

June 15, 2020

James McHenry
Director
Executive Office for Immigration Review

Submitted via email

RE: EOIR'S DECISION TO RESUME THE NON-DETAINED IMMIGRATION COURT DOCKET IS PREMATURE

Dear Director McHenry,

The undersigned organizations and their members across the country provide legal services to individuals in immigration court proceedings. We write to you in response to the Executive Office for Immigration Review's (EOIR) decision to resume non-detained immigration court hearings during the worldwide spread of the novel coronavirus, also known as COVID-19.¹ The number of COVID-19 infections and hospitalizations continues to surge and as of June 15, 2020, more than 2,094,000 people have been diagnosed with COVID-19 in the United States and more than 115,000 people have died.² Last week, twenty-one states reported a rise in their daily average of new COVID-19 cases compared to the week prior.³ The United States is at the epicenter of this crisis and public health experts predict that there will be an additional 100,000 COVID-19 related deaths in the United States by September 2020.⁴ EOIR's decision to resume non-detained hearings during this national public health emergency is premature and will not only affect the health and safety of the community, but also impact the fundamental fairness of immigration court proceedings.

During the COVID-19 pandemic, immigration judges continued to adjudicate detained cases while the non-detained dockets have been postponed since March 18, 2020.⁵ Suspected COVID-19 infections have forced numerous detained courts to frequently close without explanation and without adequate communication to the public. EOIR's overall lack of transparency about piecemeal immigration court operations has led to mass confusion and even prompted an investigation by the inspector general.⁶

To date, EOIR has failed to publicize health criteria or standards that it is relying on to determine immigration court operations during the COVID-19 pandemic. EOIR recently announced that non-detained hearings for the Honolulu immigration court will resume on Monday, June 15, 2020 and the following immigration courts will resume non-detained cases on June 29, 2020: Boston, Dallas, Las Vegas, Buffalo, Memphis, Hartford, and New Orleans.⁷ Following these announcements, EOIR issued Policy Memo 20-13, *EOIR Practices Related to the COVID-19 Outbreak* that is void of basic information about the procedures that EOIR is utilizing to determine court operations and introduces additional barriers to a respondent receiving a fair day in court.⁸ This memo fails to adequately account for the significant risks of COVID-19 transmission both inside and outside of the courtroom. For example, procedures have not been put into place to mitigate transmission in long security lines outside of buildings. Nor does it address how litigants will maintain social distancing in elevators, or lines to access elevators, in high rise buildings that house courtrooms. The memo also falls short of specifying precautionary measures that are needed to prevent the

possible spread of COVID-19 in crowded waiting rooms or crowded courtrooms for Master Calendar Hearings. Additionally, the policy memo introduces problematic policies that could directly impact a respondent's due process rights. For example, the policy memo outlines an array of scenarios where visitors will be prevented from accessing EOIR-controlled space, yet the memo does not provide any safeguard to prevent respondents from being issued *in absentia* orders of removal. Prior to the closing of the non-detained docket in March, EOIR employees in at least one New York court, were told to "issue in absentia deportation orders if immigrants weren't showing up, even if the coronavirus was the suspected cause."⁹

We urge EOIR to issue a new policy memorandum incorporating the following recommendations:

- **The overwhelming majority of non-detained hearings should be postponed for the duration of the national public health emergency.**
 - Given the continued spread of COVID-19 and the physical conditions in immigration courts around the country, we recommend that all non-detained hearings be postponed for the duration of the national public health emergency, with the exception of cases where the respondent or their representative requests in writing that their immigration court proceeding move forward.¹⁰ Cases that do move forward should do so by video-teleconference (VTC) or, if the respondent requests, telephonically. EOIR should notify all respondents with delayed hearings of the opportunity to request that their hearing go forward, and implement a simple and user-friendly process, available in numerous languages, allowing such requests to be made by mail, email, and/or through a form on the EOIR website. The undersigned notes that our recommendation regarding the use of VTC is limited and unique to the situation of the COVID-19 pandemic; in ordinary circumstances we maintain that the use of VTC for merits hearing raises inherent due process challenges.
 - Non-detained cases should resume no sooner than 60 days after the national public health emergency has been lifted. Once the non-detained docket does resume, EOIR should automatically grant continuance requests if any of the parties requests one due to COVID-19 related concerns, such as local stay-at-home orders or restrictions, particular vulnerabilities, or dependent care.
- **As soon as EOIR resumes the adjudication of non-detained cases, EOIR should invoke a moratorium on the issuance of *in absentia* orders for *pro se* and represented respondents.**
 - Given EOIR's failure to communicate information regarding court closures and new rules relating to the court process in any language other than English, or through mechanisms other than through Twitter and information posted to its website, it is highly likely that many respondents have not received vital information about court re-openings and new COVID-19-related procedures. For respondents that are represented, EOIR's last minute and ad-hoc scheduling announcements have proven difficult to relay to clients during the pandemic. Issuing *in absentia* orders under these circumstances would be deeply problematic.

- Given ongoing dangers posed by travel, especially on crowded public transit systems, the disproportionate impact of the pandemic on immigrants many of whom rent their housing and may have had to change address as a result of the economic fallout, and the likelihood that many unrepresented respondents would have no way to receive information from EOIR regarding changes to the court process as a result of COVID-19, EOIR should instruct immigration judges to continue cases of respondents who fail to appear for a hearing during the declared national emergency, rather than issue *in absentia* orders. There must be a clear way for respondents and representatives experiencing COVID-19-related issues to communicate with the court.
- **EOIR must engage in ongoing and open communication with stakeholders and the public regarding EOIR's procedures and decisions in order to make informed decisions that will mitigate harm and uphold due process.**
 - EOIR, in conjunction with the Department of Homeland Security (DHS) where necessary, must make all plans to reopen immigration courts publicly available on their website and distribute the plans through various stakeholder channels, including stakeholder email lists, social media, and posting in courtrooms where applicable. Throughout the pandemic, there has been considerable confusion around which courts are open and which are closed, with court closures and openings being announced at all hours, through differing channels, and sometimes with little to no notice. In order to reduce confusion and prevent unnecessary exposure, EOIR must commit to making its policies transparent and communicating changes as far in advance as possible in various languages.
 - Each immigration court should develop a process for monthly, remote stakeholder engagements at which legal service providers may share concerns and suggestions regarding public health precautions in the court's functioning.
 - EOIR must provide at least 30 days' notice of the resumption of non-detained hearings at a particular court, which will help attorneys and respondents plan for filing deadlines and not unnecessarily create health and safety risks to meet deadlines for hearings that ultimately remain suspended.

We respectfully request a meeting as soon as possible to discuss these recommendations and EOIR's plans given the emergent circumstances. Please contact Laura Lynch (llynch@aila.org) with any questions.

Sincerely,

American Immigration Council
American Immigration Lawyers Association
Catholic Legal Immigration Network, Inc.
Human Rights First
National Immigrant Justice Center
National Immigration Project of the National Lawyers Guild

¹ Memorandum from James McHenry, EOIR Practices Related to the COVID-19 Outbreak, June 11, 2020, <https://www.justice.gov/eoir/page/file/1284706/download>.

² See COVID-19 Interactive Map, Johns Hopkins University & Medicine, <https://coronavirus.jhu.edu/map.html>, accessed June 15, 2020 (at 9:00 am ET).

³ Derek Hawkins, Miriam Berger, Meryl Kornfield, Brittany Shammass, Karla Adam, Hannah Knowles, Samantha Pell, and Candace Buckner, *As coronavirus infections surge nationwide, 21 states see increase in average daily new cases*, Washington Post, June 13, 2020, <https://www.washingtonpost.com/nation/2020/06/13/coronavirus-live-updates-us/>.

⁴ John Bacon, *'Pandemic is still here': 100,000 more Americans could die in coming months; USA hits 2M cases*, USA Today, June 11, 2020, <https://www.usatoday.com/story/news/health/2020/06/11/coronavirus-us-2-million-cases-100000-more-could-die/5340920002/>.

⁵ EOIR Statement, March 18, 2020, <https://www.aila.org/File/Related/20030201u.pdf>.

⁶ U.S. Department of Justice Office of the Inspector General, Ongoing Investigations, <https://oig.justice.gov/ongoing/all.htm>.

⁷ Tweet by DOJ EOIR, May 29, 2020, https://twitter.com/DOJ_EOIR/status/1266452835874607104; Tweet by DOJ EOIR, June 5, 2020, https://twitter.com/DOJ_EOIR/status/1269029080466444293; Tweet by DOJ EOIR, June 8, 2020 https://twitter.com/DOJ_EOIR/status/1270101002780377088; and Tweet by DOJ EOIR, June 11, 2020 https://twitter.com/DOJ_EOIR/status/1271191943188529153.

⁸ Memorandum from James McHenry, EOIR Practices Related to the COVID-19 Outbreak, June 11, 2020, <https://www.justice.gov/eoir/page/file/1284706/download>.

⁹ Dara Lind, *Immigration Courts Are Telling Employees to Come to Work — Ignoring Health Risks and Local Shelter-in-Place Orders*, ProPublica, Mar. 20, 2020, <https://www.propublica.org/article/immigration-courts-are-telling-employees-to-come-to-work-ignoring-health-risks-and-local-shelter-in-place-orders>.

¹⁰ See Donald J. Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, The White House, Mar. 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergencyconcerning-novel-coronavirus-disease-covid-19-outbreak/>.