

Pro Bono Network Webinar: Breaking Updates

Immigration Court 101



Richard Caldarone
Litigation Counsel

Adilene Nunez Huang
Managing Attorney, Greater DC

Kursten Phelps
Director of Legal and Social Services

December 16, 2019



**TAHIRI
JUSTICE
CENTER®**

Today's Agenda

- Litigation, law and policy updates
 - Public charge, USCIS fees and fee waivers, UAC asylum jurisdiction, torture convention, *Matter of A-B-* treatment, and more
- Immigration Court 101
 - Overview of Immigration Court system and the players
 - Overview of procedural process from Master Calendar to Individual Hearing
 - Practice Pointers for filings and hearings
- Questions

Public Charge and USCIS Fees Litigation

- Public charge preliminary injunctions in California and Maryland stayed by courts of appeals
 - At least one nationwide preliminary injunction is still in effect
- Arguments were held on 12/9 in D.C. Circuit in district court hearing challenge to fee waiver change. A preliminary injunction was ordered, meaning that, for now, you can file fee waivers using means-tested public benefits as a basis.

Late Breaking Updates

Asylum bans updates

- Southern District of California issued injunction preventing third-country transit ban from applying to those in Mexico, but unable to enter the U.S. because of metering, before July 16, 2019
- Lawsuit filed challenging application of safe-third-country agreement with Guatemala to those in Mexico, but unable to enter the U.S. because of metering, when agreement took effect.

Late Breaking Updates

Asylum – Border and MPP updates

- MPP (“Remain in Mexico”) now effectively across entire southern border, as Arizona entrants are now being bused to El Paso and put into MPP.
 - Decision from 9th Circuit on the legality of MPP is imminent.
- PACR/HARP with accelerated CFI/RFI processing and access to counsel issues begun in El Paso. A lawsuit has been filed.

Other Asylum litigation and case law updates

- Arguments on 12/9/19 in D.C. Circuit in *Grace* litigation re: applicability of *Matter of A-B-* to credible fear interviews
- 11th Circuit opinion upholding *Matter of A-B-* (*Amezcu-Preciado v. Attorney General*, No. 18-14788)
- BIA opinion on “under color of law” for CAT claims (*Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019))
- BIA opinion on adverse credibility findings (*Matter of Y-I-M-*, 27 I&N Dec. 724 (BIA 2019))

Late Breaking Updates

Some good news

- Government has relented in UAC asylum case; Lafferty memo now a dead letter
 - Jurisdiction for UAC asylum applicants continues to vest with asylum office for initial adjudication, even when the minor is in proceedings

Objectives

- Provide a basic introduction and overview of the Immigration Court system, basic procedural process, and basic court rules and practices
- **Note:** Local practices vary widely. This training is not jurisdiction specific. Discuss particular local rules and practices for your local court with your Tahirih mentor attorney.

Immigration Court 101

Introduction into Immigration Court

- Formal name is Executive Office for Immigration Review (EOIR)
- Part of the Department of Justice. Article II, not Article III court
- Tahiri practices in:
 - Arlington, VA
 - Atlanta, GA
 - Baltimore, MD
 - Houston, TX
 - San Francisco, CA

Immigration Court 101

Who's Who

- Immigration Judge (IJ) – employee of DOJ
- Assistant Chief Counsel (TA) – employee of DHS-ICE
- Your client (Respondent)
- You (Respondent's Counsel)
- Interpreter, when applicable

Immigration Court 101

Procedural Steps

- Notice to Appear (NTA) served on Respondent by ICE
- NTA lodged by ICE with EOIR
- Master Calendar Hearing(s)
- Individual (merits) Hearing

Immigration Court 101

When Jurisdiction Vests

- The Notice to Appear is the document that initiates removal proceedings *when it is filed with the court*
 - 8 C.F.R. § 1239.1 Notice to Appear
- What happens when your client has an NTA but not a hearing notice?
 - Talk with your client
 - Call the hotline (1-800-898-7180)
 - File a FOIA request
 - You may also need to connect with DHS and request that they file the NTA with the court

Practice Pointer: Before the MCH

- Go over the NTA with your client
- Prepare your filing (if you plan to file something at the MCH)
- Or prepare your continuance arguments
- Call the hotline to confirm hearing date and time
- Prepare your client for the hearing – procedurally, logistically, their role, after leaving the counsel's table
- Procedurally what will happen
- Prepare your talking points for the MCH
- Register with EOIR, if you haven't already

Immigration Court 101

Master Calendar Hearing

- This is your client's first hearing
- Subsequent MCHs are status hearings
- Call the hotline (1-800-898-7180) a few days prior to the scheduled hearing to confirm that hearing will take place as scheduled
- Plan to arrive early:
 - To account for travel delays
 - To account for security lines to enter the building
 - To account for the time it takes you and client to find the courtroom

Practice Pointer: After the MCH

- Mark your calendar for the next hearing (another MCH or ICH)
- Mark your calendar for any prework you need to accomplish before that hearing
 - If next hearing is the individual hearing, when is your filing deadline?
- Make a copy of the hearing notice

Practice Pointer: After the MCH

- Write a short letter to your client with advisories:
 - Next hearing date, time, and type of hearing
 - Failure to appear could result in an order of removal *in absentia*, 8 C.F.R. § 1003.26(c)
 - Any next steps you would like the client to know
- Notify client of these advisories – either in person or on the phone
- Send the advisory letter as a follow-up to the call/meeting

Immigration Court 101

Master Calendar Hearing

- Arrive early to sign in on the attorney sign in sheet, if there is one. This will get your case called sooner.
- The IJ will hear dozens of cases during a Master Calendar docket.
- Clerk will call your case by full A number or last 3 digits of A number
- Hearing is on the record.

Immigration Court 101

Master Calendar Hearing

- Provide signed EOIR-28 to IJ and copy to OCC, if not previously filed.
- Enter appearance verbally (Your name, Firm Name, Pro Bono counsel for Respondent)
- Respondent will confirm address
- IJ will ask for pleadings
 - Verbal admission or denial of the allegations on the NTA
 - If potentially filing for asylum, withholding or CAT relief, decline to designate a country of removal

Immigration Court 101

Master Calendar Hearing

- Respondent, through counsel:
 - files application for relief (if not already filed) or
 - requests continuance to prepare/investigate claim for relief (if recently retained) or
 - Requests continuance based on pending affirmative application (such as VAWA, T visa, or U visa application)
 - Bring copies of Receipt Notice for IJ and TA.
 - This may not be successful in some courts, see *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018).
- If no continuance requested, IJ will set date for Individual Hearing

Caution – Declining Merits Date

- If your client has filed for asylum, they are eligible for an EAD 180 days after filing for asylum. However that “clock” will stop if you request a continuance or reject the first Individual Hearing date offered by the IJ.

Immigration Court 101

How Long Until the Merits?

- Depends on the court.
- With backlogs nationwide, unless it is a detained respondent or a family unit case, the merits hearing will usually be at least one year out. Some courts are moving more quickly. Expect it either to be very far out or very soon.
- Consult with your mentor attorney about anticipated timelines.

Immigration Court 101

Filing Deadlines

- Briefs and supplemental evidence must be filed no later than 15 calendar days prior to the merits hearing date.
 - However, IJs may set a deadline earlier, and that earlier date controls.
- Some judges may order briefing well in advance of the merits hearing.

Practice Pointer: Filing Motions & Applications

- Asylum can be filed in open court at Master Calendar Hearing OR at clerk's window
- Cancellation Applications must be filed to a Service Center
- Motions can be filed at the clerk's window or by mail
- Pre-hearing briefs and evidence must be filed at the window, or by mail

Practice Pointer: Filing at Clerk's Window

- Take original plus 2 copies of filing/motion when filing
- Have clerk stamp all 3 sets
- Clerk will retain the original set
- If OCC is in same building, take other two copies to OCC, stamp both, and serve one on OCC
- The final copy has an EOIR and an OCC stamp, and is for the Tahirih file, and a copy can be made for the client

Practice Pointer: Court Rules on Filings

- Must have a cover page
- Must be paginated (not including exhibit tabs)
- Use alphabetic side tabs
- Must include a signed Certificate of Service for OCC
- Must include an EOIR-28 if one is not already on file for the attorney of record
- Review the Immigration Court Practice Manual and any Pre-Hearing Instructions from IJ

Immigration Court 101

Before the Individual Hearing

- Meet several times for mock hearings to go through testimony.
- Call OCC in the days preceding hearing to discuss limiting issues.
- Prepare your witnesses, including expert witnesses
- File witness list with the court, and file well in advance any telephonic testimony motions for witnesses who cannot be present at the hearing
- Make a plan to meet with the client, preferably off-site, well before the merits. Get breakfast/lunch to relax and try to calm nerves.
- Take a stress ball and tissues for your client during testimony.
- If you haven't already talked to OCC, get there early to chat before hearing.

Immigration Court 101

Individual Hearing

- Only your client's case is heard.
- Client, you, TA, IJ, clerk, and interpreter are present in courtroom.
- Client may request to have others in courtroom (such as an advocate or a non-party family member).
- Members of the public are not allowed in without permission of your client and court.
- Witnesses present must wait outside the courtroom until called.

Immigration Court 101

Merits Hearing

- Interpreter sworn in
- IJ marks the exhibits
- Respondent's counsel calls witnesses
 - Respondent
 - Psychological Expert
 - Country Conditions Expert
 - Any other relevant witnesses

Immigration Court 101

Merits Hearing

- Respondent's counsel does direct exam
- TA cross-examines
- IJ may question witnesses
- Closing arguments
- Decision – oral at close of hearing, scheduled oral decision at future date, or written decision to be sent by mail

Be ready for anything

Immigration Court 101

Appeals

- If the IJ does not rule in your client's favor, reserve appeal
- If you win, DHS may reserve appeal
- A Notice of Appeal must be filed with the BIA within 30 days of the decision.
 - Your Tahirih mentor attorney will discuss appeal options immediately, and will discuss whether you will stay on for the appeal.

Practice Pointer: Trial Notebooks

- Prepare a trial notebook for your merits hearing, that includes
 - Accessible copy of your filing, with quick reference to exhibit tabs and page numbers for key points or evidence
 - Concise, easy to reference outline of arguments and anticipated counter-arguments, with supporting statutory/regulatory language and case law
 - Your direct, anticipated re-direct questions, and closing statement.

Immigration Court 101

Practice Pointer: I object!

- Federal Rules of Evidence are guiding and not binding in immigration court
- Yes, you can (and should) object!
- Common objections for you during examination:
 - Relevance
 - Calls for an opinion outside of the scope of this witness's knowledge/expertise
 - Calls for a legal conclusion
 - Mischaracterization of the evidence/testimony
 - Asked and answered

Practice Pointer: I still object!

- Responses if DHS objects to your evidence:
 - It is relevant to the case and is reliable
 - Keeping Respondent's evidence out violates her/his right to present evidence on her/his own behalf – INA § 240(b)(4)(B), 8 CFR § 1240.10(a)(4)
 - Also violates fundamental fairness and deprives the respondent of due process

Practice Pointer: I still object!

- Responses if DHS introduces evidence that is not solely for impeachment:
 - Object:
 - Right to review and respond to evidence presented – INA §240(b)(4)(B); 8 CFR § 1240.10(a)(4)
 - ICPM 3.1(b)(ii)A, 4.16(a)(i) → requires timely filing (unless submitted for impeachment purposes only), notes importance of sufficient time to review and respond to evidence (ICPM 3.1(d)(ii))
 - Request continuance
 - Request evidence be given less weight

Practice Pointer: Note taking

- Have someone take notes during the individual hearing. This will help you get started on your Notice of Appeal and appellate brief, if necessary.
- Have someone who speaks the client's language taking notes/observing, too, to flag any inaccurate or imprecise interpretations.

Immigration Court Resources

- EOIR hotline for limited case information
 - 1800-898-7180
- [EOIR online registry](#)
 - Attorneys MUST register with EOIR – (1) online registration and (2) take ID to any EOIR court to verify identity and complete registration
- [EOIR Practice Manual](#)

Tahirih Pro Bono Network

Questions?

Kursten Phelps

Director of Legal
& Social Services

kurstenp@tahirih.org

571-356-9492

Richard Caldarone

Litigation Counsel

richardc@tahirih.org

571-249-2131

Adilene Nunez Huang

Managing Attorney,
Greater DC office

adin@tahirih.org

571-550-9148

A recording of this briefing will be posted on Tahirih's Pro Bono E-Library at www.tahirih.org
Please complete the evaluation survey as you exit the webinar.

Thank you! How You Can Help

- Co-counseling all types of cases
- Litigation or research matters
- Advocacy alerts, including submitting comments to proposed rules
- Encourage your colleagues to join Tahirih's Pro Bono Network:

<https://www.tahirih.org/get-involved/our-pro-bono-network/join-our-network/>

