

September 26, 2022

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

Re: Agency Information Collection Activities; Proposed Collection; Comments Requested;
Notice of Appeal From a Decision of an Immigration Judge; Federal Register Doc. 2022–16147;
OMB Number 1125–0002.

Dear Ms. Reid:

On behalf of the American Bar Association, I submit the following comments in response to the Federal Register notice “Agency Information Collection Activities; Proposed Collection; Comments Requested; Notice of Appeal From a Decision of an Immigration Judge; Federal Register Doc. 2022–16147; OMB Number 1125–0002 (July 28, 2022).” Specifically, the ABA supports the proposed revision to help appellants in immigration proceedings, but also recommends a similar option for appellees where the government appeals an immigration decision as discussed below.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As a national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable.

Pursuant to this information collection request, the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) would revise the current version of the Notice of Appeal to the Board of Immigration Appeals (Form EOIR-26) to add a check box to allow the Respondent to indicate that he or she consents to having their case considered for inclusion in the Board of Immigration Appeals (BIA) Pro Bono Project. Because the case screening mechanism of the BIA Pro Bono Project often relies on screeners who are not DOJ employees to review the Record of Proceedings (ROPs) in individual cases and determine which are appropriate for pro bono placement through the Project, obtaining this express consent from the Respondent would address concerns regarding potential violations of the Privacy Act of 1974 or other concerns

about providing access to ROPs for this limited purpose. We understand that alleviating these concerns is critical to the reinstatement of the Project.

The ABA supports this proposed revision for multiple reasons. Enhancing access to counsel in the context of removal proceedings at both the Immigration Court and BIA levels has long been one of our core advocacy principles. As you are aware, there is currently no right to appointed counsel in removal proceedings. Consequently, unless a Respondent can afford to pay for counsel or obtain pro bono counsel, he or she will go through proceedings and face potentially life-or-death consequences of removal from the United States without representation, while opposed by experienced government counsel. Numerous academic and policy studies have consistently shown that legal counsel makes a significant difference in immigration court proceedings, with represented noncitizens being far more likely to identify and secure immigration relief.

Since its inception in 2001, the BIA Pro Bono Project has been the primary vehicle for obtaining counsel for unrepresented Respondents whose cases go before the BIA. Because BIA appeals are purely appellate proceedings, with no face-to-face participation by the Respondent and no right to an interpreter or translator, it is even more difficult for a Respondent to succeed at this level without counsel. Due process cannot be satisfied when unrepresented foreign-born respondents are required to research, write, and file an appellate brief in English and respond to arguments that trained government counsel might present. This is particularly true when an unrepresented Respondent has prevailed and been granted relief by an Immigration Judge at the end of a live hearing on the record, but the Department of Homeland Security (DHS) appeals to the BIA. It is fundamentally unfair to require a Respondent who may be indigent and lack language and literacy skills to defend a grant of relief through a formal appellate process without representation. While ideally such Respondents would be provided with appointed counsel, the BIA Pro Bono Project is an important backstop in identifying potentially meritorious cases for potential pro bono representation.

Adding the proposed check box to Form EOIR-26 will not be overly burdensome to Respondents as long as it is explained fully in the instructions. Unrepresented Respondents who choose to appeal their cases are already required to complete the form, either on their own or with pro se assistance. However, it will be important to include clear instructions on the revised form and provide additional information to unrepresented Respondents through relevant Legal Orientation Programs and other pro se resources. This revision should not be confusing or add additional work for Respondents who are represented by counsel. In such cases, counsel would presumably be completing the form and would simply not check the box.

We would like to raise one important additional issue that does not appear to be contemplated in the notice. As noted above, access to counsel for those Respondents who have won relief from the Immigration Judge but whose case is later appealed to the BIA by DHS is of particular concern. Adding a box to Form EOIR-26 will not authorize access to ROPs for Respondents who are appellees rather than appellants before the BIA. Under the current system, even with a

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revised Form EOIR-26, these Respondents would have no way to authorize their case to be considered by the Project. Consequently, we urge the BIA to consider this issue and devise a comparable mechanism by which Respondents in this posture could indicate their assent to have their cases screened by the BIA Pro Bono Project. An example of such a mechanism, at least in cases where Immigration Judges deliver oral decisions from the bench, would be for the Immigration Judge to indicate the Respondent's position on this issue near the same place on the decision form where she or he must indicate whether each party has waived or reserved appeal. Another option would be for the government attorney to serve the Respondent with a consent form and confirm such service on the Notice of Appeal. While we do not take a position on which mechanism would be preferred, we believe this issue must be addressed as a part of this process.

Thank you for the opportunity to share our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Enix-Ross", with a stylized, flowing script.

Deborah Enix-Ross