



NEW JERSEY STATE BAR ASSOCIATION

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Sent via email to david.neal@usdoj.gov

Director David L. Neal
Executive Office for Immigration Review
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Director Neal:

On behalf of the New Jersey State Bar Association, which includes immigration attorneys among its 16,000 attorney members, I write to seek reconsideration of the policy change the Executive Office of Immigration Review (EOIR) has scheduled to implement in Newark, NJ, on Oct. 3, 2022. After more than two years of successful Webex Master Calendar hearings, EOIR will again require immigration attorneys to appear in person. While vague Webex bandwidth issues have been cited as the impetus for the change, there has been no stated reason why EOIR will not default to the prior practice of holding Master Calendar hearings telephonically. To be sure, there are legitimate concerns about the ability to judge credibility or simultaneous interpretation in certain telephonic immigration hearings, but those issues are not in play here as EOIR has waived clients' appearance in Master Calendar hearings. Reverting to the pre-pandemic, inflexible court appearance requirements is both unnecessary, in light of back-up telephonic hearing capabilities, and presents costly time and monetary burdens to attorneys and respondents.

I. EOIR HAS SUCCESSFULLY HELD WEBEX HEARINGS SINCE THE HEIGHT OF THE COVID-19 PANDEMIC IN 2020.

EOIR Newark began Webex hearings in summer 2020 because of litigation filed by New Jersey immigration attorneys in the New Jersey chapter of Association of Immigration Lawyers Association (AILA) on July 31, 2020, in the District Court of New Jersey, Newark Vicinage. That suit sought protection from EOIR Newark's order compelling attorneys to appear in person during the pandemic. As a result of this litigation, Assistant Chief Immigration Judge David Cheng (ACIJ Cheng) of the New Jersey Immigration Court, and on behalf of EOIR Newark, committed to providing attorneys with remote videoconferencing for the duration of the pandemic. As part of the parties' stipulation for dismissal, the parties agreed to the following:

WHEREAS, PM 21-03 further provides that, “[o]nce WebEx compatibility is available at an immigration court, for the duration of the declared national emergency related to COVID-19, either party may file a motion for the alien or the representative for either party to appear at a hearing by VTC through WebEx rather than in person,” *see id.*; and

WHEREAS, PM 21-03 further provides that motions to appear at a hearing by VTC through WebEx for any party or party attorney/representative, like motions for telephone appearances, are “subject to the discretion of the immigration judge, any applicable law and any applicable requirements of the ICPM [Immigration Court Practice Manual], a standing order, or a local operating procedure,” *see* PM 21-03 at p. 4.

See Stipulation for Dismissal, Docket 44, dated Feb. 16, 2021 (Docket No. 2:20-cv-09748-JMV-JBC) (emphasis added), attached hereto as **Exhibit A**.

In the wake of that consent order, EOIR Newark joined all other state and federal courts in New Jersey in operating virtually during the pandemic. In practice, and pursuant to ACIJ Cheng’s Standing Order dated June 19, 2020, all Master Calendar hearings were held telephonically, without the need for a motion, and all respondents’ appearances were waived if an attorney appeared on their behalf. *See* Standing Order dated June 19, 2020, attached hereto as **Exhibit B**. This Standing Order was rescinded pursuant to ACIJ Cheng’s Standing Order on Dec. 28, 2021, effective Jan. 10, 2022, at which time Master Calendar hearings changed from being held telephonically to being held via Webex. As it was before, these were without the need for a motion, and all respondents’ appearances continued to be waived if an attorney appeared on their behalf. *See* Standing Order dated Dec. 28, 2021, attached hereto as **Exhibit C**.

Even today, many court operations across New Jersey continue to be virtual. To name a few, state municipal matters are being managed remotely, except for DUIs and trials, and in Superior Court, non-consequential hearings such as preliminary appearances and status conferences continue to be held remotely.¹ The U.S. District Court for the District of New Jersey extended its standing order on Aug. 8, 2022, regarding virtual hearings for criminal proceedings.²

Additionally, EOIR itself has acknowledged the benefits of internet-based hearings, for which Newark was a national leader in its overall success as a pilot program jurisdiction. On Aug. 11, 2022, EOIR issued Director’s Memorandum 22-07.³ That stated, “all immigration courts have the capacity to hold such hearings...” and “internet-based hearings have proven a valuable safety measure during the pandemic, as immigration judges can conduct such hearings without requiring groups of people to congregate in a courtroom...” The memo cites the benefits of internet-based hearings, including that “Respondents and counsel appearing remotely are

¹ *See* njcourts.gov/public/covid19_one-stop.html#court_hearings, last accessed Sept. 27, 2022.

² *See* njd.uscourts.gov/sites/njd/files/CARESActSOSixthExt.ofSO2021-03.pdf, last accessed Sept. 27, 2022.

³ *See* justice.gov/eoir/page/file/1525691/download, last accessed Sept 27, 2022.

relieved from traveling to court.” Finally, the memo said that “EOIR anticipates that, going forward, internet-based hearings will remain essential to EOIR’s operations.”

II. EOIR NEWARK INTENDS TO SUSPEND STANDARD WEBEX HEARINGS ON OCT. 3, 2022, WITHOUT PROPER NOTICE TO THE BAR, INCLUDING NJSBA.

Notwithstanding the above, the EOIR seeks to disband the standard for Webex hearings without proper notice to New Jersey attorneys and their clients who will be substantially and disproportionately affected by this sudden policy shift. The NJSBA only learned of this policy through its affiliate AILA NJ members when the committee chair for AILA NJ announced the new policy to its members by email on Aug. 30, 2022. The email was supplemented on Aug. 31, 2022, and again Sept. 8, 2022. The below paragraphs, taken from our AILA NJ colleagues’ letter to EOIR leadership, contain the entirety of the new policy, which was communicated via the emails referenced above.

From the Aug. 30, 2022 Email from EOIR Committee Chair:

The standing order for Webex hearings is revoked and in person appearances required as of 10/3/22. This of course is subject to exceptions and variations as follows:

1. Webex hearings will continue for all cases heard by Judge Ranasinghe and Judge Jeannopolous
2. Judge Pierro and Judge Chen will have in person master calendars and Webex merits hearings.
3. Judges Rubin, Rastegar, Riefkohl, Finston, Wilson and Lane will have in person hearings master and merits.
4. Represented respondents’ appearances are waived for master calendars like they are now on Webex masters, but not for merits hearings. This includes cases where an attorney is already on record or making his/her first appearance. Atty shows up, the respondent does not have to appear. If you are hired at the last minute and can’t make it, the respondent has to appear.
5. This does not apply to Elizabeth hearings as the facility does not admit visitors, all remote hearings.
6. If it is Judge Shirole or Pope and the hearing notice is for Newark, (DD Case), in person at Newark. Any doubts about Shirole call Elizabeth. Pope will all be in person.
7. You can still file a motion for a Webex hearing for good cause but it MUST be filed 15 days or before. If it is not granted you have to

appear. I am told the reason for this is the Webex bandwidth is incapable of handling the level of internet traffic that has developed. The system is crashing constantly. More and more attorneys are using it with technical issues constantly. So the “good cause” issue will be a major consideration in granting or denying motions for Webex calendars.

From August 31, 2022 Email from EOIR Committee Chair:

1. DHS has to appear in person and they will be required to file motions for Webex.

2. I failed to include ACIJ Cheng and IJ Mullican among the list of judges where in person appearances are required.

From September 8, 2022 Email from EOIR Committee Chair:

ACIJ Cheng has rephrased the “good cause” language requirement for a Webex motion. He chooses to phrase it as “there has to be a reason”.

See AILA New Jersey letter dated Sept. 23, 2022, attached hereto as **Exhibit D**.

III. THE NEW POLICY FAILS TO PROVIDE PROPER NOTICE TO NEW JERSEY ATTORNEYS AND IT IS IN CONFLICT WITH PRINCIPLES OF EQUAL ACCESS TO JUSTICE, DUE PROCESS AND FUNDAMENTAL FAIRNESS.

EOIR Newark failed to circulate a general notice to the entire bar of the policy change and thereby limited the ability of all practitioners to learn of the change in a timely fashion. Indeed, unless immigration attorneys are members of AILA NJ, which some, but not all NJSBA Immigration Law Section members are, they might still be unaware of this abrupt change in policy, which will prejudice them and their clients. To date, EOIR Newark has not published a formal standing order to officially announce it. This lack of notice will hinder equal access to the justice system for countless respondents whose attorneys are not aware of the sweeping changes made to the practice. As our AILA NJ colleagues adeptly stated, notice of these changes should come directly from EOIR Newark in the form of a standing order, notice to the bar, website update, or other written statement. Further, the new policy is confusing and complicated in its implementation.

This new policy also denies equal access to justice because of the effect it will have on attorneys’ fees. The fees for appearing at Master Calendar hearings in person, rather than virtually, will be markedly more expensive, and needlessly so, for immigration clients. Although clients’ appearance would be waived, the time attorneys spend to appear in person will be exponentially greater than that spent at a Webex appearance. In immigration removal proceedings, where respondents have no right to court-appointed counsel, many clients will find it cost prohibitive to pay an attorney for protracted appearances at Master Calendar hearings in Newark. An additional

consequence may be that seasoned immigration attorneys would limit the removal defense cases they accept that require needless Newark appearances.

Consistency in agency practices is a hallmark of due process and fundamental fairness. Respondents and attorneys should be able to rely on established policies and practices and conform their behavior accordingly. To be clear, changes should be announced with reasonable notice and ample breadth to the entire legal community. EOIR Newark's decision to change course without prior, reasonable notice will have serious economic and practical consequences to immigration attorneys and their clients.

IV. THE NEW POLICY WILL BE UNNECESSARILY BURDENSOME AND WILL RESULT IN ADDITIONAL BACKLOGS AND INEFFICIENCIES THROUGHOUT THE IMMIGRATION COURT SYSTEM.

The new EOIR Newark policy will burden immigration attorneys by immediately requiring them to appear in person in Newark for Master Calendar hearings while their clients' appearances remain waived. A Master Calendar hearing in Immigration Court is the equivalent to a status conference in most other litigation-based practice areas. They are administrative, taking approximately five to 15 minutes to complete. This will place a heavy burden on immigration attorneys across New Jersey all of whom will again be required to be physically present on the 12th Floor of EOIR Newark, which is New Jersey's sole immigration court, by 8:30 a.m. on any given weekday for a hearing that will likely last fewer than 15 minutes. This change will be a hardship for attorneys from the south, such as an attorney from Cape May who would have to travel 148 miles to Newark, as well as those from the north, such as an attorney from Montague who would have to travel 59 miles to Newark, all for a brief hearing.

A silver lining of the COVID-19 pandemic has been the legal community's embrace of technology. Attorneys and courts alike learned, adopted, and then mastered a more efficient process to effectively practice law. There is no reason to revert to antiquated, unnecessary practices. Health concerns aside, appearing for Master Calendar hearings via Webex has proven to be a much more efficient process that reallocates attorneys' time into their files and clients' valuable financial resources. If Webex is experiencing bandwidth issues, telephonic Master Calendar hearings should be the back-up policy for attorneys rather than in person Master Calendar hearings. Immigration attorneys rely on Webex hearings to manage their practices, caseloads and clients' schedules and expectations. Immigration attorneys have relied on the belief that EOIR Newark's Master Calendar hearings would be handled in a remote fashion and have entered into retainer agreements with clients with fee estimates that do not contemplate in-person appearances, have scheduled their calendars, and accepted other court hearing dates, upon that belief. This new policy, which is being implemented in a haphazard manner, creates numerous conflicts, requiring voluminous motion practice to correct. The new policy would upend these successfully established practices on which attorneys, their staff, and their clients have come to rely over the last two years.

The new policy states that motions to appear via Webex will be entertained, but that they must enumerate a "*reason for the request.*" Requiring a motion requesting a virtual hearing on every Master Calendar hearing, where an attorney may have dozens in any given week, is an

overwhelming and unnecessary burden. Additionally, the court, and its already backlogged docket, will be flooded with motions for virtual hearings. The most likely reality is that a majority of attorney motions requesting Webex appearances would be undecided by the date of the appearance. That would lead to a stressful situation each week in which immigration attorneys cannot properly plan their schedules and calendars because they do not know whether or how the immigration judge has ruled on their motion, and whether an in-person appearance will be necessary. Additionally, calling EOIR Newark to ascertain an immigration judge's decision on a pending Webex motion is, and will continue to be, an unreliable practice strategy. Court staff are already far too busy with court administration to field dozens of additional calls from immigration attorneys each day relating to these issues.

EOIR should continue to permit immigration attorneys to appear for Master Calendar hearings via Webex *as standard policy*, without a motion. Although EOIR Newark has cited bandwidth concerns as an impetus for the sudden return to in person hearings, it has failed to set forth any basis for not defaulting to the process of holding Master Calendar hearings telephonically nor any substantive reasoning to support the policy that an attorney's in-person appearance at a Master Calendar hearing is vital to the judicial process. Indeed, prior to the Dec. 21, 2021, EOIR Newark standing order to conduct Master Calendar hearings by Webex, all Master Calendar hearings were handled successfully via telephone, with the respondent's appearance waived. If bandwidth upgrades are a concern, EOIR Newark should temporarily reinstate that practice and hold Master Calendar hearings with immigration attorneys via telephone until Webex bandwidth issues are rectified.

Once again, the NJSBA urges this court to permit hearings for all Master Calendar hearings to be held telephonically or via Webex, without the need for a motion. When we learn and implement a better process, we should embrace that spirit of innovation and creative problem solving rather than revert to antiquated processes. We look forward to working with EOIR Newark to find solutions that allow the court to efficiently accomplish its work and best serve the litigants who appear before it.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jalawrence".

Jeralyn L. Lawrence, Esq.
President, New Jersey State Bar Association

Cc: Hon. David Cheng, Assistant Chief Immigration Judge, EOIR Newark (sent via email to david.cheng@dhs.gov)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AMERICAN IMMIGRATION
LAWYERS ASSOCIATION, NEW
JERSEY CHAPTER, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW, et al.,

Defendants.

HON. JOHN MICHAEL VASQUEZ

Civil Action No. 20-CV-9748 (JMV)(JBC)

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE**

WHEREAS, Plaintiffs commenced this action on July 31, 2020, alleging violations of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment, seeking an order enjoining Defendants from compelling attorneys to appear at the Newark Immigration Court for in-person proceedings, and seeking an order compelling Defendants to provide attorneys with an option for hearings at the Newark Immigration Court by remote videoconference; and

WHEREAS, on August 7, 2020, Plaintiffs filed a motion for preliminary injunction seeking an order enjoining compelled in-person proceedings at the Newark Immigration Court; and

WHEREAS, Defendants have denied Plaintiffs' allegations and opposed Plaintiffs' motion for preliminary injunction; and

WHEREAS, on September 3, 2020, the Court held a hearing and issued an order directing Defendants to provide additional information to allow the Court to

decide Plaintiffs' motion for preliminary injunction; and

WHEREAS, while this action was pending, Defendant Executive Office for Immigration Review ("EOIR") Director James McHenry authorized EOIR's Office of Information Technology and the Office of the Chief Immigration Judge to implement an option for video conferencing at the Newark Immigration Court, specifically Cisco WebEx ("WebEx"), in addition to the already available options for in-person, telephonic, and video teleconference ("VTC") hearings, that would allow users, including attorneys, to connect remotely in order to participate in immigration court proceedings; and

WHEREAS, beginning on September 29, 2020, EOIR commenced the use of the WebEx platform to conduct VTC hearings at the Newark Immigration Court, and has continued its use of the WebEx platform since then; and

WHEREAS, the WebEx platform allows Plaintiffs and their clients, as well as other parties to immigration court proceedings and their attorneys or representatives, to all appear remotely via video technology for proceedings conducted before the Newark Immigration Court, thus permitting all persons involved in such proceedings to appear from a separate location and connect to the immigration court proceedings remotely, provided that each individual has his or her own desktop, laptop, tablet, or smartphone with an internet connection; and

WHEREAS, on October 16, 2020, the Court issued an Opinion and Order denying Plaintiffs' motion for preliminary injunction without prejudice, and denying Defendants' motion to dismiss this matter as moot, but providing that "if,

in Plaintiffs' view, circumstances arise that necessitate relief from this Court, Plaintiffs will be free to seek whatever relief that they deem to be appropriate at the time"; and

WHEREAS, on November 6, 2020, Director McHenry issued Policy Memorandum ("PM") 21-03 which provides, *inter alia*, that "EOIR has begun to increase its ability to conduct hearings by VTC through the use of the WebEx platform which is compatible with EOIR's existing VTC platform and allows a respondent or a representative for either party to appear from a remote location outside an immigration court", *see* PM 21-03 at p. 4; and

WHEREAS, PM 21-03 further provides that, "[o]nce WebEx compatibility is available at an immigration court, for the duration of the declared national emergency related to COVID-19, either party may file a motion for the alien or the representative for either party to appear at a hearing by VTC through WebEx rather than in person", *see id.*; and

WHEREAS, PM 21-03 further provides that motions to appear at a hearing by VTC through WebEx for any party or party attorney/representative, like motions for telephone appearances, are "subject to the discretion of the immigration judge, any applicable law and any applicable requirements of the ICPM [Immigration Court Practice Manual], a standing order, or a local operating procedure", *see id.*; and

WHEREAS, PM 21-03 further provides that the availability of appearances by VTC, including through the WebEx platform, "may also be subject

to nationwide system capacity restrictions or other technological limitations”, *see id.* at p.4, fn.8; and

WHEREAS, PM 21-03 further provides that immigration judges are not bound or required to rule in any particular way on a motion for a VTC appearance, including through the WebEx platform, “though the record should reflect a clear decision on any such motion filed,” *see id.* at p. 4; and

WHEREAS, to Plaintiffs’ knowledge, since the implementation of the WebEx platform at the Newark Immigration Court, immigration judges have been regularly granting motions for Plaintiff Attorneys and their clients to appear remotely and from separate locations for immigration court proceedings conducted through WebEx; and

NOW, THEREFORE, in consideration of the mutual representations made herein, including those made in the above recitals, it is hereby stipulated by and between Plaintiffs and Defendants, by and through their respective attorneys, as follows:

1. All of Plaintiffs’ claims against the Defendants are dismissed, without prejudice, with each party bearing its own costs, expenses and fees, including attorneys’ fees, incurred up to the date by which counsel for the parties sign this stipulation (hereafter, “Effective Date”). Plaintiffs reserve the right to seek costs, expenses and fees in connection with any subsequent litigation. In the event Plaintiffs seek relief from the Court in a subsequent action authorized by the October 16, 2020 Opinion and Order, they agree that, in any subsequent action,

they may only seek costs, expenses and fees, including attorneys' fees, incurred after the Effective Date of this stipulation of dismissal and agree that they may not seek, and waive any claim to, any costs, expenses and fees, including attorneys' fees, incurred prior to the Effective Date of this stipulation of dismissal; and

2. Nothing in this stipulation is intended to alter, supplement or modify in any respect EOIR's PM 21-03 or the Court's October 16, 2020 Opinion and Order, nor to limit Plaintiffs' remedies in any subsequent litigation, except as described above in Paragraph 1.

Dated: February __, 2021

GIBBONS P.C.

By:

LAWRENCE S. LUSTBERG, ESQ.
MICHAEL R. NOVECK, ESQ.
Attorneys for Plaintiffs

Dated: February 16, 2021

RACHAEL A. HONIG
Acting United States Attorney
for the District of New Jersey

By:

Ben Kuruvilla

BEN KURUVILLA
Assistant United States Attorney
Attorneys for Defendants

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEWARK, NEW JERSEY**

**STANDING ORDER REGARDING TELEPHONIC APPEARANCES
FOR MASTER AND MERITS HEARING**

Due to the COVID-19 pandemic and in the interest of public health and safety, the Newark Immigration Court hereby issues the following standing Order regarding telephonic appearances for master and merits hearings. The following Order regarding telephonic appearances is effective immediately for all scheduled hearings, and shall remain in effect until further Order of the Court.

A. MASTER HEARINGS

1. All master calendar hearings for represented respondents will be conducted telephonically without the need for a motion for telephonic appearance to be filed in advance. A respondent is considered represented once counsel or an accredited representative files a Form EOIR-28 with the Court before the date of the scheduled hearing, in accordance with 8 C.F.R. § 1292.4(a).
2. The Court hereby waives the presence of all represented respondents for master hearings in accordance with 8 C.F.R. § 1003.25(a).
3. For any master hearings on the Court's juvenile docket, the Court waives the presence of any respondent who is in the care and custody of the Office of Refugee Resettlement (ORR) or who has been approved for participation in the Unaccompanied Refugee Minor (URM) program.
4. Counsel or accredited representatives for respondents are to file written pleadings at least fifteen (15) calendar days in advance of the telephonic master hearing. For an example of acceptable written pleadings, see the Immigration Court Practice Manual, Appendix L (April 10, 2020)
5. Unless otherwise ordered by the individual Immigration Judge, all filings, including but not limited to applications, pretrial motions, briefs, and supplemental documents, must be filed at least fifteen (15) calendar days in advance of the telephonic master hearing. The Court will not accept any filings on the date of the telephonic master hearing. The parties are strongly encouraged to submit filings by way of U.S. mail, overnight delivery service, or e-mail, in accordance with the Court's ***Standing Order Regarding Documents Filed Via Electronic Mail***.

B. MERITS HEARINGS

1. The individual Immigration Judge, in his or her discretion, and upon consent of the respondent, may conduct a telephonic merits hearing in accordance with 8 C.F.R. § 1003.25(c). For any merits hearing, a timely motion for telephonic appearance is required in advance of the hearing and must include a sworn affidavit or declaration from the respondent indicating that he or she has been advised of the right to proceed in person and waives that right. *See* 8 C.F.R. § 1003.25(c).
2. The parties are strongly encouraged to confer and reach stipulations as to facts and/or legal issues in advance of all hearings. *See* 8 C.F.R. § 1003.21; Immigration Court Practice Manual, Chap. 4.18; *Matter of Yewondwosen*, 21 I&N Dec. 1025 (BIA 1997).
3. Any party who wishes to appear telephonically does so with the understanding that any paper filings to be considered by the Court must be in the official Record of Proceedings (ROP) at the time the hearing is scheduled to be held. No additional filings will be accepted at the hearing if counsel does not appear in person, and the decision of the Court will be based on the documents in the ROP at the close of the hearing.
4. Unless otherwise ordered by the individual Immigration Judge, all filings, including but not limited to applications, pretrial motions, briefs, and supplemental documents, must be filed at least fifteen (15) calendar days in advance of the telephonic merits hearing. The parties are strongly encouraged to submit filings by way of U.S. mail, overnight delivery service, or e-mail, in accordance with the Court's ***Standing Order Regarding Documents Filed Via Electronic Mail***.
5. Unless otherwise ordered by the individual Immigration Judge, the respondent must file any changes, corrections or amendments to all pending applications and/or to his or her declaration(s) at least fifteen (15) calendar days in advance of the telephonic merits hearing. The respondent is strongly encouraged to submit such filings by way of U.S. mail, overnight delivery service, or e-mail, in accordance with the Court's ***Standing Order Regarding Documents Filed Via Electronic Mail***.
6. Any party appearing telephonically waives the right to object to the admissibility of any documents offered in Court on the sole basis that they are unable to examine the document.
7. In cases where the parties have agreed to request that the Court issue a decision solely on the sworn application(s) and documentary evidence, the parties must file a **Joint or Unopposed Motion to Adjudicate Application Without Evidentiary Hearing on the Merits**. The **Joint or Unopposed Motion to Adjudicate Application Without Evidentiary Hearing on the Merits** must include at a minimum the following:

- a. A sworn affidavit or declaration from the respondent indicating:
- 1) that the respondent has been advised of the right to proceed in person and waives that right;
 - 2) that any application or request for relief on which the respondent is proceeding and/or affidavit or supporting declaration has been read to the respondent in a language the respondent speaks and understands;
 - 3) that any application or request for relief and all documentary evidence is true, correct and complete to the best of the respondent's knowledge; and
 - 4) that any other pending relief applications are withdrawn. *See* 8 C.F.R. § 1003.25(c).
- b. A statement from the parties regarding their respective positions on appeal;
- c. A statement from DHS counsel regarding the status of requisite identity, law enforcement, or security investigations or examinations, and, if completed, the applicable expiration date in accordance with 8 C.F.R. § 1003.47(a); and
- d. If the respondent is applying for voluntary departure under INA §§ 240B(a) or (b), his or her counsel or accredited representative must clearly indicate in the Motion that he or she has explained to the respondent the conditions that attach to voluntary departure as set forth in 8 C.F.R. § 1240.26 and *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). The Motion must also include a sworn affidavit or declaration from the respondent that he or she understands the conditions that attach to voluntary departure, and that he or she accepts such conditions should voluntary departure be granted in the exercise of the Court's decision. *See id.* For the purposes of post-conclusion voluntary departure during the period this Standing Order is in effect, the parties should assume the Court would set the minimum bond of \$500.00 and grant the maximum period of sixty (60) days to depart.

GENERAL PROVISIONS

1. Attorneys are encouraged to be succinct and to file only such documents that are relevant and probative. Attorneys are also encouraged to limit the filing of duplicative country condition reports and to file only such reports that are necessary and reasonable.
2. To ensure the quality of the record, the parties appearing telephonically shall be in a quiet private location. The call may never be placed on hold. The use of cellular phones or phones in public places are prohibited. Failure to respond when the case is called may result in the conclusion that counsel has failed to appear.

3. If the Court is unable to reach Counsel by telephone for the hearing, or counsel fails to respond when the matter is called, the Court may treat the failure to respond as failure to appear by counsel or accredited representative. Counsel or accredited representative will thereafter be required to appear in person at any rescheduled hearing. Scheduling simultaneous appearances in multiple locations does not excuse a failure to appear.

4. All parties appearing telephonically before the Court must further comply with the attached instructions for making telephonic appearances. *See* Appendix A.

An Immigration Judge may, in his or her discretion, halt any telephonic hearing, and the parties may be required to attend a future in-person hearing on a date to be determined. Further, nothing in this Standing Order should be interpreted to supplant an Immigration Judge's authority to manage his or her cases.

IT IS SO ORDERED.

DATE: June 19, 2020

DAVID CHENG Digitally signed by DAVID
CHENG
Date: 2020.06.19 10:37:29 -04'00'

David Cheng
Assistant Chief Immigration Judge

Appendix A

Instructions for Telephonic Appearances before the Newark Immigration Court

Making Your Telephonic Appearance

You must call into the hearing at least 15 minutes before the hearing time.

In order to access the OpenVoice telephonic system, dial **1-888-585-9008**.

After dialing the main number, you will be prompted to enter the conference room number. To determine the appropriate conference room number for the Immigration Judge you are telephonically appearing before, please refer to the table below:

ACIJ David Cheng	413-028-400
Judge Alberto Riefkohl	995-524-125
Judge Arya Ranasinghe	804-581-973
Judge Ramin Rastegar	976-981-466
Judge Shana Chen	792-017-922
Judge Shifra Rubin	332-397-526
Judge Tamar Wilson	407-314-087
Judge Leo Finston	752-644-025
Judge Laura Pierro	810-713-588

When prompted, please enter the security code. The security code will be provided by the Court to the attorney of record or accredited representative in advance of the hearing. All attorneys and accredited representatives must ensure their contact information with the court is updated and accurate.

After entering the security code, you will be joined into the telephonic hearing and you will be asked to state your name. Please state your full name as it appears on your E-28 and the last three digits of the respondent's A# for whom you are telephonically appearing.

After check-in, **please mute your phone** and wait until your case is called. Your case will be called in the order in which the Court deems appropriate.

To mute and unmute your participant line, use the mute feature on your phone or please press * 2.

Once you enter the hearing, do not place the call on hold as it will be disruptive to the hearings.

If Court has commenced once you enter the hearing, do not interrupt. Your name will be announced upon entering the hearing and late appearances will be disruptive to hearings already commenced.

Once your matter is concluded, please disconnect from the line.

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW UNITED STATES IMMIGRATION
COURT NEWARK, NEW JERSEY**

**SUPERCEDING STANDING ORDER REGARDING
APPEARANCES FOR MASTER AND MERITS HEARING**

Due to the COVID-19 pandemic and in the interest of public health and safety, the Newark Immigration Court hereby issues the following superseding standing Order regarding appearances for master and merits hearings. This Order is effective **January 10, 2022** for all scheduled hearings, and shall remain in effect until further notice, and further rescinds Standing Order of June 19, 2020.

A. MASTER HEARINGS

1. All master calendar hearings for represented respondents shall be conducted via Webex without the need for a motion to be filed in advance. A respondent is considered represented once counsel or an accredited representative files a Form EOIR-28 with the Court before the date of the scheduled hearing, in accordance with 8 C.F.R. § 1292.4(a).
2. The Court hereby waives the presence of all represented respondents for master hearings in accordance with 8 C.F.R. § 1003.25(a).

B. MERITS HEARINGS

1. All merits hearings for represented respondents will be conducted via Webex without the need for a motion for Webex to be filed in advance. ALL PARTIES MUST BE LOGGED INTO WEBEX 15 MINUTES PRIOR TO SCHEDULED HEARING TIME.

1. Unless otherwise ordered by the individual Immigration Judge, all filings, including but not limited to applications, pretrial motions, briefs, and supplemental documents, must be filed at least fifteen (15) calendar days in advance of the merits hearing. The parties are strongly encouraged to submit filings by way of U.S. mail, overnight delivery service, or ECAS.
2. Unless otherwise ordered by the individual Immigration Judge, the respondent must file any changes, corrections or amendments to all pending applications and/or their declaration(s) at least fifteen (15) calendar days in advance of the merits hearing. The respondent is strongly encouraged to submit such filings by way of U.S. mail, overnight delivery service, or ECAS.

GENERAL PROVISIONS

An Immigration Judge may in their discretion, halt any video Webex hearing, and the parties may be required to attend a future in-person hearing on a date to be determined. Further, nothing in this Standing Order should be interpreted to supersede an Immigration Judge's authority to manage their cases and exercise their judicial independence as appropriate.

WebEx User Name	URL: Link for Attorneys	Phone Dial in Number	ACCESS CODE
ACIJ.CHENG	*****eoir.webex.com/meet/ACIJ.CHENG		

DAVID CHENG
Digitally signed by DAVID CHENG
Date: 2021.12.28 08:15:19 -0500



New Jersey Chapter
American Immigration Lawyers Association

September 23, 2022

VIA ELECTRONIC MAIL

Director David L. Neal
Executive Office for Immigration Review
david.neal@usdoj.gov

cc: Paul Friedman, Court Administrator
EOIR, Newark Immigration Court
paul.friedman@usdoj.gov

Hon. David Cheng
Assistant Chief Immigration Judge
david.cheng@usdoj.gov

Chief Counsel Jane Minichiello
Newark Office of Chief Counsel
jane.h.minichiello@ice.dhs.gov

RE: Request for Continuation of Internet Based Hearings at EOIR Newark

Dear Director Neal,

Now Is Not the Time To Resume in Person Hearings

We, the New Jersey chapter of American Immigration Lawyers Association, (AILA NJ) write you as officers of the court to urge you against returning to in person hearings as the default in the Newark Immigration Court. AILA NJ firmly believes the current framework of internet based hearings has been beneficial to the court, prosecutors, the private bar, and respondents. Internet based hearings have been the norm for well over a year, and have protected all of us from untold numbers of COVID-19 infections. At present, EOIR Newark is scheduled to resume in-person hearings on October 3, 2022.

The Rather Confusing New Policy Change

The EOIR Committee Chair for AILA NJ announced¹ the new policy by email dated August 30, 2022. It was augmented on August 31, and then again September 8, 2022. These email segments below are the entirety² of the new policy to the best of AILA NJ's knowledge:

From August 30, 2022 Email from EOIR Committee Chair:

The standing order for webex hearings is revoked and in person appearances required as of 10/3/22! This of course is subject to exceptions and variations as follows:

1. Webex hearings will continue for all cases heard by Judge Ranasinghe and Judge Jeannopolous
2. Judge Pierro and Judge Chen will have in person master calendars and webex merits hearings.
3. Judges Rubin, Rastegar, Riefkohl, Finston, Wilson and Lane will have in person hearings master and merits.
4. Represented respondents' appearances are waived for master calendars like they are now on webex masters, but not for merits hearings. This includes cases where an attorney is already on record or making his/her first appearance. Atty shows up, the respondent does not have to appear. If you are hired at the last minute and can't make it, the respondent has to appear.
5. This does not apply to Elizabeth hearings as the facility does not admit visitors, all remote hearings.
6. If it is Judge Shirole or Pope and the hearing notice is for Newark, (DD Case), in person at Newark. Any doubts about Shirole call Elizabeth. Pope will all be in person.
7. You can still file a motion for a webex hearing for good cause but it MUST be filed 15 days or before. If it is not granted you have to appear.

I am told the reason for this is the webex bandwidth is incapable of handling the level of internet traffic that has developed. The system is crashing constantly. More and more attorneys are using it with technical issues constantly. So the "good cause" issue will be a major consideration in granting or denying motions for webex calendars.

¹ To date, ACIJ Cheng has not issued a standing order, notice to the bar, or any other written statement regarding a policy change.

² Slight edits not affecting the content or meaning were made for readability.

From August 31, 2022 Email from EOIR Committee Chair:

1. DHS has to appear in person and they will be required to file motions for webex.

2. I failed to include ACIJ Cheng and IJ Mullican among the list of judges where in person appearances are required.

From September 8, 2022 Email from EOIR Committee Chair:

ACIJ Cheng has rephrased the "good cause" language requirement for a webex motion. He chooses to phrase it as "there has to be a reason".

History of the COVID-19 Pandemic in New Jersey

On March 9, 2020, Governor Murphy declared a state of emergency due to the outbreaks of COVID-19 in the state of New Jersey. On March 11, 2020, the World Health Organization made the assessment that COVID-19 can be characterized as a pandemic. There was an outbreak of COVID-19 at EOIR Newark in March 2020, leading to several infections. Unfortunately, one noted member of the private bar died in June 2020 and one Government attorney was hospitalized for months. Several other employees at the federal building also died of COVID-19.

Of the over 1,000,000 Americans who have died of COVID-19, approximately 35,000 of them were New Jerseyans. We take the pandemic seriously. Despite our high vaccination rates, many of us still mask indoors. Many AILA NJ attorneys still do not see clients in person or have greatly reduced the amount of in person time with clients.

Court operations in New Jersey continue to be overwhelmingly internet based. State municipal and Superior Court matters are still almost all held via phone and video conference.³ The United States District Court for the District of New Jersey extended their standing order on August 8, 2022 regarding virtual hearings for criminal proceedings.⁴ Hon. Freda L. Wolfson, U.S. Chief District Judge, noted “of August 4, 2022, 14 of the State’s 21 counties have ‘high’ community risk levels, up from the 10 counties at high risk as of the entry of this Court’s last extension of Standing Order 2021-03, and those 14 counties currently at high risk include Camden and Essex, the locations of two of the Court’s three vicinages...”⁵ EOIR Newark is located in Essex county.

In short, all court operations in New Jersey are still almost entirely conducted remotely or internet based, not in-person, and are conducted via phone, teleconference, or video hearings. The U.S. Department of Health & Human Services also maintains we are still in the midst of the COVID-19 National Public Health Emergency, and recently renewed their determination on July 15, 2022.⁶ The proposed EOIR Newark policy is an outlier.

³ https://www.njcourts.gov/public/covid19_one-stop.html#court_hearings, accessed September 20, 2022; <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=wQ2>, accessed September 22, 2022.

⁴ <https://www.njd.uscourts.gov/sites/njd/files/CARESActSOSixthExt.ofSO2021-03.pdf>, accessed September 20, 2022.

⁵ *Id.* at 2.

⁶ <https://aspr.hhs.gov/legal/PHE/Pages/covid19-15jul2022.aspx>, accessed on September 19, 2022.

The Proposed Policy Conflicts with EOIR Promises Made in Federal Court

New Jersey immigration attorneys and their New Jersey chapter of American Immigration Lawyers Association, (AILA NJ), filed suit against EOIR Newark on July 31, 2020 in District Court of New Jersey, Newark Vicinage, seeking protection from the EOIR's order compelling attorneys to appear in person during the pandemic. Due to this suit, ACIJ Cheng of the New Jersey Immigration Court, and on behalf of EOIR, committed to providing attorneys with remote videoconferencing for the duration of the pandemic and to troubleshoot and address any glitches or interruptions in its use. As part of the parties stipulation for dismissal, the parties agreed:

WHEREAS, PM 21-03 further provides that, “[o]nce WebEx compatibility is available at an immigration court, for the duration of the declared national emergency related to COVID-19, either party may file a motion for the alien or the representative for either party to appear at a hearing by VTC through WebEx rather than in person”, *see id.*; and

WHEREAS, PM 21-03 further provides that motions to appear at a hearing by VTC through WebEx for any party or party attorney/representative, like motions for telephone appearances, are “subject to the discretion of the immigration judge, any applicable law and any applicable requirements of the ICPM [Immigration Court Practice Manual], a standing order, or a local operating procedure”, *see* PM 21-03 at p. 4.

See Stipulation for Dismissal, Docket 44, dated February 16, 2021 (Docket No. 2:20-cv-09748-JMV-JBC) (emphasis added). AILA-New Jersey urges this honorable court to stand by its stipulation that WebEx internet based hearings will be available as per the Standing Order and PM 21-03. A change in the standard for adjudicating a motion to appear via WebEx is contrary to the Immigration Court Manual and PM 21-03 as well as the aforementioned stipulation for dismissal.

The Proposed Policy Conflicts with Current EOIR Guidance

Acknowledging the benefits of internet-based hearings, you issued Director's Memorandum 22-07 on August 11, 2022.⁷ The memo indicates “all immigration courts have the capacity to hold such hearings...,” and “internet-based hearings have proven a valuable safety measure during the pandemic, as immigration judges can conduct such hearings without requiring groups of people to congregate in a courtroom...” The memo further states “EOIR anticipates that, going forward, internet-based hearings will remain essential to EOIR’s operations.”

AILA NJ does not understand how this Memorandum from August 11 comports with the proposed policy announced by EOIR Newark only 19 days later on August 30, 2022. If there are bandwidth issues, we will happily work with EOIR to provide solutions to those issues. The first solution should not be to act contrary to the resolution of the federal lawsuit and EOIR internal guidance.

⁷ <https://www.justice.gov/eoir/page/file/1525691/download>, accessed September 22, 2022.

AILA NJ Attorneys and Respondents Rely on Internet Based Hearings as the Default

AILA NJ attorneys rely on internet based hearings to manage their practices, caseloads and clients' schedules. When asked if they agreed with the proposed policy regarding in-person hearings, 86% of AILA NJ attorneys said no. When asked if they wanted virtual hearings as the default form of proceeding, 98.7% of AILA NJ attorneys said yes. This polling consisted of over 150 members, representing a majority of the removal defense practitioners who regularly appear before EOIR Newark. In short, we ask that internet based hearings continue to remain the default. The new policy would upend these established practices that assist attorneys, their staff and their clients in presenting their cases in a timely manner.

In-Person Appearance Requirement Unnecessarily Burdens Respondents

Respondents attend proceedings when they are represented. For master hearings, waiving the in-person requirement allows for a more efficient and effective flow between courtrooms for attorneys as they need only coordinate themselves to appear on time, which creates additional time for the IJ to move through her docket efficiently because no time is wasted waiting for Respondents to park, get through a physical line, take an elevator, or wait for an interpreter. Respondents, typically, have parental obligations requiring them to ensure their children attend school or that they are picked up from school. Appearing in-person would impose an unnecessary requirement on the Respondent where he or she is represented and their representative appears in court on their behalf.

AFGE Local 511 Rely on Internet Based Hearings

Moreover, according to the Union representing the government attorneys, AFGE Local 511, opposing counsel have come to rely on internet based hearings to conduct the majority (if not the entirety) of their caseloads. Many of these government attorneys work remotely so as to reduce their risk of severe illness from COVID-19 by avoiding working in a public courtroom, thereby exposing themselves to potentially over a hundred people daily. They have also developed procedures and practices to ensure case preparation and litigation are conducted efficiently and effectively. OPLA offices are understaffed, and virtual courtrooms enable telework, which in turn permits them to better manage their out of court duties, which on the whole consist of efforts to reduce EOIR's dockets by thousands of cases and facilitating the efficiency of the remaining proceedings that go forward. It makes no sense to hinder their ability to assist EOIR to resolve cases. To upend these reliances with what amounts to no formal written notice without more than 30 days to rearrange their schedules, commutes and other obligations is to impose an undue burden on our adversaries.

Additionally, government attorneys who are in a high risk health category or have irreconcilable home issues are currently spending copious amounts of time writing motions for telephonic appearance, which on a master calendar day can consist of up to 50 motions for telephonic appearance. To date, none have heard responses from such motions relating to court proceedings for the week of October 3rd. Such time would clearly be better placed reviewing cases for substantive completion, rather than focused on procedural motions to appear virtually. Placing even more burdens on a system that is already hampered with problems is counter-effective.

AILA NJ Requests a Standing Order or Notice to the Bar

This proposed policy is unnecessarily complicated and confusing. There is no clear guidance as to when remote internet based hearings are available. One is left to assume that it is based on an IJ's particular preference, not bandwidth issues as claimed. Surely, that is not the case. And, there is no clear appealable standard for adjudicating a denial of a request for internet based hearings. A good cause standard has existed (by statute and case law) because it is well-established and reviewable. "There must be a reason" is not a sufficient standard for adjudicating a motion for internet based hearing.

Local operating procedures—especially major and complicated ones such as this—must appropriately be in the form of a Standing Order, Notice to the Bar, website update, or other written statement.⁸ We have nothing in writing from our ACIJ. Rather, the immigration bar has merely three emails from the AILA NJ EOIR Committee Chair. Pro bono attorneys who are not part of AILA might very well be unaware of the policy change. Neither would attorneys who primarily practice in New York but have some cases in New Jersey. Notice should come from EOIR Newark, not simply emails cobbled together and corrected by our EOIR Committee Chair.

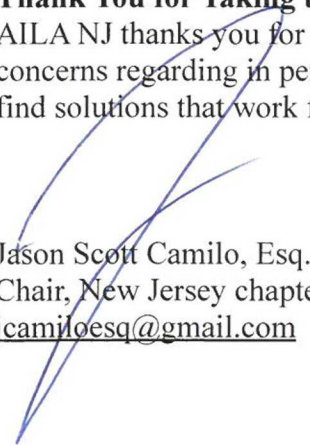
AILA NJ Is Happy to Work with EOIR to Solve Any Bandwidth Issues

If bandwidth issues are the impediment to internet based hearings, AILA NJ is happy to help EOIR Newark solve these problems together. Some immigration courts use Open Voice. Some use regular conference lines. Masters could be staggered with call times by A number (i.e., 0-4 call at 8:30am, 5-9 at 10:00am). Attorneys could continue to use Webex but not use the video function to conserve bandwidth.

All of these are reasonable solutions that should not be hard to implement and are in use across the country at immigration courts. EOIR Elizabeth, just next door, is still entirely remote. Attorneys are not even allowed in the building to file documents. EOIR Newark and Elizabeth currently share the same ACIJ, so implementation of any new procedures not in place should be easier to manage.

Thank You for Taking this Matter Seriously

AILA NJ thanks you for taking this matter under serious consideration. We hope that our concerns regarding in person appearances are heard. We hope to work together with EOIR to find solutions that work for all officers of the court, as well as the respondents we serve.



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⁸ 8 C.F.R. § 1003.40(c), stating "An immigration Court having administrative control over Records of Proceedings may establish local operating procedures, provided that... the Chief Immigration Judge has approved the proposed operating procedure(s) in writing."