process may require the appointment of counsel when significant liberty interests are at stake, even outside the criminal context.

Applying that precedent, the Sixth Circuit has already recognized that, just as due process can require the appointment of counsel in juvenile delinquency proceedings or terminations of parental rights, it also can require the appointment of counsel in removal proceedings. In *Aguilera-Enriquez v. INS*,[54] the Sixth Circuit stated that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an Immigration Judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."[55]

Notwithstanding these cases, it appears that the Immigration Courts generally do not appoint counsel, even where necessary.[56] Perhaps this reluctance stems from the inclusion of the broad mandate that the immigrant be represented "at no expense to the Government," found in most of the statutory and regulatory provisions relating to an immigrant's right to counsel.[57] As noted above, such an interpretation would create an unnecessary conflict between statutory provisions and the constitutional mandate of fundamental fairness. Not only is the more limited

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[49] *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 25 (1981).

[50] *Id.* at 24.

[51] *Id*. at 27.

[52] *Id.*

[53] *Id.* at 32. The Supreme Court also applied this case-by-case approach to determinations of whether counsel would have to be appointed in probation and parole hearings. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) ("[T]here will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.").

[54] 516 F.2d 565 (6th Cir. 1975). It may be worth noting that the dissent in *Aguilera-Enriquez* would have gone further, and extended the right to government-sponsored counsel in removal proceedings without reference to a particular need.

[55] *Id.* at 568 n.3.

[56] *See* Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. Third World L.J. 393, 404 (2000).

[57] *See* 8 U.S.C. §§ 1362, 1228(b)(4)(B), 1229a(b)(4); 8 C.F.R. §§ 1003.15(a)(5), 1003.16(b).

interpretation unnecessary, but an interpretation prohibiting appointed counsel is ill-advised on policy reasons.

First, the Department could not authorize the expenditure of funds for appointed counsel, in the absence of a Congressional appropriation or an order of a federal court. But Congress is currently authorizing the expenditure of funds by the Department to a Legal Orientation Project ("LOP") under the auspices of the Executive Office for Immigration Review to offer "Know Your Rights" ("KYR") presentations to detained immigrants. As part of these presentations, LOP attorneys speak with thousands of detainees per year. However, LOP attorneys may not engage in even limited representation using Department funding. Amending the regulations would permit contracts to be issued – perhaps as part of pilot projects – that would permit limited representation where it would lead to efficiency gains for the Government. For instance, many detainees wish to seek voluntary departure, or agree to have a removal order entered against them if it will facilitate their swift return to their country or origin. If LOP attorneys could make such requests in proceedings, it would permit more rapid adjudication of such cases, permitting cost savings to the Government in several categories.[58]

Second, the massive expansion of immigration proceedings and immigration detention cannot be overlooked in a review of due process protections for detained immigrants. In mid-October 2007, the ICE detained population surpassed 30,000 immigrants per day, an increase from approximately 27,900 in fiscal year 2007.[59] In 2005 and 2006, the population was much lower, hovering near 19,600 to 19,700 on a daily basis.[60] In 1994, only 5,532 immigrants were held in deportation proceedings under the control of the Immigration and Naturalization Service, the predecessor agency to ICE.[61] The recent spike in immigration detention has significantly increased the number of detainees whose cases come before the Immigration Courts. The potential for imprisonment and deprivation of physical liberty has been treated as one of the most significant factors in determining whether appointed counsel is necessary on due process grounds.[62] It is thus likely that there has been a significant increase in individuals who could make colorable due process claims on this ground.

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[58] More efficient handling of detained cases would provide cost savings to various agencies: to the Department of Homeland Security by reducing the overall length of detention for immigrants in removal proceedings; to the Executive Office for Immigration Review by permitting more rapid adjudication of cases, thus permitting Immigration Judges to focus their attention on more difficult cases; and to the Department of Justice insofar as the efficiency gains of lifting the ban on representation would enable the Department to capitalize on the relationships and existing programs of LOP contractors.

[59] Gorman, *supra* note 5.

[60] *Id.*; *Immigration Enforcement Actions: 2005, Annual Report*, Mary Dougherty, Denise Wilson, Amy Wu, Office of Immigration Statistics Policy Directorate, at 5 (November 2006).

[61] Statement of Joseph Greene and Edward McElroy, Hearing before the Subcommittee on Immigration and Claims, "Review Of Department Of Justice Immigration Detention Policies," Committee on the Judiciary, House of Representatives, 107th Congress, First Session, December 19, 2001, at 21, *available at* http://www.house.gov/judiciary.

[62] *Gault*, 387 U.S. at 36-37, 41.

Third, the massive increase in detention, particularly in facilities located far from legal aid offices,[63] leaves increasing numbers of immigration detainees unable to access free legal services. While the Department mandates the distribution of a free legal services list, the availability of free legal services varies from area to area. With the opening of large new facilities in remote locations, free legal services are not always easily available, or may be available only for certain types of cases. Immigration Judges are generally well-aware of how (and whether) a detainee can access free legal services in their area. This would presumably be a factor an Immigration Judge would consider in determining that appointment of counsel is necessary in a particular case.[64]

Finally, as noted above, where appointed counsel would be necessary for fundamental fairness, it would also likely result in savings to the Government. In cases involving detained immigrants eligible for hearings, the Government pays large sums of money to hold the detainee. On average, a delay of only two weeks could cost the Government more than $1,000.[65] It is not uncommon, where a detainee is granted a longer continuance, or multiple continuances, to find an attorney.[66] The phrase "at no cost to the Government," even if interpreted to preclude appointment of counsel at Government expense, should take into account the overall costs to the Government. The appointment of counsel would in many instances cost the Government less, especially where the attorney conducts an initial consultation and determines that the immigrant has no relief and should seek voluntary departure or removal. The cost of this representation would likely be far lower than paying $95 per day on average for continued detention.[67] Thus, potential efficiency gains from the appointment of counsel can result in an overall less expensive proceeding.

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[63] ICE manages more than a dozen immigration detention facilities across the nation. A list is available at http://www.ice.gov/pi/dro/facilities.htm. However, a total of more than 300 facilities, including privately-run prisons and county jails, are used to hold detainees under contracts with ICE. *See, e.g.*, Bernstein, Nina, "New Scrutiny as Immigrants Die in Custody, *New York Times*, June 26, 2007, *available at* http://www.nytimes.com/2007/06/26/us/26detain.html. Many of these facilities are located in rural areas, far from free or low cost legal representation.

[64] Petitioner would hope that after implementing the rule advocated herein, the Department would develop, or assist in the development of, local and national plans to increase representation of respondents, and particularly detainees.

[65] While daily costs of immigration detention vary from facility to facility, reports suggest that the cost per day per person is now at an average of $95. Multiplied by 14 days, the average cost of a two-week continuence is between $1,120 and $1,330. *See e.g.*, Jorge Bustamante, Report of the United Nations Special Rapporteur on the Human Rights of Migrants, Mission to the Uniteds States of America, A/HRC/7/12/Add.2, March 5, 2008, at 11; Kolodner, Meredith. "Immigration Enforcement Benefits Prison Firms," *New York Times*, July 19, 2006 (reporting the average cost at $95 per day); *see also* "Immigration-Related Detention: Current Legislative Issues," Congressional Research Service, April 28, 2004, available at http://www.immigrationforum.org/documents/CRS/Detention_CRS_4-28-04.pdf (finding that for FY2004, DHS budgeted $80 per day for each detainee held in detention, up from $75 per day in FY 2000).

[66] *See, e.g., Vargas-Hernandez v. Gonzales*, -- F.3d --, 2007 WL 2215796 (9th Cir. August 03, 2007) (five continuances); *Lopez-Reyes v. Gonzales*, -- F.3d --, 2007 WL 2178454 (1st Cir. July 31, 2007) (continuances from 2002-2005). The granting of a continuance is in the sound discretion of the Immigration Judge. *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); 8 C.F.R. § 1240.6.

[67] *See* Bustamante, *supra* note 65.

Unrepresented individuals must be advised by an Immigration Judge of all of their rights. Immigrants appearing *pro se* are frequently inadequately prepared. They will often seek a continuance of their hearing in order to search for counsel. In contrast, appointed counsel is familiar with the workings of the immigration laws, not to mention the functioning of the courtroom. Appointed counsel can assess the immigrant's potential for relief, if any, and advise the immigrant accordingly. This process can significantly contribute to the efficient operation of the Immigration Courts.

The Attorney General should issue regulations making it clear that Immigration Judges have the power to appoint counsel in immigration proceedings. This would remove any confusion or ambiguity in the current regulations that may be an impediment to Immigration Judges exercising such power. Further, regulations could provide guidance as to the factors an Immigration Judge should consider when deciding whether to appoint counsel. By explicitly setting out the Immigration Judge's power, the Attorney General can ensure that immigration proceedings comport with due process.

The Petitioners note the particular circumstance of individuals with claims to be U.S. citizens, generally pursuant to the provisions of INA § 301 (citizenship acquired at birth), § 309 (acquired at birth through unwed mother), § 320 (Child Citizenship Act provisions), and prior versions of those statutes.[68] The federal courts have long held that special procedural protections must be afforded against the removal of possible citizens.[69] The interest of a U.S. citizen in not being wrongfully removed must be protected. Such claims are often legally and factually complex. Counsel should generally be appointed in such cases.

U.S. Immigration and Customs Enforcement (ICE) claims that only one U.S. citizen has been deported from the United States in the past four years.[70] Research conducted by the Boston College Center for Human Rights and International Justice suggests that the deportation of U.S. citizens is more common that ICE acknowledges. To date, the Center has documented eight cases of U.S. citizens being deported in recent years.[71] Such cases are often complex,[72] and

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[68] *See, e.g., Matter of Tijerina- Villareal*, 13 I&N Dec. 327, 330 (BIA 1969).

[69] *See, e.g., Stark v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J., dissenting) (noting "those rare instances, as in a claim of citizenship in deportation proceedings, when a judicial trial becomes a constitutional requirement"); *Moy Suey v. U.S.*, 147 F. 697, 698-99 (7th Cir. 1906) ("[n]o rule of evidence may fritter … away" citizenship rights); *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922) ("[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").

[70] Testimony of Gary Mead, Deputy Director, Office of Detention & Removal Operations, ICE, before the House of Representatives, Subcommittee on Immigration, Citizenship, Refugees, Border Security & International Law, Hearing on "Problems with ICE Interrogation, Detention, and Removal Procedures," February 13, 2008 (hereinafter "Hearing on Problems with ICE Interrogation"); Eunice Moscoso, "House Told U.S. Citizens Abused in ICE Raids," Cox News Service, February 14, 2008.

[71] Written Statement of Rachel Rosenbloom, Boston College Center for Human Rights and International Justice, Hearing on Problems with ICE Interrogation, *supra* note 70.

[72] Indeed, these complexities can confuse even professional ICE agents. For instance, an ICE official recently stated incorrectly to the press that a man who was detained in Colorado and who claimed to be a U.S. citizen bore the burden of proving his legal entitlement to remain in the United States. Marisa Taylor, "Immigration Officials Detaining, Deporting American Citizens," McClatchey Newspapers, January 24, 2008. But the

occasionally involve a mentally disabled or otherwise impaired individual. Where facially plausible claims of citizenship are being decided by an Immigration Judge, the special care required in such a circumstance strongly suggests the necessity of counsel being appointed for the alleged alien.

The interest of permanent residents in not being removed is a liberty interest of the highest order,[73] and even more so for permanent residents with decent arguments against removability. The circumstance of an asylum-seeker, facing grave threats to their life, is also a relevant consideration. Petitioners submit that the Immigration Judge would properly take the nature of the right into consideration when deciding whether counsel should be appointed in any particular case.

VII. Comments on Specifics of the Proposal

Appendix A includes the proposed alterations to current regulations. The suggested revisions are largely self-explanatory. The two major changes are (1) the clarification in several regulations that the "at no expense to the Government" clause does not prohibit appointment of counsel; and (2) the enactment of a provision expressly permitting appointment of counsel for indigent individuals where appointment is necessary to render the proceedings fundamentally fair.

The latter provision would clarify that an Immigration Judge has the power to appoint counsel. Further, it would set forth factors for the Immigration Judge to consider in making the decision whether to appoint counsel. It focuses on the fundamental fairness of the proceeding, generally, and requires that the Immigration Judge take into account the complexity of the issues involved, the respondent's ability to represent himself or herself, the respondent's ability to read and write English, and the nature of the rights and interests involved.

The provision would also require the appointment of counsel where the respondent makes a claim to U.S. citizenship, and where that claim has facial plausibility. Petitioners believe that the liberty interest of a potential U.S. citizen in not being removed is so significant that appointment of counsel will always be required, unless the respondent wishes to move forward *pro se*.

VIII. CONCLUSION

As demonstrated above, respondents in removal proceedings have both a statutory and constitutional guarantee of procedural fairness. Ample case law indicates that, in some cases, this guarantee may require appointment of counsel by an Immigration Judge. To ensure that counsel is appointed in appropriate cases, the Attorney General should issue regulations

(continued…)

Government has the burden of proving removability. 8 U.S.C. § 1229a(c)(3); Testimony of Gary Mead, Hearing on Problems with ICE Interrogation, February 13, 2008.

[73] *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950) (noting "ascending scale of rights" with permanent residents just below U.S. citizens in the nature of their interest).

explicitly recognizing an Immigration Judge's authority to appoint counsel, including guidelines for when to appoint counsel. The Petitioners request that the Attorney General amend the regulations accordingly, and submit proposed text of such changes in Appendix A. If the Attorney General deems it necessary to publish the proposed rule change in the Federal Register for comments, and/or hold hearings regarding the proposed rule changes, please inform the undersigned of any such determinations or actions on this petition.

APPENDIX A

PROPOSED AMENDMENTS TO CURRENT REGULATIONS

The following are proposed amendments to current regulations implementing the above concerns. Any additions are underlined and redactions are indicated with a strikethrough.

TITLE 8--ALIENS AND NATIONALITY

CHAPTER V--EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE

PART 1003_EXECUTIVE OFFICE FOR IMMIGRATION REVIEW--Table of Contents

Subpart C_Immigration Court_Rules of Procedure

Sec. 1003.15 Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:
  (1) The alien's names and any known aliases;
  (2) The alien's address;
  (3) The alien's registration number, with any lead alien registration number with which the alien is associated;
  (4) The alien's alleged nationality and citizenship;
  (5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:
  (1) The nature of the proceedings against the alien;
  (2) The legal authority under which the proceedings are conducted;
  (3) The acts or conduct alleged to be in violation of law;
  (4) The charges against the alien and the statutory provisions alleged to have been violated;
  (5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;
  (6) That if the respondent is indigent and cannot obtain counsel, that counsel may be appointed only where lack of counsel would render the proceedings fundamentally unfair, as determined under 8 CFR 1003.16;
  (~~6~~7) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and
  (~~7~~8) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with Sec. 1003.26.

(c) Contents of the Notice to Appear for removal proceedings. In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.
  (1) The alien's names and any known aliases;
  (2) The alien's address;
  (3) The alien's registration number, with any lead alien registration number with which the alien is associated;
  (4) The alien's alleged nationality and citizenship; and
  (5) The language that the alien understands.

(d) Address and telephone number. (1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR-33.
  (2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

TITLE 8--ALIENS AND NATIONALITY

CHAPTER V--EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE

PART 1003_EXECUTIVE OFFICE FOR IMMIGRATION REVIEW--Table of Contents

Subpart C_Immigration Court_Rules of Procedure

Sec. 1003.16 Representation.

(a) The government may be represented in proceedings before an Immigration Judge.

(b) The alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice in accordance with 8 CFR part 1292~~, at no expense to the government~~.

(c) Counsel may be appointed for an indigent alien only where the Immigration Judge concludes that appointment of counsel is necessary in order for the proceedings to be fundamentally fair. In making this determining, an Immigration Judge shall consider:

(1) The alien's ability to read, write, and comprehend the English language;

(2) The complexity of the relevant statutory and regulatory provisions;

(3) The complexity of the application of the relevant statutory and regulatory provisions to the facts of the case;

(4) The nature of the claims being advanced in the proceedings;

(5) Whether the respondent is detained;

(6) The nature of the due process interest at stake;

(7) An alien's ability to conduct proceedings on his or her own behalf;

(8) Health or any other exigent circumstances that necessitate an efficient proceeding;

(9) Any other factors that warrant the appointment of counsel.

Where a respondent makes a facially plausible claim to U.S. citizenship, and does not obtain private counsel or free legal counsel, the Immigration Judge shall appoint counsel to represent the respondent unless the respondent indicates his desire to proceed forward without counsel.

TITLE 8--ALIENS AND NATIONALITY

CHAPTER V--EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE

PART 1240_PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED

Subpart A_Removal Proceedings

Sec. 1240.1 Immigration judges.

(a) Authority. (1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:

(i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act;

(ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105-100, section 902 of Pub. L. 105-277, and former section 212(c) of the Act (as it existed prior to April 1, 1997);

(iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and

(iv) Appoint counsel for an indigent respondent where required by fundamental fairness, as determined under 8 CFR 1003.16.

~~(iv)~~

(v) To take any other action consistent with applicable law and regulations as may be appropriate.

(2) In determining cases referred for further inquiry, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases. An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act.

(b) Withdrawal and substitution of immigration judges. The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

(c) Conduct of hearing. The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(d) Withdrawal of application for admission. An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. During the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

TITLE 8--ALIENS AND NATIONALITY

CHAPTER V--EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE

PART 1240_PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED

Subpart A_Removal Proceedings

Sec. 1240.3 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292. Nothing in this provision limits the appointment of counsel pursuant to 8 CFR 1003.16.