U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division

Management of Immigration Cases and Appeals by the Executive Office for Immigration Review

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EXECUTIVE DIGEST

INTRODUCTION

The Office of the Inspector General (OIG) conducted a review to examine the Department of Justice's (Department) Executive Office for Immigration Review (EOIR) processing and management of immigration cases and appeals involving foreign-born individuals (aliens) charged with violating immigration laws. Among other duties, EOIR courts are responsible for determining whether aliens charged by the Department of Homeland Security (DHS) with immigration violations should be ordered removed from the United States or be granted relief from removal, which would allow them to remain in this country.[1]

RESULTS IN BRIEF

The OIG found that immigration court performance reports are incomplete and overstate the actual accomplishments of these courts. These flaws in EOIR's performance reporting preclude the Department from accurately assessing the courts' progress in processing immigration cases or identifying needed improvements.

For example, administrative events such as changes of venue and transfers are reported as completions even though the immigration courts have made no decisions on whether to remove aliens from the United States. As a result, a case may be "completed" multiple times. In our sample of 1,785 closed cases, 484 administrative events were counted as completions by EOIR. Reporting these administrative actions as completions overstates the accomplishments of the immigration courts.[2] Similarly, those same administrative events result in a case

[1] Removal is the expulsion of a person from the United States who is not a U.S. citizen and is more commonly referred to as "deportation." In formal proceedings, "deportation" was changed to "removal" by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996.* The Department of Homeland Security alleges an alien is removable when the alien does not have legal grounds to be in the United States because, for example, the alien stayed longer than the alien's visa allowed or committed a crime while in the United States.

[2] EOIR stated that it measures completions in this way so that it has a precise measurement of an individual court's work. While there may be legitimate management decisions for tracking the completion rates for each individual court, we believe that the way EOIR externally reports these actions is confusing because it appears to be reporting on the time it takes to substantively complete cases. Moreover, a court's decision to transfer a case to another court or another venue for handling does nothing *(Cont.)*

being reported as a "receipt" when the case is opened at the receiving court.[3] As a result, the same case may be reported as a "receipt" multiple times, thereby overstating the total number of cases opened by the immigration courts during a particular period.[4]

Further, for those cases where EOIR has put in place a timeliness goal for handling a case, EOIR does not report the total time it takes to complete the case. Instead, EOIR tracks case processing time by court. As a result, a case with a timeliness goal of 60 days that spent 50 days at one court and was then transferred to another court, where it spent another 50 days, would be reported by EOIR as two cases that were each completed within the 60-day timeliness goal. In actuality, there was only one case, and that case took EOIR 100 days to reach a decision on whether the alien should be removed, thereby exceeding the 60-day goal. This practice makes it appear that more cases meet the completion goals than actually do.

Additionally, in January 2010, EOIR abandoned completion goals for cases involving non-detained aliens who do not file asylum applications, which make up about 46 percent of the courts' completions.[5] EOIR made this decision to prioritize and focus on the completion of detained cases, in which aliens are deprived of their liberty and housed at taxpayer expense. While the OIG recognizes the importance of the timely completion of cases involving detained aliens, EOIR also should have goals for the timely processing of non-detained cases.

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to advance the case towards completion. Yet, EOIR's statistical system rewards the transferring court by giving it credit for closing the case, which we do not believe provides an accurate measure of "completion" rates. Further, we believe there is an important management need for EOIR to track the time it takes to complete a single case from start to finish.

[3] "Receipts" are defined by EOIR as the total number of proceedings, bond redeterminations, and motions to reopen or reconsider received by the immigration courts during a reporting period. Our review included only proceedings receipts.

[4] Because cases are often completed in a fiscal year different from the one in which they are "received," it is not possible to determine how the figures impact the fiscal year data produced by EOIR.

[5] This 46 percent is based on FY 2010 proceedings completion data from the EOIR Statistical Year Book. The balance of the courts' proceedings are detained proceedings, asylum proceedings, and credible fear determination hearings (hearings held to review DHS determinations that aliens' fears of persecution or torture if they are removed were not credible), which have goals.

Despite overstating case receipts and completions, EOIR's immigration court data still showed that it was not able to process the volume of work. From FY 2006 through FY 2010, the overall efficiency of the courts did not improve even though there was an increase in the number of judges. In 4 of those 5 years, the number of proceedings received was greater than the number of proceedings completed. As a result, the number of pending cases increased.

Our analysis of a sample of closed cases showed that cases involving non-detained aliens and those with applications for relief from removal can take long periods to complete. This results in crowded court calendars and delayed processing of new cases. For example, cases for non-detained aliens took on average 17½ months to adjudicate, with some cases taking more than 5 years to complete.

In addition to the volume of new cases, the number and length of continuances immigration judges granted was a significant contributing factor to case processing times. In the 1,785 closed cases we examined, 953 cases (53 percent) had one or more continuances. Each of these cases averaged four continuances. The average amount of time granted for each continuance was 92 days (about 3 months), which results in an average of 368 days for continuances per case.

In contrast, the EOIR's Board of Immigration Appeals (BIA) completed more appeals of immigration court decisions than it received from FY 2006 through FY 2010. Appeals involving non-detained aliens, however, still took long periods to complete. In our sample, the BIA averaged more than 16 months to render decisions on cases involving non-detained aliens, as compared to 3½ months for cases involving detained aliens. However, EOIR's performance reporting does not reflect the actual length of time to review and decide those appeals because EOIR does not count processing time for one- and three-member reviews from the date the appeal was filed. Rather, EOIR begins the counting process once certain work is completed by the BIA and/or its staff. As a result, EOIR's performance reporting data underreports actual processing time, which undermines EOIR's ability to identify appeal processing problems and take corrective actions.

RECOMMENDATIONS

In this report, we make nine recommendations to help EOIR improve its case processing and provide accurate and complete information on case completions. They include for EOIR to collect immigration court data that distinguishes decisions on the removal of

aliens from other case activities, that reflects actual case length even when more than one court is involved, and that eliminates case exemptions from completion goals. In addition, EOIR should develop immigration court case completion goals for non-detained cases in which an asylum application has not been filed. To reduce lengthy delays, EOIR should analyze reasons for continuances and develop guidance that provides immigration judges with standards and guidelines for granting continuances. To better allocate its resources, EOIR should develop a process for tracking the time that immigration judges spend on different types of cases and work activities; collect and track data on its use of staffing details of judges; and develop an objective staffing model to assist in determining staffing requirements and the allocation of positions among immigration courts. Lastly, EOIR should seek additional resources, or reallocate existing resources, in order for BIA to more timely process appeals for non-detained aliens and improve the collection, tracking, and reporting of appeal statistics to accurately reflect actual appeal processing times.

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BACKGROUND

The Office of the Inspector General (OIG) conducted a review to examine the Department of Justice's (Department) Executive Office for Immigration Review (EOIR) processing and management of immigration cases and appeals involving foreign-born individuals (aliens) charged with violating immigration laws.

EOIR, headed by a Director who reports directly to the Deputy Attorney General, has three primary adjudicating components:

- Office of the Chief Immigration Judge, which includes the immigration courts that conduct hearings in response to cases filed by the Department of Homeland Security (DHS) to determine whether aliens should be ordered removed from the United States or be granted relief from removal, which would allow them to remain in this country;

- Board of Immigration Appeals (BIA), which decides appeals of immigration court decisions, among other matters; and

- Office of the Chief Administrative Hearing Officer, which adjudicates cases involving employment of undocumented workers, verification of employment eligibility, immigration-related document fraud, and immigration-related employment discrimination.[6]

EOIR's fiscal year (FY) 2012 budget was $302.3 million, with an authorized staffing level of 1,582 positions.

Office of the Chief Immigration Judge and the Immigration Courts

The Office of the Chief Immigration Judge establishes overall program direction, policies, procedures, and priorities for judges conducting hearings on alien removals and other matters in immigration courts.

The Office of the Chief Immigration Judge oversees 59 immigration courts with approximately 120 additional hearing locations, including

[6] Our review did not include the Office of the Chief Administrative Hearing Officer.

detention centers and correctional facilities.[7] As of the beginning of FY 2011, the courts were staffed by 238 immigration judges (284 were authorized) and 553 support personnel (709 were authorized).[8] Immigration judges are attorneys appointed by the Attorney General to serve as independent arbiters of immigration issues.[9] The judges are responsible primarily for hearing cases to decide whether aliens should be removed from the United States.[10]

According to EOIR's data, in FY 2010, the courts received a total of 325,326 proceedings and completed a total of 287,207 proceedings.[11] EOIR told the OIG that it anticipates that the courts' caseloads, and therefore their volume of proceedings, will continue to increase in the future as a result of expanded DHS enforcement actions.

Removal Proceedings

Role of the Department of Homeland Security

Through its law enforcement activities, the DHS locates aliens it determines are in the United States illegally and thus may be removable. The DHS serves the alien with a charging document (notice to appear), which orders the alien to appear before an immigration judge to show

[7] EOIR may open or close an immigration court depending on the volume of the caseload in that particular area.

[8] Beginning in January 2011, EOIR has been under a Department-wide hiring freeze, which has impeded the hiring of judges and staff to fill authorized positions.

[9] All immigration judges are career Schedule A appointees and are compensated under the IJ pay system that varies by locality. The 2011 base annual salary range was $108,850 to $143,060 without locality adjustments. In 2011 annual pay was capped at $165,300.

[10] In addition to hearing cases, immigration judges consider other matters such as bond redetermination (bond) hearings and motions. Bond hearings are held when detained aliens ask to be released on their own recognizance or to have the amount of their bond reduced. Motions can be filed by either party (the alien or the DHS), including, for example, to reopen a case previously heard by an immigration judge due to changed circumstances. In FY 2010, the courts received a total of 52,660 bond redetermination requests and 14,902 motions. During the same period, the courts completed a total of 51,141 bond redetermination requests and 14,899 motions.

[11] A proceeding includes any action taken on a case at a particular immigration court. When a case is processed at multiple courts, there are multiple proceedings associated with that case. All of the proceedings together make up an alien's immigration case.

why the alien should not be removed, and includes the following information:

- the *Immigration and Nationality Act* provisions that subject the alien to removal;
- the alien's option to obtain representation at no expense to the government; and
- the date, time, and location of the initial hearing, if scheduled by the DHS.

The DHS serves the alien with the notice to appear in person or by mail if unable to do so in person. When the DHS serves the alien in person, it may provide oral notice in a language the alien understands of the hearing's time and place and the consequences if the alien does not appear. Along with the notice to appear, the DHS provides the alien with a list of organizations and attorneys that provide free legal services. Often the DHS does not schedule the initial hearing, and the notice to appear will not specify the date, time, and location of the initial hearing.

After the alien has been served, the DHS files a copy of the notice to appear with the immigration court (which is determined by the alien's location). Once the notice to appear is filed with the court, the immigration court is vested with jurisdiction to decide whether the alien violated immigration laws and whether to order the alien's removal from the United States. If the DHS has not scheduled the initial hearing, the immigration court schedules the hearing and notifies the parties of the hearing's time and place. DHS attorneys represent the DHS's position in cases before the immigration judges and in appeals before the BIA.

The Immigration Court Process

The immigration court removal process generally involves an initial master calendar hearing and subsequent master and individual merits hearings (described below). An alien found to be removable by an immigration judge may seek to remain in the United States by applying for one or more types of relief from removal. Immigration judges may conduct hearings in person at the immigration court or by telephone or videoconference.

Master Calendar Hearing. An immigration judge conducts a master calendar hearing to advise the alien of the purpose of the removal proceeding and of the alien's rights, and ensure the alien understands the allegations and charges. The judge also provides information regarding reduced-fee or free (pro bono) representation from

non-government sources and informs the alien that the alien must respond to the charges and present any applications for relief from removal.[12]

If the case is not complex or the alien admits to being in the United States illegally and does not ask for relief from removal to remain in the country, and the alien is represented or waives the opportunity to seek representation, the immigration judge may make a final decision at the master calendar hearing about whether the alien will be removed. When that does not happen, the alien or the DHS attorney may request a continuance, and if the judge grants it, another master calendar hearing or an individual merits hearing is set.[13] The judge may extend the scheduled hearing date several times before examining contested matters or applications for relief.

Individual Merits Hearing. Individual merits hearings are evidentiary hearings to decide contested matters, that is, aliens' challenges to being removable and aliens' applications for relief. Generally, the DHS bears the burden of proving by clear and convincing evidence that an alien is removable, but the alien may challenge removability. When the alien applies for relief from removal, the burden of proof rests with the alien. During a single case, a judge may reconvene over time multiple merits hearings as a result of continuances and scheduling conflicts to review evidence and hear testimony.

After the evidence is presented, the judge renders a decision on the alien's removability. If removability of the alien is not established, the immigration judge may order the proceedings terminated. If the judge finds the alien to be removable and the alien applies for relief from removal, the judge must determine whether to grant relief that would allow the alien to remain in the United States. The judge informs the alien of the right to appeal adverse determinations.

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[12] Aliens in immigration court proceedings do not have a right to government-provided representation. However, they are given the opportunity to obtain representation (such as attorneys, law students, family members, and representatives from recognized charitable organizations) at their own expense. According to EOIR's FY 2010 data, aliens were represented in 122,465 (43 percent) proceedings of 287,207 total proceedings completed.

[13] An alien may request a continuance for a number of reasons, including time to obtain representation, time to gather evidence, or for a change of venue to a different immigration court. The DHS attorney may request a continuance for reasons including preparation of evidence or completion of a DHS investigation.

See Appendix I for a flow chart that illustrates the immigration court process.

Types of Immigration Cases

Immigration courts process five principal types of cases:

1. *Detained Without Applications for Relief from Removal:* Cases involving aliens who are in DHS custody during the immigration court process. These aliens do not apply for relief if they are found removable. Aliens may be detained because of their involvement in criminal activities.[14]

2. *Detained With Applications for Relief from Removal:* Cases involving aliens in DHS custody who, if they are found removable, apply for relief (other than asylum) from the order of removal so that they may legally reside in the United States.

3. *Asylum:* Cases involving aliens who have applied for asylum because they fear, or have suffered, harm in their native countries. If judges deny their claims for asylum, the aliens are ordered to be returned to their home countries.[15]

4. *Non-Detained Without Applications for Relief from Removal:* Cases involving aliens who are not in DHS custody during the immigration court process and who do not request relief from removal.

5. *Non-Detained With Applications for Relief from Removal:* Cases involving aliens not in DHS custody who, if they are found removable, apply for relief (other than asylum) from the order of removal so that they may legally reside in the United States, or have removal deferred.

Aliens may be detained for all or part of the duration of their cases.

[14] Under the *Immigration and Nationality Act,* the government is required to detain certain aliens who pose a national security risk or commit crimes in the United States, including crimes involving moral turpitude, drug smuggling, murder, and other aggravated felonies.

[15] Aliens in the United States may make a claim for asylum because of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Generally, aliens must apply for asylum within 1 year of arriving in the United States.

Immigration Court Case Completion Goals

EOIR assesses its case processing performance based on how timely various types of cases are completed (see Table 1).[16] EOIR does not have outcome measures for its cases, such as an increase in the number of final removal orders or grants of relief because, as an impartial body that decides immigration cases, it cannot have quotas to meet. Each case is to be decided on its own merits.

Beginning in January 2010, EOIR abolished its case completion goals for cases involving non-detained aliens, except when the aliens seek asylum and therefore are counted under EOIR's completion goal for asylum cases.[17] According to EOIR, it discontinued the goals to help the immigration courts focus more on the highest priorities – namely, cases involving aliens who are detained during their proceedings. EOIR also reset the goals for detained cases by establishing one goal that does not distinguish between cases with and without relief applications.

[16] We evaluated EOIR's adjudication of removal cases, except Institutional Hearing Program cases because these cases involve aliens serving sentences in prison for criminal convictions. We did not examine bond or credible fear determination hearings because they are not removal hearings, although EOIR has established completion goals for these types of matters.

[17] According to 8 U.S.C. § 1158(d)(5)(A)(iii) (2011) (corresponds to INA § 208(d)(5)(A)(iii)), in the absence of exceptional circumstances, the final adjudication of asylum applications must be completed within 180 days after the application is filed.

Table 1: EOIR's 2009 and 2010 Case Completion Goals for the Immigration Courts

Type of Case	2009 Goals		2010 Goals	
	Time Goal	Percentage Goal	Time Goal	Percentage Goal
Detained				
Without applications for relief from removal	30 days	90%	60 days	85%
With applications for relief from removal other than asylum	120 days	90%		
Asylum (detained or non-detained)	180 days	90%	180 days	90%
Non-Detained				
Without applications for relief from removal	240 days	90%	Abolished	
With applications for relief from removal other than asylum	240 days	60%	Abolished	

Notes: EOIR has established goals for other matters that are outside the scope of our review. The goals in the table are for the five principal types of cases.

The percentage goals are the proportions of a particular type of case that are to meet the time goals for that type of case.

Source: EOIR Reports on Case Completion Goals: FY 2010 1st Quarter and 2nd Quarter.

EOIR monitors the performance of the immigration courts in meeting the case completion goals in internal quarterly reports. The immigration courts' success in meeting the goal for detained cases has been identified as an adjudication priority and is published in the Department's annual Performance and Accountability Report and congressional budget submission.

The Board of Immigration Appeals

Once an immigration judge renders a decision, both the alien and the DHS have the right to appeal that decision to the BIA. The majority of appeals received by the BIA involve orders of removal and applications for relief from removal.[18] The BIA is directed by a Chairman and is

[18] The BIA also reviews cases involving petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon

(Cont.)

staffed with board members who adjudicate appeals, staff attorneys who assist board members, and support staff at EOIR's headquarters in Falls Church, Virginia.[19] In FY 2010, the BIA was authorized 175 attorney positions, including 15 board members, of which 166 were filled as of September 30, 2010. The BIA also was authorized 131 support staff positions, of which 104 were filled as of September 30, 2010. Overall, BIA's authorized staffing increased approximately 20 percent from FY 2006 to FY 2010. In FY 2010, the BIA received 15,556 appeals of immigration judge case decisions, which is 23 percent less than it received in FY 2006. Also in FY 2010, it completed 16,069 appeals of immigration judge case decisions, which is almost 32 percent less than it completed in FY 2006.

Generally, the BIA does not conduct courtroom proceedings – board members decide appeals by reviewing briefs submitted by the parties, along with the immigration court case files and transcripts. On rare occasions, board members hear oral arguments. A single board member decides the appeal unless it falls into one of six categories that require a decision by a panel of three board members.[20] The BIA may, by majority vote or by direction of the BIA Chairman, assign a case for review by all of the board members (an en banc review).[21]

The BIA Process

The BIA appellate review process begins when an alien or the DHS appeals an immigration judge's decision. The BIA's clerk's office receives the appeal or motion, assembles the materials for BIA review, and sets briefing schedules. Paralegals and staff attorneys review the appeal. The attorneys or paralegals prepare a draft decision order on the case's

transportation carriers for the violation of immigration laws, and motions for reopening and reconsidering decisions.

[19] The BIA Chairman is a career Senior Executive Service position, with a salary range of $119,554 to $179,700. The board member positions are career Schedule A positions, with a salary range of $119,554 to $165,300.

[20] These categories are the need to: (1) settle inconsistencies among the rulings of different immigration judges; (2) establish a precedent construing the meaning of laws, regulations, or procedures; (3) review a decision by an immigration judge that is not in conformity with the law or with applicable precedents; (4) resolve a case of major national import; (5) review a clearly erroneous factual determination by an immigration judge; or (6) reverse the decision of an immigration judge in a final order, other than nondiscretionary dispositions.

[21] 8 C.F.R. § 1003.1(a)(5).

merits and initially assess whether the case should be reviewed by a single board member, three-member panel, or, in rare cases, recommend en banc review. Board members review the draft decision orders and may accept them, direct that they be modified, or decline them.

The BIA may issue an affirmance of the immigration judge's decision with or without an opinion. An affirmance without opinion, which does not contain the BIA's explanation or reasoning for approving the decision, is required when the case meets the criteria of 8 C.F.R. § 1003.1(e)(4)(i). The BIA may also modify, reverse, or remand a case to the immigration court for further consideration.

See Appendix II for a flow chart that illustrates the appeal process.

If the BIA rules against an alien, the alien may appeal the case to the appropriate U.S. Court of Appeals (Court of Appeals). The Department's Office of Immigration Litigation represents the United States before the Court of Appeals, and the alien may obtain his or her own representation. The DHS cannot appeal the BIA's ruling to the Court of Appeals, but may seek the Attorney General's review. The Attorney General may vacate the decision of the BIA and issue his or her own decision. A BIA decision is the final administrative decision in the matter, unless it is stayed, modified, rescinded, or overruled by the BIA itself, the Attorney General, or a Court of Appeals.

BIA Completion Goals for Cases on Appeal

Like the immigration courts, EOIR has goals for the BIA to complete percentages of the appeals it reviews within specific timeframes. Two of the goals are derived from 8 C.F.R. § 1003.1(e)(8)(i): those pertaining to appeals (regardless of the aliens' detention status) undergoing review by one or three board members. An additional goal established by EOIR pertains to detained appeals. Appeals involving detained aliens are measured twice: once under either the one- or three-member review timeline and again under the detained alien case timeline. (See Table 2.)

Table 2: EOIR's 2010 Completion Goals for the Board of Immigration Appeals

Type of Review	Time Goal	Percentage Goal
One-member decision	90 days	100%
Three-member decision	180 days	100%
Detained alien decision	150 days	90%

Notes: The percentage goals are the proportions of appeals that are to meet the time goals for that type of review.

In FY 2007, the EOIR goal for detained appeals was reduced from 180 days to 150 days.

Source: EOIR Report on Case Completion Goals: FY 2010 2nd Quarter.

EOIR tracks the performance of the BIA in meeting the completion goals in internal quarterly reports. The BIA's success in meeting the goal for detained appeals has been identified as an adjudication priority and is published in the Department's annual Performance and Accountability Report and congressional budget submission.

SCOPE AND METHODOLOGY OF THE OIG REVIEW

Our review examined the processing and management of removal cases in the immigration courts and of appeals of immigration judge removal decisions at the Board of Immigration Appeals. We limited our review to cases initiated by the Department of Homeland Security because these cases are the majority of EOIR's caseload at both the immigration courts and the BIA. We did not review the processing of cases by EOIR's Office of the Chief Administrative Hearing Officer, which adjudicates a small number of cases primarily related to employer sanctions that are unrelated to the removal caseload.

We conducted field work at EOIR Headquarters, the BIA, and three immigration courts: Arlington, Virginia; New York, New York; and Chicago, Illinois.

We reviewed applicable laws, regulations, policy, and written procedures related to EOIR. We attended hearings at the immigration courts and the BIA and interviewed appropriate personnel at the locations visited. We also examined EOIR files, operational and administrative reports, and databases, which included automated case information.

We reviewed EOIR's public and internal reporting regarding caseloads and goal accomplishments for both the immigration courts and the BIA. We used a limited amount of this aggregated data to present overall trends, but we used individual cases and appeals to analyze case characteristics and processing times.[22] We did not rely on EOIR's performance reports in our analyses of the courts' or the BIA's ability to efficiently process cases or appeals because we found the data to be inaccurate (as discussed in Section I of the Results of the Review).[23] The

[22] We used EOIR's publicly available Statistical Year Books and internal Director's Monthly Reports to analyze trends from FY 2006 through FY 2010 for the immigration courts' and the BIA's aggregated completed, received, and pending cases. These reports track data for the immigration courts by proceeding. A proceeding is all legal action taken on a case at a particular immigration court, excluding bond redeterminations and motions. All of the proceedings together make up an alien's immigration case.

[23] EOIR established a working group in September 2011 to review the data it collects, assess its accuracy, analyze whether it clearly presents information, and determine whether more data should be collected and reported. In July 2012, the head of the working group informed the OIG that the review was completed. She advised the *(Cont.)*

problems we identified in the aggregated data did not affect our analysis of individual cases and appeals.[24]

To determine case processing times, we obtained EOIR data elements for a random sample of 1,785 cases that were closed during calendar year 2009 at 10 immigration courts. We selected these 10 courts because they represented a diverse mix in terms of size (as measured by the number of immigration judges at each court), geographical diversity, and because they collectively handle a wide spectrum of case types. For further information on the sample of closed cases, see Appendix III.

To determine characteristics of the immigration courts' pending caseload, EOIR provided us with 252,925 cases that were pending on August 3, 2010. According to EOIR, these were all of the cases pending at the immigration courts on that date. For further information on the pending cases, see Appendix IV.

To analyze the BIA's case review process, we reviewed a sample of 23 appeals closed between January 2011 and May 2011. Each appeal involved a removal case in which an immigration judge had made a final decision. Sixteen of the appeals involved non-detained aliens (70 percent) and seven involved detained aliens (30 percent), and most of the decisions regarding the appeals, regardless of the aliens' custody status, were made by single board members. To obtain a sample of appeals that exemplified work performed by the BIA's staff attorneys, we selected cases reviewed by different staff attorneys prior to the BIA decision. To determine the types of pending appeals and how long they had been pending, we analyzed individual case information for all immigration judge case appeals pending on May 24, 2011 (17,987 appeals).

OIG that a report of the group's findings and recommendations is being compiled for the EOIR Director.

[24] We did not assess the validity and reliability of the data entered in EOIR's automated case system.

RESULTS OF THE REVIEW

SECTION I. THE IMMIGRATION COURTS

PERFORMANCE REPORTS

EOIR's performance reports are incomplete and overstate the actual accomplishments of the immigration courts in adjudicating immigration cases. EOIR reports completions even when the immigration courts have made no decisions on whether to remove the aliens from the United States. Further, EOIR does not report the total time it takes to complete each case and excludes a substantial portion of cases from the data used to track the timely completion of cases, approximately one-third of our case sample analysis. In addition, EOIR abandoned completion goals for cases involving non-detained aliens that do not involve asylum, which make up about 46 percent of the courts' completions. Some courts' caseloads consist primarily of non-detained cases, and therefore, these courts do not have measures to assess their performance in processing the majority of their cases. While no performance report is perfect, we concluded that the flaws in EOIR's performance reporting precludes the Department from accurately assessing the courts' progress in processing immigration cases or identifying needed improvements.

EOIR reports completions even when no decisions have been made whether to remove the aliens from the United States.

EOIR records completions when cases are closed at a particular court even if a decision has not yet been made as to whether to remove the alien from the United States or to grant relief from removal. As explained below, actions that close a case in a particular court but that do not result in a decision regarding whether to remove the alien include transfers or changes of venue, administrative closures, and failures to prosecute:

- Changes of venue and transfers occur when a case is moved from one court to another.

- Administrative closures occur when both parties agree to temporarily remove a case from the court calendar until the DHS or the alien files a motion to recalendar the case.[25] For example, the DHS and the alien can file a joint motion to administratively close a case in which the alien has an application pending with the DHS for an immigration benefit that may result in relief from removal.[26]

- Failures to prosecute occur when the DHS does not file copies of the notices to appear with the courts prior to the initial hearing. In those instances, the DHS serves the alien with the notice to appear and puts the master calendar hearing on the court's calendar. Although the DHS and alien are present for the hearing, the immigration judge is not permitted to hear the case because the DHS has not filed a copy of the notice to appear with the court and thus the court lacks jurisdiction. When failures to prosecute occur, the aliens are generally excused and no further hearings are scheduled until the DHS files the copies of the notices to appear.

In all these actions, no decisions are made about whether the aliens may remain in the United States or be ordered removed, but EOIR counts the actions in its performance reports as completions. As a result, EOIR does not accurately report the actual number of cases that are completed.

In our analysis of a sample of 1,785 cases closed during calendar year 2009, we found that a single case may be "completed" multiple times before a judge makes a decision to remove the alien or grant relief from removal. In addition to the 1,785 final decisions in these cases, EOIR would have reported as completions 484 actions that were administrative events rather than final decisions that determined whether the aliens should be ordered removed from the United States or granted relief from removal.[27]

[25] Recent case law permits immigration judges to administratively close certain cases even without the consent of both parties. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

[26] Immigration benefits include naturalization and permanent residency.

[27] Sixty-four percent of the 1,785 aliens in our sample were ordered removed. Approximately 77 percent of the aliens who received a decision in less than 1 year (1,295 aliens) were ordered removed.

EOIR does not accurately count the total time to complete each case, exempts some cases when measuring whether cases are meeting completion goals, and has discontinued some goals.

EOIR's performance reports do not fully represent how long or how many cases are in the immigration court system awaiting decisions by immigration judges. Three EOIR practices contribute to incomplete and inaccurate performance reporting: (1) dividing case time between courts, (2) exempting cases from completion goals based on certain case activities, and (3) discontinuing completion goals for entire categories of cases. We explain each practice in more detail below.

Dividing Case Time Between Courts

EOIR does not tally the time an alien's case spends at different courts to determine the actual total case length and whether that total time met completion goals.[28] For example, a case for a detained alien has a timeliness goal of 60 days, but if the case were to spend 50 days at one court and 50 days at another court, EOIR would report two detained cases that were each completed in 50 days, both meeting the 60-day goal. In actuality, the case took 100 days from the first court's receipt of the notice to appear until the second court's decision on whether the alien should be removed. Thus, EOIR understates the time it takes to complete some cases and reports cases as having successfully met EOIR's goals when they have not.[29] EOIR officials told us that they report case length in this manner because a case that is closed at a particular court is "complete," from the point of view of the particular court, and is no longer pending on that court's docket. Although tracking cases in this manner can serve as a measure of a particular court's workload and may identify specific delays in EOIR's handling of a case, it is not an accurate measure of the

Case Examples

A 2009 case involving a non-detained alien without an application for relief from removal had a change of venue 142 days after the court received the case. The receiving court substantively decided the case after another 196 days. According to EOIR's method of tracking completions, the case would be reported as having been completed twice, the first in 142 days, and then again in 196 days, both times being successfully within the case completion goal of 240 days. In actuality, it took an immigration judge 338 days to render a substantive decision on the case. Therefore, the case actually exceeded the completion goal by more than 3 months.

A 2009 case involving a detained alien with an application for relief from removal was transferred 20 days after the court received the case. The transfer moved the case to a different hearing location serviced by the same court. The case was decided substantively after another 131 days. According to EOIR's method of tracking completions, the case would be reported as having been completed twice, the first in 20 days, well within the case completion goal of 120 days, and the second in 131 days, which is outside the 120 day completion goal. In actuality, it took an immigration judge 151 days to render a substantive decision on the case, exceeding the completion goal by a month.

[28] EOIR's case completion goals vary by type of case and changed between 2009 and 2010. Table 1 in the Background section shows the goals by case type and year.

[29] EOIR includes a footnote in its internal Report on Case Completion Goals that states the report measures the time from receipt to completion at each court, which is a proceeding.

total time taken by EOIR to render a decision on removability in each case. The text box (previous page) describes two cases in our sample that show the effect of EOIR's practice on reported completion times.

As a result, the total number of cases resolved by the immigration courts each year is not readily apparent in EOIR's reports. For example, in its FY 2010 Performance and Accountability Report, EOIR reported that it completed 89 percent of its detained cases within 60 days. However, because these completions include actions where a proceeding was completed at a particular immigration court but then reopened in another immigration court, the statistics overstate EOIR's overall completion rate. These facts are not disclosed in the Performance and Accountability Report. Additionally, because EOIR counts multiple receipts for cases that change venue or are transferred, the actual number of new cases it receives each year also is overstated.[30]

Exempted Cases

EOIR excludes cases from being measured in the goals when the cases are delayed for reasons that EOIR considers to be outside the control of immigration judges.[31] These delays primarily occur when the DHS adjudicates immigration benefits or conducts background investigations. The immigration judges cannot proceed with the cases until the DHS decides whether the aliens are eligible for the benefit or the background investigations have been completed.[32]

[30] "Receipts" are defined by EOIR as the total number of proceedings, bond redeterminations, and motions to reopen or reconsider received by the immigration courts during a reporting period. Our review included only proceedings receipts.

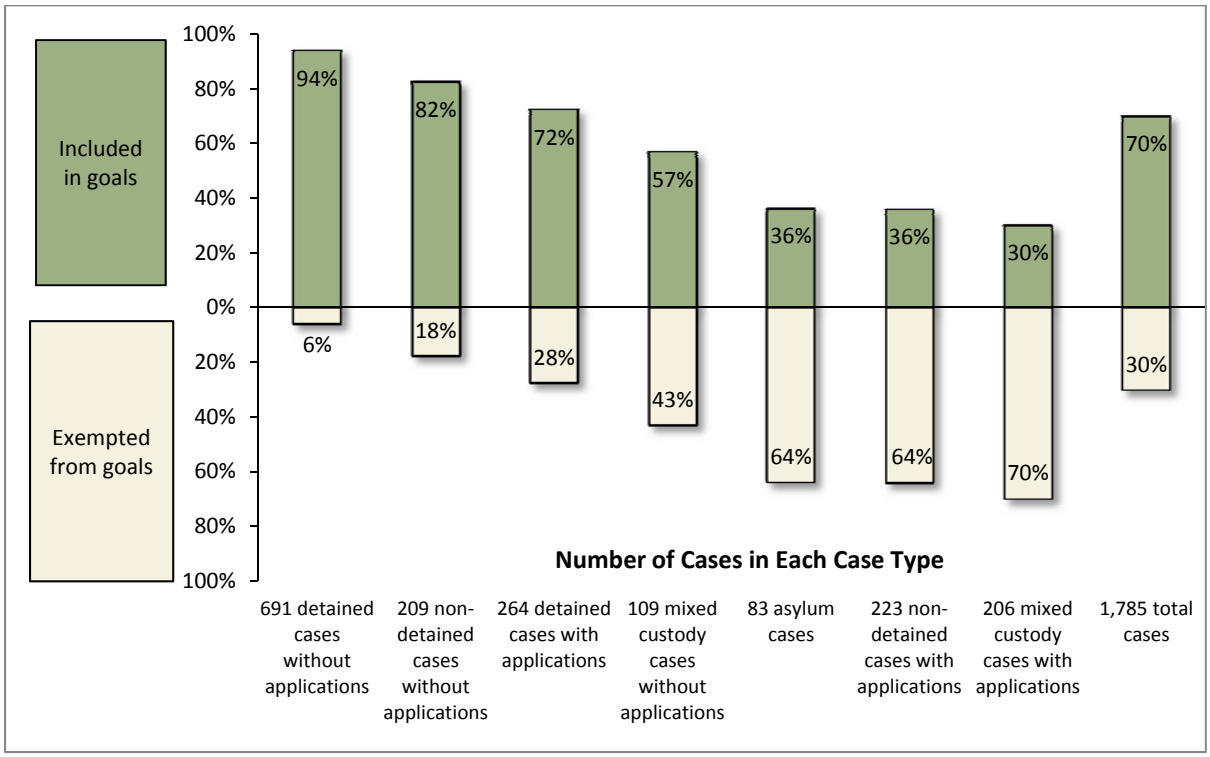
[31] EOIR also excludes cases that involve juvenile and unaccompanied juvenile aliens, incarcerated criminal aliens where the DHS has filed the notice to appear less than 120 days from the alien's earliest possible release date, and incarcerated criminal aliens whose cases have been remanded back to the immigration courts by the BIA. In our sample of 1,785 closed cases, 47 cases (2.6 percent) were excluded from the goals for these reasons.

[32] We are told that the DHS has worked with EOIR to identify procedures that promote court docket efficiency. As a result, over the last 2 years, the DHS implemented a project to expedite benefits applications pending at the DHS's U.S. Citizen and Immigration Services when the aliens are in immigration court proceedings. This project is meant to ensure that applications for these aliens are adjudicated quickly to allow the immigration court proceedings to proceed. Our review did not involve an assessment of this project.

Once EOIR exempts a case from its completion goal, the exemption applies throughout the duration of the case. EOIR does not restart its count of court processing days when the cases resume after the DHS rules on the aliens' benefits or completes the background investigations. However, EOIR counts any completions (such as transfers or changes of venue) that occurred before the case was exempted toward that case's completion goal.

In our sample of closed cases from 2009, the percentage of cases exempted from EOIR's goals varied by the alien's custody status and whether the alien submitted an application for relief from removal. Figure 1 below shows the percentage of exempted cases in our sample by case type.

Figure 1: Percentage of Cases Exempted from Case Completion Goals by Case Type



Notes: Mixed custody cases involved aliens who were detained for a portion of the life of the case. All of the asylum cases involved non-detained aliens.

"Applications" refer to applications for relief from removal, which allow aliens to legally remain in the United States or to have removal deferred.

Although goals for cases involving non-detained aliens were in effect in calendar year 2009, those goals were discontinued beginning in calendar year 2010, as discussed in the following section.

Source: Sample of cases closed in calendar year 2009 from EOIR.

Most significantly, our analysis shows that a majority of the asylum cases in our sample – 64 percent – were exempted by EOIR from the goals despite a statutory requirement that these cases be completed within 180 days.[33] Because a large percentage of cases may not be counted toward their completion goals, the usefulness of the goals is questionable in helping EOIR ensure cases are completed in a timely manner.

Discontinued Completion Goals

Beginning in calendar year 2010, EOIR discontinued the completion goals it previously established for monitoring the timeliness of its non-detained cases, with the exception of asylum cases. As a result, there are no standards against which to measure the courts' ability to process these non-detained cases within particular time frames. According to EOIR, it discontinued the goals to help the immigration courts focus more on the highest priorities – namely, cases involving aliens who are detained during their proceedings.

However, our analysis showed that the non-detained cases constitute a large number of the immigration courts' proceedings – about 46 percent.[34] For 18 courts, including New York, non-detained cases constitute the majority of their case load.[35] Table 1 in the Background section shows the case completion goals that existed for the immigration courts during calendar year 2009 and the new goals that became effective in calendar year 2010.[36]

[33] According to 8 U.S.C. § 1158(d)(5)(A)(iii) (2011) (corresponds to INA § 208(d)(5)(A)(iii)), in the absence of exceptional circumstances, the final adjudication of asylum applications must be completed within 180 days after the application is filed.

[34] The 46 percent is based on FY 2010 proceedings completion data from the EOIR Statistical Year Book. The remaining 54 percent of the courts' proceedings, all of which have goals, are detained proceedings, asylum proceedings, and credible fear determination hearings (hearings held to review DHS determinations that aliens' fears of persecution or torture if they are removed were not credible).

[35] These immigration courts still have goals against which to measure the processing of their asylum cases. However, our analysis showed that the asylum cases accounted for less than half of the cases processed at each of these 18 courts during FY 2010.

[36] The immigration courts did not meet completion goals for the non-detained cases from FY 2006 through FY 2009. The completions for the non-detained cases without applications were occasionally close to the goals – 79 to 89 percent of the cases *(Cont.)*

The OIG recognizes the importance of the timely completion of cases involving detained aliens, given that the aliens are deprived of their liberty and detained at taxpayer expense. However, we believe that EOIR should have goals for the non-detained cases as well so that EOIR can assess whether, after prioritizing the detained cases, it is still making adequate progress on the timely completion of the non-detained cases. Moreover, the OIG believes that EOIR should have separate goals to reduce the non-detained cases that have been pending for an excessive amount of time.[37] Our analysis of case data (described later in the report) showed that about 75 percent of pending cases are non-detained cases.

Conclusion

EOIR's reporting on the immigration courts' completion of cases is flawed and makes it difficult to know how well the courts are performing. EOIR counts completions when case actions occur that do not result in decisions to order the removal of aliens from the United States or to grant relief from removal. By reporting these actions as completions, EOIR obscures the actual number of immigration cases it receives and completes each year. Further, EOIR's method for counting case length underreports actual case processing times. When cases are moved from one immigration court to another, each court's processing time is considered separately when assessing whether the case processing time met goals. The total time that such cases remain in the court system overall is not reported. Also, EOIR exempts many cases from case completion goals when an event occurs that EOIR believes is outside the control of the courts and prevents the immigration judge from proceeding with the action. EOIR still counts any case activities that it defines as a "completion" before the case became exempt, and does not restart its count of court processing days once the case resumes. Further, beginning in January 2010, EOIR made a decision to abolish its completion goals for non-detained cases. EOIR made this decision to

were completed within 240 days during the time period. The completions for the non-detained cases with applications were never closer than 10 percentage points from the goal. The goal was to complete 60 percent of these cases within 240 days, but only 38 to 50 percent of the cases were completed within 240 days.

[37] EOIR began a project in March 2008 to attempt to resolve non-detained cases pending over 5 years. The goals of the project are to identify these cases, schedule and complete the cases as soon as possible, and document the reasons for any cases that legitimately remain pending. According to EOIR, there were 6,836 cases over 5 years old as of January 2010. We discuss our analysis of the pending cases by type of case and age later in the report.

emphasize the processing of detained cases, which understandably are a priority. All cases, however, regardless of whether the alien is detained or not detained, should have goals to enable EOIR to monitor its performance in resolving cases in a timely manner.

We have no evidence to suggest that EOIR intended for its reporting to be misleading. Nevertheless, substantially complete and accurate data reporting is essential for EOIR to better administer the volume of immigration cases, and without an accurate and comprehensive picture of how the immigration courts are performing, EOIR will be limited in its ability to identify areas that need improvement.

Recommendations

To provide more accurate and complete information for managing cases in the immigration courts, we recommend that EOIR:

1. improve reporting of immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect actual case length even when more than one court is involved,

2. eliminate case exemptions from completion goals to reflect actual case length, but identify case delays that EOIR considers outside the control of immigration judges, and

3. develop immigration court case completion goals for non-detained cases.

CASE PROCESSING

We found that the immigration court system overall did not keep pace with processing the volume of immigration cases received from FY 2006 through FY 2010. The rate of completions decreased despite a small increase in the number of judges. During the period, the number of pending cases increased significantly. Our analysis of a sample of closed cases showed that cases involving non-detained aliens and those with applications for relief from removal can take long periods to complete. This results in crowded court calendars and delayed processing of new cases. For example, cases in our sample for non-detained aliens took on average 17½ months to adjudicate, with some cases taking more than 5 years to complete. In addition to the volume of new cases, the number and length of case continuances granted by immigration judges were a significant factor in slowing case processing. As a result of slow case processing, aliens who ultimately were not found to have supportable claims for relief from removal remained in the United States longer, and EOIR and the DHS expended more resources to pursue the cases.

Immigration courts did not keep pace with processing cases, and pending cases increased significantly.

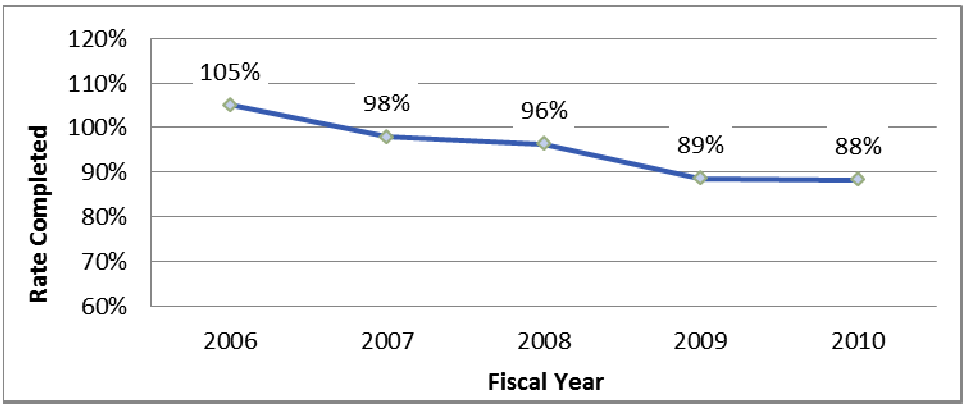
EOIR has a strategic goal to adjudicate all immigration cases in a timely manner, which is an important aspect of upholding immigration law.[38] According to EOIR's reports on the immigration courts' performance from FY 2006 through FY 2010, the courts were unable to complete as many proceedings as they received each year during that period. In addition, the number and age of the cases that the courts carried over from fiscal year to fiscal year increased. As discussed below, EOIR's performance reports (although needing improvement) showed a downward trend in the court system's productivity for processing immigration proceedings, which EOIR counts instead of individual cases.

According to EOIR's FY 2010 Statistical Year Book, from FY 2006 through FY 2010, the number of proceedings received outpaced the

[38] Executive Office for Immigration Review Strategic Plan, Fiscal Years 2008 – 2013.

number of proceedings the courts completed.[39] In 4 of 5 years during this period, the number of proceedings received was greater than the number of proceedings completed (that is, the completion rate was less than 100 percent). The number of proceedings received grew about 5 percent, from 308,652 in FY 2006, to 325,326 in FY 2010. During this same period, the number of proceedings the immigration courts completed decreased about 11 percent, from 324,040 in FY 2006 to 287,207 in FY 2010. Figure 2 illustrates the court system's case completion rate for each fiscal year.[40]

Figure 2: Immigration Courts' Completed Proceedings as a Percentage of Proceedings Received, FY 2006 – FY 2010



	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Receipts	308,652	279,430	292,013	327,928	325,326
Completions	324,040	273,468	281,216	290,435	287,207

Notes: The rate completed is the total number of completions as a percentage of the total number of receipts for the entire immigration court system for each fiscal year. Completions include proceedings that resulted in decisions and other completions, such as administrative closures and transfers of cases to other courts.

Source: EOIR FY 2010 Statistical Year Book.

[39] EOIR's Statistical Year Book tracks data for the immigration courts by proceeding. A proceeding is all legal action taken on a case at a particular immigration court, excluding bond redeterminations and motions. These proceedings make up the alien's immigration case.

[40] Notably, bond redetermination hearings, which are not included in this proceedings data, increased from 29,740 to 51,141 from FY 2006 through FY 2010. Given the scope of our review, we were not able to assess the impact of the increase in bond redetermination hearings on the immigration courts' ability to complete the proceedings analyzed here.

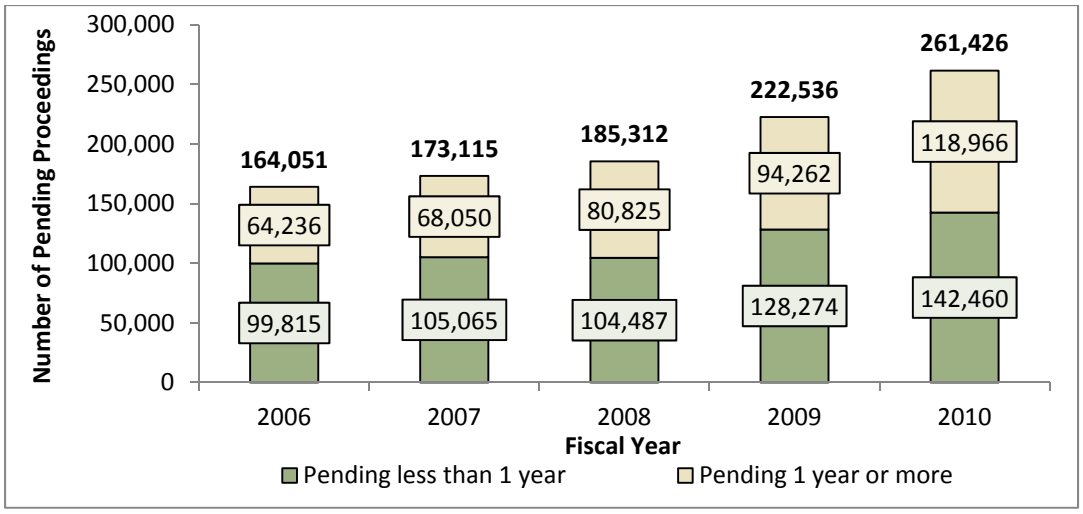
During this same 5-year period that the completion rate was declining, the number of immigration judges was increasing. We determined that EOIR hired 75 immigration judges from FY 2006 through FY 2010, which after attrition increased the number of on-board judges by 27, from 211 to 238 (13 percent).[41] Despite the increase in judges, the overall efficiency of the courts did not improve.[42]

As the overall completion rate for proceedings decreased below 100 percent from FY 2006 through FY 2010, the number and age of proceedings pending at the conclusion of each year increased. As shown in Figure 3, based on EOIR's internally reported data, the number of pending proceedings increased from 164,051 in FY 2006 to 261,426 in FY 2010 – an increase of 59 percent. Also, the number of proceedings pending 1 year or more increased from 64,236 in FY 2006 to 118,966 in FY 2010 – an increase of 85 percent. The percentage increase of cases pending 1 year or more was actually greater, but EOIR's method of reporting does not always capture true case length. These numbers indicate that the court system overall is falling further behind and that more cases are experiencing processing delays.

[41] Seventeen of the 75 judges (23 percent) were hired during FY 2010. New judges undergo extensive training and may not have the performance level of more experienced judges. Beginning in January 2011, EOIR has been under a Department-wide hiring freeze, which impedes the hiring of judges and staff.

[42] EOIR noted that in FY 2011, there was an 11 percent increase in the number of judges and the number of matters completed. However, FY 2011 was outside the scope of our review and we have not verified those figures.

Figure 3: Number and Age of Pending Proceedings at the Immigration Courts, FY 2006 – FY 2010



Note: Pending proceedings are as of the end of each fiscal year (September 30).

Source: FY 2006 – FY 2010 EOIR Director's Monthly Reports for September.

We analyzed individual case information for all removal proceedings pending on a randomly selected day – August 3, 2010 (252,925 cases) – to determine the amount of time that aliens had been waiting for resolution on their cases.[43] Our analysis measured the amount of time from the date the original court received the notice to appear until August 3, 2010. Non-detained proceedings accounted for 75 percent (189,276), asylum proceedings accounted for 19 percent (48,940), and detained proceedings accounted for 6 percent (14,709) of all pending proceedings. We determined from the individual case information that, as of that date, 118,794 proceedings (47 percent) had been pending less than 1 year. We also determined that 57,068 proceedings (23 percent of all pending proceedings) had been pending 1 to 2 years, 29,244 proceedings (12 percent of all pending proceedings) had been pending 2 to 3 years, and 47,819 proceedings (19 percent of all pending proceedings) had been pending 3 years or more.[44] (See Figure 4.) Predominantly, the proceedings pending for over 3 years involved aliens who were not detained, and most of these proceedings

[43] We randomly selected the date of August 3, 2010. We had no indication that the pending cases on a particular day would be significantly different than any other day within a reasonable time frame.

[44] We determined that 21,614 proceedings (8.5 percent of all pending proceedings) were pending 5 years or more.

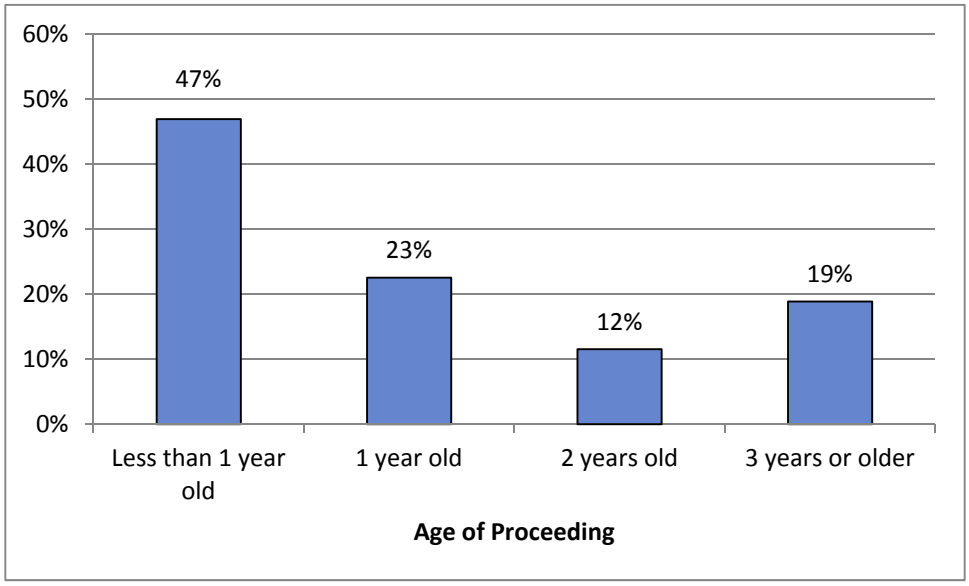
involved aliens who had filed applications for relief from removal.[45] There were 6,238 proceedings (2.5 percent of all pending proceedings) that were pending for 10 years or more.

We note, however, that our calculations of proceedings' lengths does not account for cases that were closed and later reopened, as happens, for example, when cases are on appeal with the BIA, or when cases are administratively closed.[46]

[45] Of the 47,819 proceedings pending over 3 years, 44,107 (92 percent) involved non-detained aliens.

[46] The individual case information for the 252,925 pending proceedings did not enable us to identify the number that were closed and later reopened, or the length of time those proceedings were closed. EOIR noted that some older proceedings may have been closed for periods of time that would skew the computations. We therefore considered the impact of these temporary closures on our analysis. We used our sample of 1,785 closed cases for a comparison and found that approximately 8 percent of those cases were closed and later reopened. We then excluded a similar proportion (approximately 10 percent) from just the oldest cases to gauge the effect of closures on our analysis and we found that 48 percent of the 252,925 proceedings would still have been pending over 1 year. Due to the limitations of the available data, we were not able to assess whether the effects of interim closures were greater or less with respect to other calculations, including those cases which had been pending for more than 10 years.

Figure 4: Age of Pending Proceedings



Notes: The figure displays data for all 252,925 removal proceedings that were pending at the immigration courts as of August 3, 2010.

Percentages do not add to 100 due to rounding.

Source: EOIR.

Cases, especially those for non-detained aliens, can take long periods to complete.

We examined a sample of closed cases and found that case processing times can be protracted. The case lengths varied considerably depending on the alien's detention status and whether the alien applied for relief from removal. Our analysis of the closed cases in our sample showed that processing times were affected significantly by case continuances granted by the immigration judges. We also found weaknesses in EOIR's resource management capabilities that affect the allocation of judges and, thus, case processing.

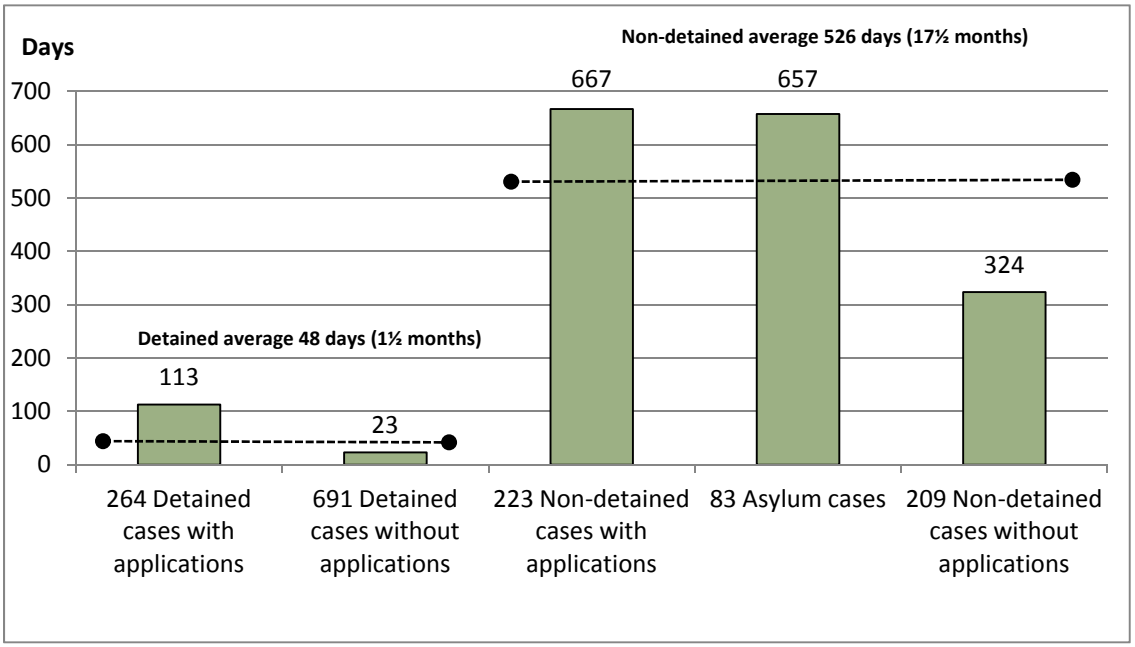
Processing Times by Case Type

Our analysis of a sample of 1,785 individual cases closed by 10 courts in calendar year 2009 showed that the courts' average case processing time for non-detained aliens was significantly greater than that for detained aliens.[47] In our sample of cases, the average time to

[47] Case processing time is the total time from the date the court receives a copy of the notice to appear until the immigration judge renders a decision on whether the *(Cont.)*

process detained cases was 1½ months. Detained cases with applications for relief from removal took almost 5 times longer on average than detained cases without applications for relief from removal. Cases involving non-detained aliens took, on average, 17½ months to adjudicate, with some cases taking more than 5 years to complete. Figure 5 shows the average case times for detained and non-detained cases.

Figure 5: Closed Cases Average Processing Time by Case Type



Notes: The figure displays data for 1,470 cases in which the aliens had a consistent custody status throughout their cases. All of the asylum cases involved non-detained aliens. The time when cases were closed and later reopened was excluded, including, for example, time that elapsed when cases were on appeal at the BIA or administratively closed.

We also examined 315 cases in which the aliens were detained for a portion of the life of the case. Because we were unable to determine the amount of time the aliens were in detention, we did not include these cases in the figure.

Applications refer to applications for relief from removal, which allow aliens to legally remain in the United States or to have removal deferred.

Source: Case sample data from EOIR.

alien is to be removed from the United States. We excluded the time when cases were outside the courts' control, such as when cases were on appeal at the BIA or administratively closed.

Excessive delay in immigration case processing can undermine the fair administration of justice if witnesses are no longer available to testify, U.S. citizen relatives die, or documentary evidence is lost. Moreover, the failure to promptly resolve cases results in aliens with unsupportable claims for relief from removal remaining in the United States longer, while those with legitimate claims for relief remaining in legal limbo for unwarranted lengths of time. In our sample, we had 27 cases that took from 5 to 9 years to complete.

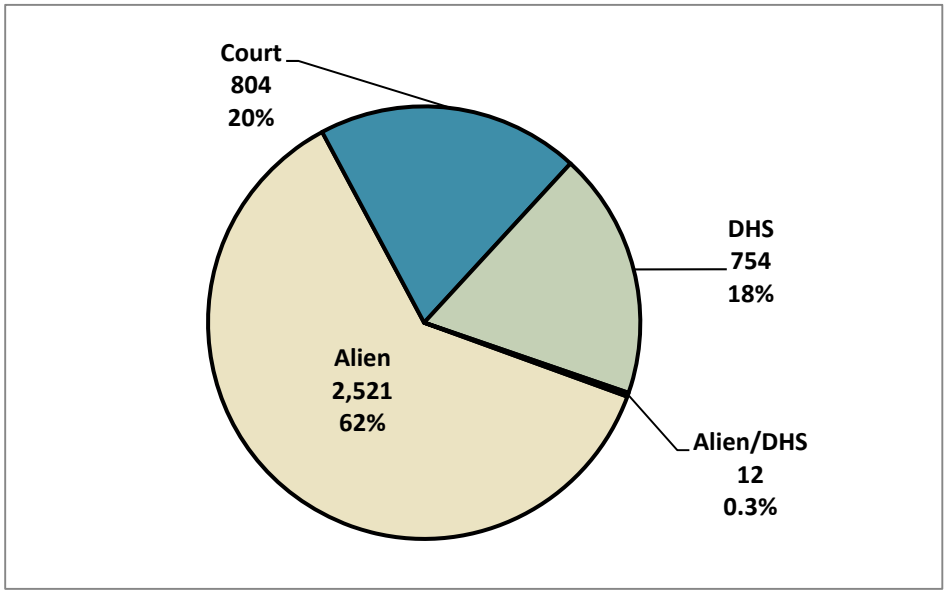
Delays in case processing for detained cases also increase associated DHS detention costs. The Department of Justice's costs also rise as time spent processing cases increases, as do the costs for those representing the aliens.

Frequent and Lengthy Continuances

We found that frequent and lengthy continuances are a primary factor contributing to case processing times, especially in non-detained cases. In our sample of 1,785 closed cases, 953 cases (53 percent) had one or more continuances. These 953 cases had a total of 4,091 continuances amounting to 375,047 days in aggregate. Each case had, on average, four continuances, and the average amount of time granted for each continuance was 92 days (about 3 months), resulting in an average of 368 days per case.

As shown in Figure 6, of the 4,091 continuances, requests from the alien accounted for 2,521 continuances (62 percent), requests from DHS accounted for 754 continuances (18 percent), and joint requests by the alien and the DHS accounted for 12 continuances (0.3 percent). Court-initiated continuances accounted for the remaining 804 continuances (20 percent).

Figure 6: Sources of Continuances



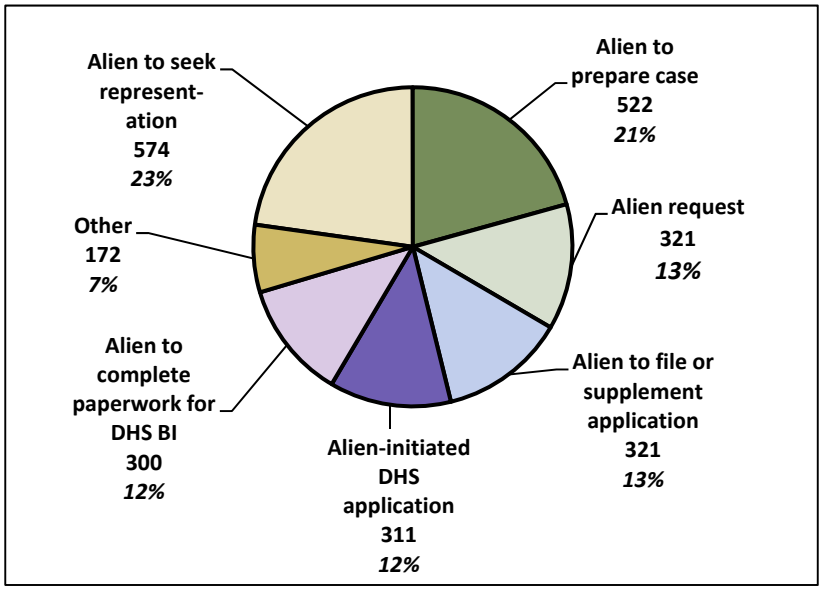
Source: Case sample data from EOIR.

Alien Continuances

Aliens request continuances for a variety reasons, but the most common reasons include seeking legal representation and preparing their cases. Aliens in immigration court proceedings do not have a right to government-provided representation. However, they are given the opportunity to obtain representation at their own expense.[48] Of the 2,521 alien-requested continuances, 574 continuances (23 percent) were to allow the alien time to obtain representation and 522 (21 percent) were to allow the alien time to prepare the case. Continuances for the alien to seek representation averaged 53 days, and continuances for the alien to prepare the case averaged 66 days. Alien-requested continuances accounted for 227,939 days (61 percent) of the total 375,047 days granted for all continuances. Figure 7 shows the reasons for continuances related to aliens from our sample of closed cases.

[48] Aliens may be represented not only by attorneys and law students, but also by other persons, including accredited representatives from recognized charitable organizations and family members.

Figure 7: Reasons for Alien Continuances



Notes: Percentages do not add to 100 due to rounding.

Other is a combination of 8 infrequently occurring reasons.

Source: Case sample data from EOIR.

Alien to seek representation: Time to seek legal representation.

Alien to prepare case: Time to prepare the case, including time to file a relief application.

Alien request: Time for other request or to accommodate alien's request for an alternative hearing date.

Alien to file or supplement application: Time to file or amend an application for relief.

Alien-initiated DHS application: Time for the DHS to adjudicate the alien's application for an immigration benefit.

Alien completes paperwork for DHS background investigation (BI): Time to complete the required paperwork for a DHS background investigation.

Of the 574 continuances granted to the aliens to obtain representation, 271 occurred at the initial hearing. The *Immigration and Nationality Act* (Act) affords aliens time prior to the initial master calendar hearing to secure representation. According to the Act, the initial master calendar hearing cannot be scheduled earlier than 10 days after the alien is served with the notice to appear. This minimum 10-day period before the initial master calendar hearing is provided for the alien to secure representation.[49] Among the cases in our sample, the average time from the aliens being served with the notices to appear until the initial master calendar hearings was 69 days (more than 2 months).[50] Nevertheless, 271 aliens requested continuances at their initial master calendar hearings for more time to seek representation.

Helping Aliens Understand the Court Process

EOIR has administered a Legal Orientation Program since 2003 to provide detained aliens with basic information about the immigration court proceedings. According to EOIR, during FY 2010, contract personnel provided information to about 62,000 detained aliens (50 percent of the detained population) at 25 of the DHS's more than 80 detention sites that may house aliens involved in removal proceedings. The program also is used for some non-detained aliens. For example, during 2010, EOIR launched a pilot program at the Miami immigration court to provide services to non-detained aliens who:

- were unable to secure representation, and
- the immigration judge believed did not understand the proceedings.

According to EOIR, the Legal Orientation Program improves the efficient processing of immigration cases because its participants have a better understanding of the process, are better prepared for their cases, and are more likely to identify forms of relief from removal for which they are eligible. The Department's FY 2012 budget request included an additional $4 million to expand the program to reach more detained aliens. Congress did not provide the additional funds.

The decision on whether to grant a continuance requested by an alien is a legal issue governed by precedent. We are informed by EOIR that there is a well-established body of case law regarding continuances and many cases deal with denial of a continuance as it

[49] Section 239(b)(1) of the Act directs that for an alien to "be permitted the opportunity to secure counsel before the first hearing . . . the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests . . . an earlier hearing date." Section 239(b)(3) states that it should not be construed that the government is prevented from proceeding against an alien if the time period has elapsed and the alien has failed to secure representation.

[50] When the aliens are served with the notice to appear, the DHS informs them that they may secure legal representation and provides a list of attorneys or programs providing reduced-fee or free assistance.

impacts the right to counsel.[51] According to EOIR, most unrepresented aliens are granted at least one continuance to obtain representation in order to meet the legal requirements of a fair hearing that affords due process. EOIR advised us that a lack of representation can significantly delay proceedings because of the extra time needed to provide explanations to, and solicit information from, the aliens.

To help aliens understand the immigration court process, and thus improve the efficient processing of immigration cases, EOIR administers a legal orientation program primarily for detained aliens (see text box).

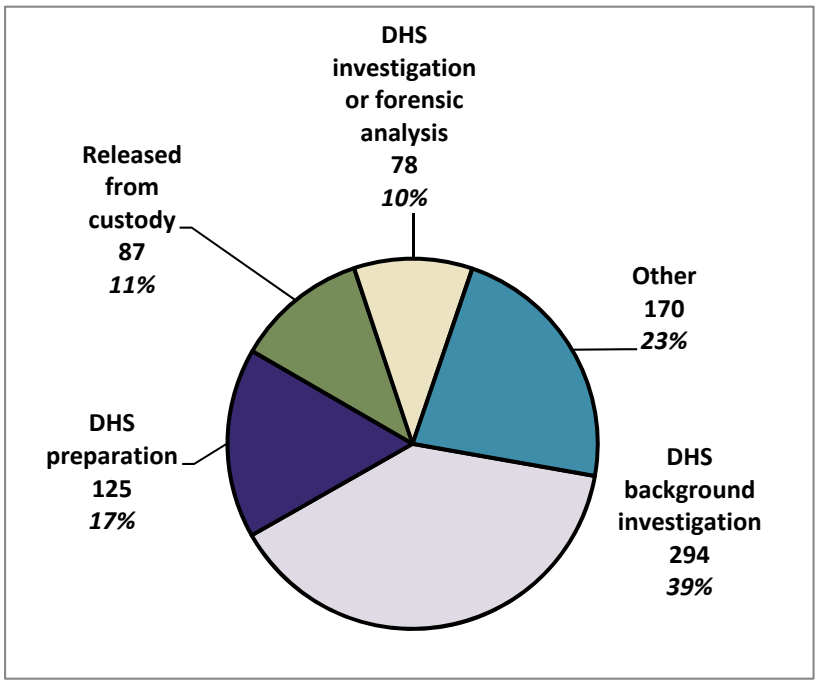
DHS Continuances

The most common DHS-requested continuance was to allow the DHS time to complete background investigations and security checks of aliens seeking relief from removal. Of the 754 DHS-requested continuances, 294 continuances (39 percent) were granted for this purpose. An immigration judge cannot grant an alien relief from removal from the United States until the DHS completes the appropriate background investigations and reports any relevant information to the judge.[52] Thus, while judges have discretion whether or not to grant continuances, because the judge cannot grant an alien relief without the results of the DHS background investigation, continuances for this reason are unavoidable. In our sample, we found that the background investigation continuances averaged 132 days. Figure 8 shows the various reasons for DHS-requested continuances.

[51] We did not undertake an analysis of these legal precedents as part of our review.

[52] However, an immigration judge does not need to wait for the results of the DHS background investigation or security check to deny an alien relief from removal.

Figure 8: Reasons for DHS Continuances



DHS background investigation: Time to complete alien background investigations.

DHS preparation: Time to prepare the case or to obtain the alien's case file.

Released from custody: Case moved from a detained to non-detained court because alien was released from custody.

DHS investigation or forensic analysis: Time to complete investigations or forensics examination of alien-filed documents.

Notes: *Other* is a combination of 10 reasons. Each reason is less than 10 percent of all DHS-requested continuances.

Source: Case sample data from EOIR.

Overall, the number of DHS-requested continuances was less than one-third of alien-requested continuances, yet DHS continuances were longer on average than alien continuances. In our sample, DHS continuances exceeded alien continuances on average by 12 days (102 days versus 90 days). Overall, DHS-requested continuances accounted for 76,863 days (20 percent) of the total 375,047 days granted for all continuances. Almost half of the total days attributable to DHS-requested continuances (38,734) were for the DHS to conduct background investigations. The DHS depends in part on the Federal Bureau of Investigation (FBI) in completing its background investigations and security checks. The FBI performs name checks in its databases and fingerprint identification. We did not assess the timeliness of the FBI's name checks and fingerprint identification in this review.[53]

[53] A 2008 OIG audit, *The FBI's Security Check Procedures for Immigration Applications and Petitions* (Report Number 08-24), found that the FBI had significant delays in processing name checks, but efficiently processed fingerprint identification. All 21 recommendations in the report have been resolved and closed, including our *(Cont.)*

EOIR Guidance on Continuances

According to 8 C.F.R. § 1003.29, immigration judges may grant continuances "for good cause shown." Immigration judges decide whether to grant a continuance request, and for how long, largely on the basis of past BIA and federal court decisions, and on the scheduling concerns of the court. Immigration judges have received limited guidance from EOIR, amounting to a single policy memorandum issued by the Chief Immigration Judge in 1994. The memorandum states that no more than two continuances should be granted for an alien to obtain representation unless the alien establishes a legitimate reason for additional continuances.[54] The guidance is silent on the amount of time that should be allowed to obtain representation and is silent on any other type of continuance.

In our sample of closed cases, 352 cases had 574 continuances to allow the alien time to find representation. In 295 (84 percent) of the 352 cases, the judges adhered to the policy to limit the number of continuances to two for finding representation. However, judges granted aliens more than two continuances for the purpose of obtaining representation in 57 cases (16 percent), which resulted in an additional 206 continuances.[55] The additional 206 continuances extended those 57 cases by 8,581 days, or an average of 151 days per case. One case we reviewed involved a detained alien who received 11 continuances to seek legal assistance, and the case took the immigration court 884 days to process. Even with all of those continuances, the alien never obtained representation and the alien was ordered removed.

Figure 9 shows the number of continuances to seek representation for the 352 cases.

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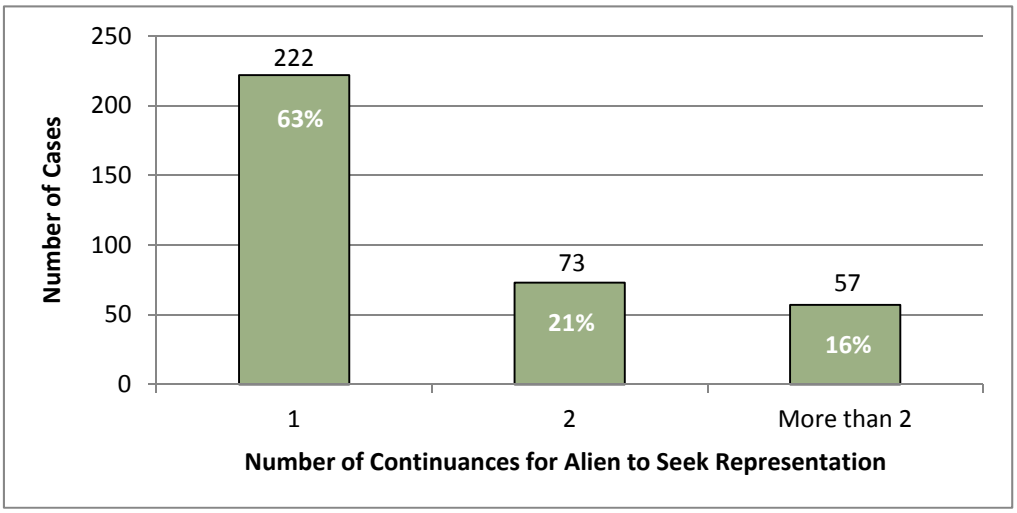
recommendation that the FBI develop a formal, long-term business plan for improving the efficiency and accuracy of the name check process. The OIG has not conducted a follow-up review to determine whether the FBI's processing times have changed, but in January 2012, the FBI informed our office that it had improved the processing time of name checks, with 99 percent of the closure rates for FY 2011 averaging within 30 days. [Note: The original report released on November 1, 2012, incorrectly stated that 18 of the 21 recommendations had been resolved and closed.]

[54] Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 94-6: Continuances, July 18, 1994.

[55] In 33 (58 percent) of the 57 cases where judges granted more than two continuances to seek representation, the aliens never obtained representation.

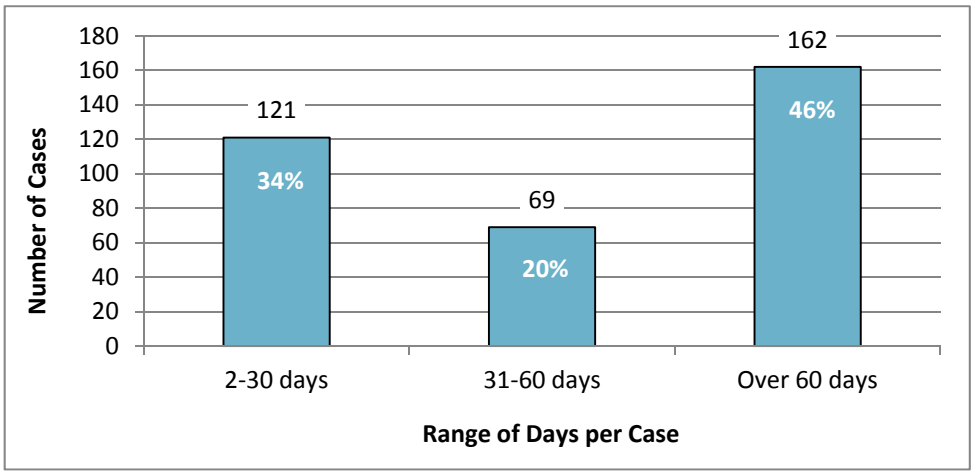
Figure 9: Number of Continuances per Case for Alien to Seek Representation



Source: Case sample data from EOIR.

For the 352 cases, the average length of each continuance to seek representation was 53 days. Figure 10 shows the range of days for the 352 cases.

Figure 10: Amount of Time per Case for Alien to Seek Representation



Source: Case sample data from EOIR.

When asked about the feasibility of issuing additional guidance on continuances, EOIR officials indicated that determining whether the circumstances of an individual case warrant a continuance is too complex to be addressed with strict guidelines. EOIR also stated that

immigration judges often set the length of continuances according to the next available hearing dates on their calendars, and therefore, guidance on the length of continuances is unlikely to have practical effect.

While we agree that such decisions are complex and fact-dependent, we also believe that immigration judges could better apply their judgment in individual cases if EOIR provided further direction on the use of continuances, particularly with regard to what qualifies as good cause for granting continuances, and to the extent possible, what is reasonable in terms of the number and length of continuances in frequently-encountered circumstances. Additionally, EOIR could require additional review and approval if the number of continuances exceeded a reasonable number, or if the total length of continuances exceeded a certain amount of days. Doing so could assist immigration judges in avoiding unnecessary delays, which would help the courts process cases expeditiously and could also help ease some of the crowding of court calendars that leads to more lengthy delays.

Weak Resource Management

In examining whether changes to EOIR staff allocations might improve case processing times, we found EOIR does not have the data or an objective staffing model to guide its resource planning and deployment of immigration judges. For example, EOIR does not track how the judges use their time on different types of cases or work activities. Case type affects the use of judges' time, with more time spent on complex cases such as asylum cases. Other work activities, such as responding to motions, conducting bond hearings, and performing administrative tasks, also compete for the judges' time. Further, although EOIR stated that it uses information on the frequency and length of judges' details to other courts to determine the allocation of judges, it was unable to provide us with data such as how frequently details occur, how long each lasted, or how many proceedings were conducted during the detail.[56] Without data on staffing details, EOIR does not know how much time judges spend helping other courts and

[56] We asked EOIR how it tracked information for both physical staffing details and details through videoconferencing. In response, EOIR stated that it does not centrally track detail travel information, but that it accounts for costs through the travel authorization, travel vouchering, and the budget processes. When we requested summary data on the number of immigration judges and hours they worked through staffing details in FY 2009 and FY 2010, EOIR did not provide any data because it stated that it does not track staffing detail information in the manner we requested. When we requested any analyses EOIR had conducted on its use of staffing details, EOIR responded that it had none.

cannot assess the effects on the detained and non-detained caseloads of the courts involved in the details.

EOIR is not using a quantitative model to determine staffing levels for immigration courts. EOIR officials told us that they consider the following types of information when making staffing decisions: Assistant Chief Immigration Judge assessments of court needs, DHS actions, frequency of staffing details and associated costs, availability of court space and agency resources, and legal requirements.[57] However, EOIR has not documented the staffing methodology it uses to assess that information or assigned relative weights to reflect the importance of each type of information. When we requested that EOIR provide any studies that project staffing levels or needs, EOIR responded that it had none.

Some models and guidance exist that EOIR can review and potentially adopt to assist its resource management decisions. Federal courts and many state courts use weighted caseload studies to assess workload and determine the number of judges needed, which could potentially help EOIR to develop a staffing model.[58] Weighted caseload is a method used to convert caseload into workload using time as a proxy for workload. It is based on the assumption that the more time it takes to process a case, the more work is involved. The Government Accountability Office also has identified best practices for strategic workforce planning. For example, staffing decisions, including needs assessments and allocation decisions should be based on comprehensive workload data that is valid and reliable.[59]

[57] According to EOIR, support staff are allocated in part on the basis of a ratio of immigration judges to support staff. EOIR also stated that staffing is based on the court size (i.e., one-judge, small, medium, and large immigration courts). The latter basis for staffing decisions was provided to the OIG after its field work was completed and therefore, was not confirmed.

[58] For example, the Judicial Conference, the federal judiciary's principal policymaking body, assesses the need for federal bankruptcy judges and federal district judges by using a weighted case methodology. The National Center for State Courts also recommends a weighted case methodology and has worked with several states to develop weighted caseload models, including California, Colorado, Iowa, Maryland, Minnesota, and New Hampshire.

[59] U.S. Government Accountability Office, *DHS Immigration Attorneys: Workload Analysis and Workforce Planning Efforts Lack Data and Documentation,* GAO-07-206 (April 17, 2007), 12-14.

Conclusion

Immigration court cases are frequently adjourned, resulting in longer processing times. Our analysis showed most continuances are attributed to the alien, and a significant percentage of the alien-requested continuances are granted to allow the alien time to seek representation and prepare the case. At initial hearings, for example, the majority of the continuances were requested by the aliens, and almost half of these continuances were to allow the aliens time to seek representation. In our sample of closed cases, we found aliens had, on average, 69 days (over 2 months) before their initial hearings to obtain representation.

EOIR has recognized that when aliens are better informed about the immigration court process, they are better prepared for their cases. To inform aliens about the court process, EOIR administers a Legal Orientation Program that in 2010 provided services to about 40 percent of detained aliens at 27 detention sites. In addition, EOIR launched a pilot program in 2010 to extend the program's services for the first time to some non-detained aliens at one immigration court. (For FY 2012, the Department requested additional funding to expand the program to more detention sites, but did not receive the funds.)

Though not as frequent as alien-requested continuances, DHS-requested continuances are longer on average than alien-requested continuances. Over one-third of the DHS continuances were caused by pending background investigations and security checks that the DHS must complete prior to an immigration judge granting an alien relief from removal from the United States. The DHS depends in part upon the FBI for assistance in completing background investigations and security checks. These continuances are unavoidable because the judges do not have the discretion to grant the aliens relief from removal until they receive the results of the DHS investigations.

We found that EOIR has provided limited guidance to immigration judges to supplement the past BIA and federal court decisions on whether to grant a continuance request and for how long to adjourn cases. EOIR's only guidance regarding continuances states that no more than two continuances should be granted for an alien to seek representation. For continuances for aliens seeking representation and preparing their cases, we found significant differences in the number of continuances granted and the total amount of time allowed for these continuances. While we agree that decisions on granting continuances are complex and fact-dependent, we also believe that immigration judges

could better apply their judgment in individual cases if EOIR provided further direction on the use of continuances, and to the extent possible, what is reasonable in terms of the number and length of continuances in frequently-encountered circumstances. Doing so could assist immigration judges in avoiding unnecessary delays, which would help the courts process cases expeditiously and could also help ease some of the crowding of court calendars that leads to more lengthy delays.

EOIR does not collect full information about how court personnel use their time and does not have a sound staffing model to determine staffing requirements and the allocation of positions among immigration courts. EOIR could develop a staffing model by reviewing methodologies used by federal and state courts in determining their personnel requirements.

Recommendations

To improve case processing by the immigration courts, we recommend that EOIR:

4. analyze reasons for continuances and develop guidance that provides immigration judges with standards and guidelines for granting continuances to avoid unnecessary delays;

5. develop a process for tracking time that immigration judges spend on different types of cases and work activities;

6. collect and track data on its use of staffing details of judges; and

7. develop an objective staffing model to assist in determining staffing requirements and the allocation of positions among immigration courts.

SECTION II. THE BOARD OF IMMIGRATION APPEALS

The BIA completed more appeals of immigration judge decisions than it received from FY 2006 through FY 2010 and reduced the number of pending appeals. Appeals involving non-detained aliens, however, still took long periods to complete. In our sample, the BIA averaged more than 16 months to render decisions on cases involving non-detained aliens. As a result, aliens whose appeals were ultimately denied remained in the United States longer than if the BIA had processed their cases more promptly, while those aliens whose appeals were ultimately granted faced prolonged uncertainty as to their legal status while the cases were being processed. EOIR's performance reporting does not reflect appeal delays and underreports actual processing time, which undermines EOIR's ability to identify problems and take corrective actions.

The BIA completed more appeals of immigration judge decisions than it received.

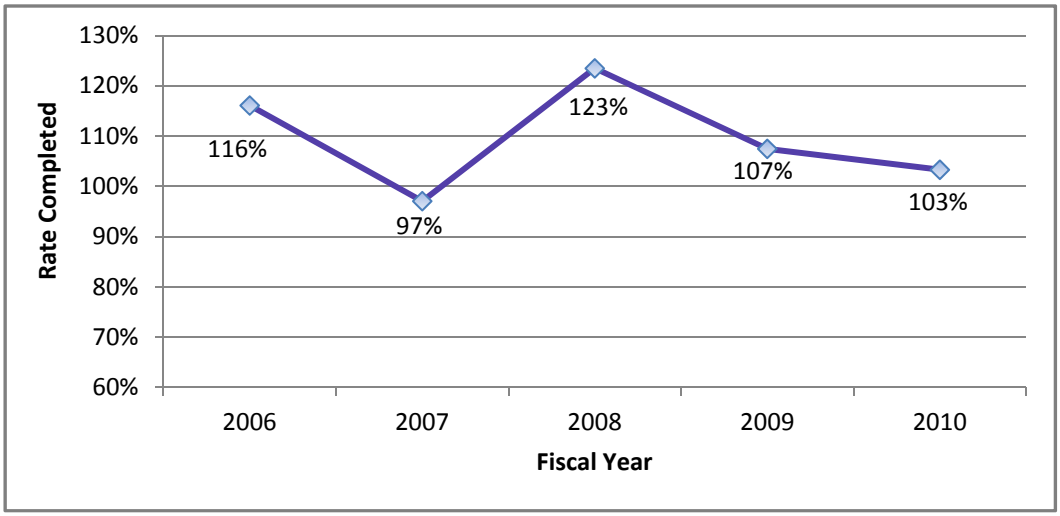
Timely processing of appeals by the BIA, like timely processing of immigration cases by the courts, is part of EOIR's strategic plan.[60] Based on EOIR's publicly reported data of the BIA's past performance from FY 2006 through FY 2010, the BIA was able to complete more appeals of immigration judge case decisions than it received most years during that period.

Completed Appeals of Immigration Judge Case Decisions

From FY 2006 through FY 2010, the BIA's completion of appeals of immigration judge case decisions generally outpaced the number of newly filed appeals. In 4 of the 5 years during this period, the number of these appeals completed by the BIA was greater than the number of appeals received (that is, the completion rate was more than 100 percent). Overall, the number of appeals received declined 23 percent, from 20,282 in FY 2006 to 15,556 in FY 2010. Figure 11 shows the BIA's completion rate of case decision appeals for each fiscal year.

[60] Executive Office for Immigration Review Strategic Plan, Fiscal Years 2008 – 2013.

Figure 11: The BIA's Completed Appeals of Immigration Judge Case Decisions as a Percentage of Appeals Received, FY 2006 – FY 2010



	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Receipts	20,282	18,343	17,759	16,644	15,556
Completions	23,544	17,802	21,928	17,885	16,069

Note: The figure displays data only for appeals of immigration judge case decisions.

Source: EOIR FY 2010 Statistical Year Book.

Pending Appeals

EOIR does not report the BIA's number of pending appeals of immigration judge case decisions separately from the number of other types of pending appeals.[61] Therefore, we could not analyze the trend from FY 2006 through FY 2010 for the number of pending immigration judge case appeals. However, because the total number of these appeals completed by the BIA was greater than the total number of these appeals received over the 5-year period, it is apparent that the BIA was able to reduce its pending caseload of immigration judge case appeals.[62]

[61] The BIA reviews cases involving other immigration court judge decisions, such as bond eligibility and motions to reopen and reconsider. The BIA also reviews cases involving DHS decisions, such as petitions to classify the status of alien relatives for the issuance of preference immigrant visas, and fines imposed on transportation carriers for the immigration law violations.

[62] The BIA's completed appeals of immigration judge case decisions as a percentage of appeals received for all immigration judge case decision appeals was 110 percent for the 5-year period.

Additionally, we analyzed EOIR's internally reported data for all types of appeals and found that the number of all appeals pending decreased 5 percent, from 27,441 in FY 2006 to 26,116 in FY 2010.

To determine the types of pending appeals and how long they had been pending, we analyzed individual case information for all immigration judge case appeals pending on May 24, 2011 (17,987 appeals).[63] Appeals involving non-detained aliens accounted for 92 percent (16,468), and those involving detained aliens accounted for 8 percent (1,519) of the immigration judge case appeals. We determined that a majority of the appeals were pending for less than 1 year – 66 percent or 11,862 appeals. Almost all of the appeals pending 1 or more years involved aliens who were not detained. Of the 6,125 appeals that were pending 1 or more years, 6,112 (99.7 percent) involved non-detained aliens.

Some appeals took long periods to complete due to BIA processing delays.

In our sample of 23 appeals, appeals from non-detained aliens took the BIA almost 5 times longer on average to complete than appeals from detained aliens. The average number of days to complete appeals (counting from the day the notice of appeal was filed to the day the BIA's decision was issued) for non-detained aliens was 485 days (16 months). For detained aliens, it was 105 days (3½ months). Because appeals from detained aliens are the BIA's priority, we expected that those appeals would have shorter processing times. However, the difference in the number of processing days between non-detained and detained appeals in our sample is significant and attributable primarily to the volume of non-detained appeals waiting for review by the BIA's paralegal specialists.[64]

According to an EOIR official, a paralegal reviews the full case file to ensure that all critical documents are present, complete, in the correct order, and pertain to the case. The paralegal also prepares an issue sheet for the case; tabs important documents; and does a jurisdictional review to determine whether the appeal was filed on a timely basis,

[63] There were a total of 27,293 appeals pending on May 24, 2011, consisting of 17,987 appeals of immigration judge case decisions, 5,418 appeals of other immigration judge decisions, and 3,888 appeals of DHS decisions.

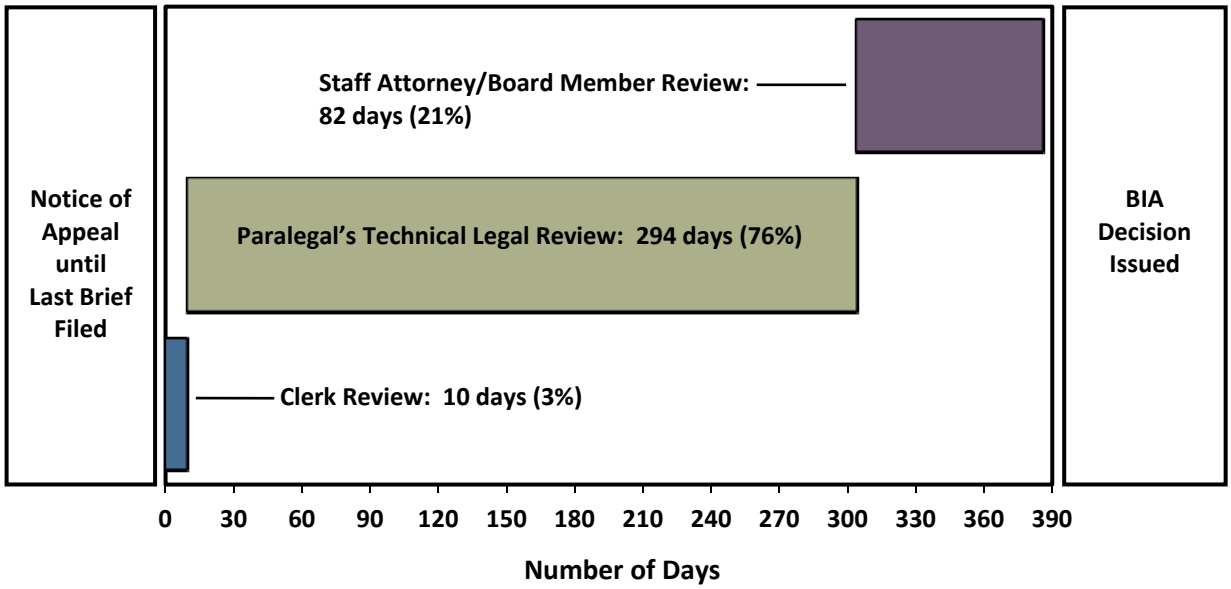
[64] There were 16 paralegal specialists at BIA during the period of our review.

whether the parties have standing, and whether a motion to withdraw or a joint motion to remand has been filed.

The EOIR official informed us that the technical legal review by the paralegal usually takes only a few hours as long as the case file is complete and presents no legal analysis problems. This official said that the paralegals processed detained appeals immediately after receiving them from the clerk. However, the paralegals processed the non-detained appeals in turn from a large queue, an average of 6 to 8 months after the appeals became available for the paralegals' review.

We found in our sample that when an alien was detained, a paralegal reviewed the appeal within an average of 8 days. When the alien was not detained, a paralegal completed the review in an average of 294 days. Figure 12 shows that, of the three types of reviews conducted during the BIA process – by the clerk, by the paralegal, and by the staff attorney and board member – 76 percent of the total processing time for non-detained appeals in our sample was the time waiting for the paralegal review and then the actual review. EOIR attributes the delays to the overall volume of appeals, the fact that detained cases are the BIA's priority when allocating its resources, and inadequate staffing levels.

Figure 12: Average Time to Review Non-Detained Appeals in Sample



Notes: A flowchart of the BIA's process is in Appendix II.

The time from the date of the filing of the notice of appeal until the date of the filing of the last brief averaged 84 days in our sample.

Source: Case Access System for EOIR (CASE) automated system.

EOIR's completion statistics for appeals do not include the entire processing time.

EOIR's completion statistics for appeals do not include the entire processing time to review and decide appeals. The interval EOIR counts varies for each of its goals. According to 8 C.F.R. § 1003.1(e)(8)(i), the BIA is required to issue its decisions within established timelines based on the number of board members assigned to review the appeal (regardless of the detention status of the alien). A single board member decides the appeal unless it falls into one of six categories that require a decision by a panel of three board members.[65] The goal for one-member decisions is 90 days. The goal for three-member decisions is 180 days. In addition to the timelines established in the Code of Federal Regulations (which are for all appeals), the BIA developed an additional

[65] These categories are the need to: (1) settle inconsistencies among the rulings of different immigration judges; (2) establish a precedent construing the meaning of laws, regulations, or procedures; (3) review a decision by an immigration judge that is not in conformity with the law or with applicable precedents; (4) resolve a case of major national import; (5) review a clearly erroneous factual determination by an immigration judge; and (6) reverse the decision of an immigration judge in a final order, other than nondiscretionary dispositions.

timeline for appeals involving detained aliens because those are priority appeals.[66] Appeals involving detained aliens are measured twice: once under either the one- or three-member review timeline and again under the detained alien case timeline, which sets the goal at 150 days for 90 percent of the detained cases.

EOIR's starting point for counting appeal processing days under each goal is described below:

- One-member reviews – The count begins when a staff attorney or paralegal is assigned to review the appeal and prepare the written decision (includes appeals from detained and non-detained aliens).[67]

- Three-member review – After a staff attorney reviews an appeal and determines that is it appropriate for a three-member review, EOIR begins the count on the date that the board agrees with the attorney's determination (includes appeals from detained and non-detained aliens).

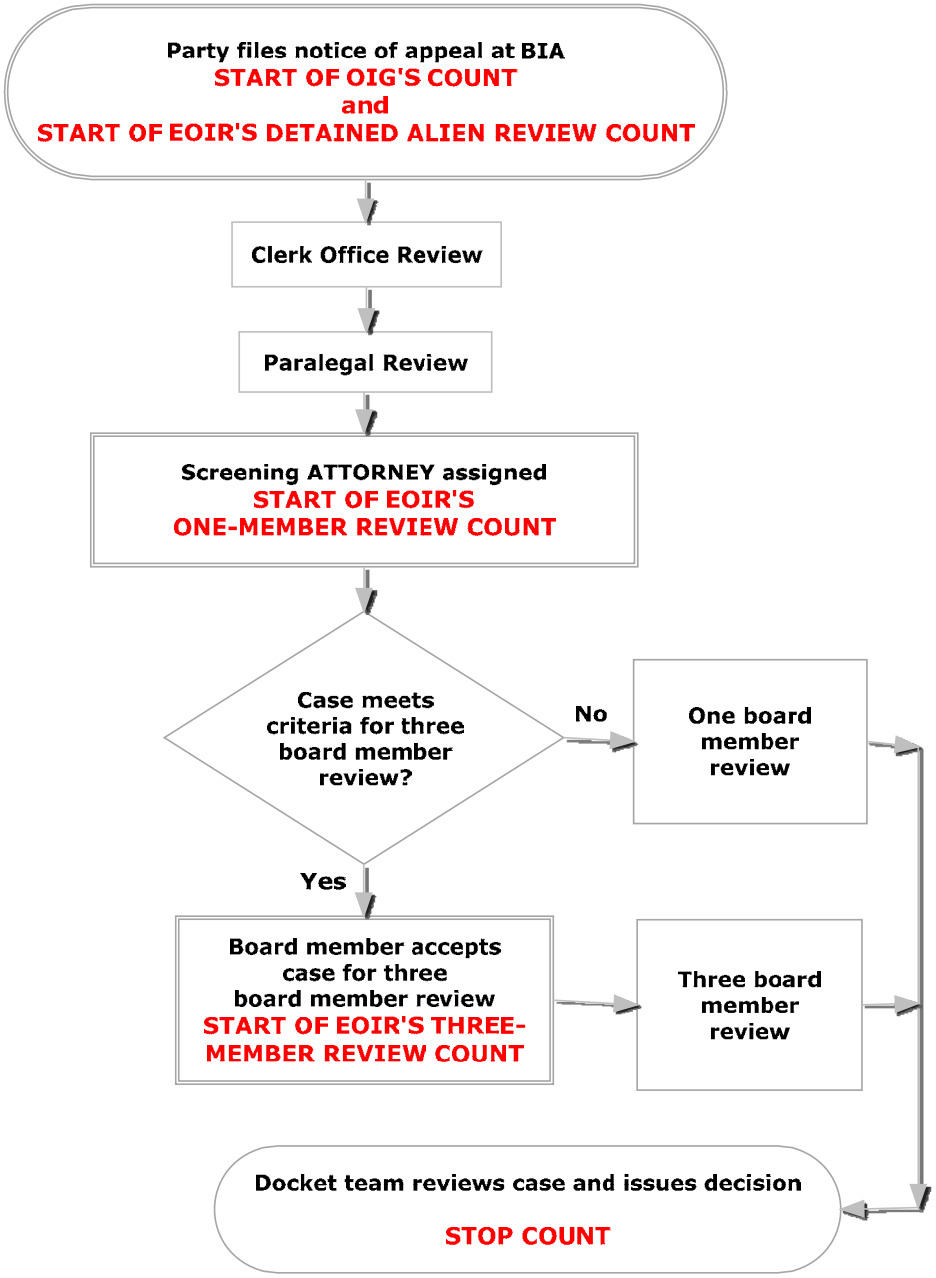
- Detained alien cases – EOIR begins the count when the alien or DHS files a notice of appeal with the BIA, which is the beginning of the appellate process.

As a result of the starting points EOIR uses, its statistics for the one- and three-member review goals do not reflect the total number of elapsed days taken to review and decide appeals. Figure 13 illustrates the basic BIA process. (See Appendix II for a detailed flowchart of the BIA's process.)

[66] The Code of Federal Regulations does not provide a timeline to complete detained cases, but does state that decisions on the merits of the cases must be issued as soon as practicable with a priority for cases involving detained aliens.

[67] This review is separate from the technical legal review by the paralegal discussed previously.

Figure 13: Board of Immigration Appeals Process



Source: EOIR documentation and interviews.

The BIA's goals for one- and three-member reviews count only part of the BIA's process for reviewing appeals, and the parts that are excluded represent a significant portion of the processing time. For the 23 appeals in our sample, we calculated processing times for one- and three-member appeals starting from the day the appeal was filed until the BIA issued a decision, which is the actual time the appellants are waiting for decisions. While EOIR's method of calculation showed an average of 54 days to process an appeal under the one-member goal and an average of 76 days under the three-member goal, the entire time to process the appeals averaged 372 and 361 days, respectively. The differences in EOIR counts and actual total elapsed days are most noteworthy among the non-detained appeals. EOIR's longest count for a non-detained appeal was 154 days. In contrast, the shortest number of elapsed days for a non-detained appeal was 206 days. Table 3 shows, for the 23 cases in our sample, the contrast between the number of days that EOIR uses to measure how long the BIA members take to decide appeals and the total processing time for appeals.

Table 3: Comparison of EOIR Count of Processing Days and Total Elapsed Days for 23 Appeals

Alien Custody Status	One-Member Review	Three-Member Review	Days in EOIR Count	Total Elapsed Days	Difference in Days
1. Detained	✓		10	62	52
2. Detained	✓		16	76	60
3. Detained	✓		23	121	98
4. Detained		✓	31	136	105
5. Detained	✓		43	114	71
6. Detained	✓		50	110	60
7. Detained		✓	72	119	47
8. Non-Detained	✓		5	474	469
9. Non-Detained	✓		7	250	243
10. Non-Detained	✓		28	364	336
11. Non-Detained		✓	34	670	636
12. Non-Detained	✓		49	456	407
13. Non-Detained	✓		54	206	152
14. Non-Detained	✓		72	700	628
15. Non-Detained	✓		73	651	578
16. Non-Detained	✓		73	304	231
17. Non-Detained	✓		78	671	593
18. Non-Detained	✓		83	342	259
19. Non-Detained	✓		83	634	551
20. Non-Detained	✓		84	610	526
21. Non-Detained		✓	90	387	297
22. Non-Detained	✓		138	545	407
23. Non-Detained		✓	154	493	339

Notes: EOIR's count for the one-member review starts with the date that the staff attorney or paralegal is assigned to review the appeal to prepare the written decision until the date the BIA's decision is issued.

EOIR's count for the three-member review starts with the date that the appeal is accepted for review by three members until the date of the BIA's decision.

Total Elapsed Days starts with the date that the appeal is filed until the date of the BIA's decision.

See Appendix II for a flowchart of the BIA process.

Source: Case Access System for EOIR (CASE) automated system.

Conclusion

EOIR personnel we interviewed stated that appeals for non-detained aliens have disproportionate processing delays due to the paralegal review, which takes months to initiate but only hours to complete. EOIR also attributes the delays to the volume of appeals and too few staff members. Further, EOIR's tracking method for the length of appeals does not include total processing times for appeals. Depending on the type of review – one or three board members – EOIR counts the appeal processing time from different starting points. These different starting points significantly skew the reported achievement of its completion goals for appeals and impede EOIR's effective management of the appeals process. The total number of days taken to review and decide appeals, not EOIR's count of days, represents how long the aliens and the DHS wait for decisions on their appeals.

Recommendations

To provide accurate and complete information for managing appeals at the BIA, we recommend that EOIR:

8. consider seeking additional resources or reallocating resources to reduce delays in the processing of appeals for non-detained aliens; and

9. improve its collecting, tracking, and reporting of BIA appeal statistics to accurately reflect actual appeal processing times.

CONCLUSION AND RECOMMENDATIONS

EOIR does not collect and report complete performance data about the immigration courts, which can conceal problems and overstate accomplishments. For example, EOIR excludes nearly a third of immigration court cases from being measured in the performance reports that it uses to track the timely completion of cases. Further, EOIR discontinued any timeliness goals for non-detained cases. It now has timeliness goals only for detained cases and asylum cases even though some courts have few, if any, detained cases. Although we agree that EOIR should prioritize the completion of detained cases, EOIR should have goals for the non-detained cases as well. EOIR also reports cases as completed even when no decisions have been made on whether to remove the aliens from the United States. After cases have been administratively closed, they may be later reopened and thus result in EOIR reporting multiple receipts for the same cases.

From FY 2006 through FY 2010, the volume of immigration cases received outpaced many immigration courts' capability to process the cases on a timely basis even though there was an increase in the number of judges. Cases, especially those for non-detained aliens, can take long periods to complete, which crowds court calendars and delays processing of new cases. Over the 5-year period, the number of cases pending one year or more increased by 85 percent.

Adding to the case processing times are the frequent continuances. In our sample of 1,785 closed cases, 953 cases (53 percent) had one or more continuances. Each of those cases had, on average, four continuances, and the average amount of time granted for each continuance was 92 days (about 3 months), resulting in an average of 368 days per case.

We found that EOIR has provided only limited guidance to immigration judges to supplement the past BIA and federal court decisions on whether to grant a continuance request and for how long to adjourn cases. In our case sample, we found significant differences in the number of continuances granted and the total amount of time allowed for continuances. Cases in which judges granted more than two continuances for aliens to seek representation resulted in an additional 206 continuances, which extended the 57 cases by a total of 8,581 days.

Staffing decisions can affect the court system's capability to process immigration cases. We found that EOIR does not collect full

information about how court personnel use their time and does not have a sound staffing model to determine staffing requirements and the allocation of positions among immigration courts. EOIR could develop a staffing model by reviewing methodologies used by federal and state courts in determining their personnel requirements.

From FY 2006 through FY 2010, the BIA was able to complete more appeals of immigration judge case decisions than it received and thus reduced the appeals pending processing. In our sample of completed appeals, the BIA processed appeals involving non-detained aliens significantly slower than appeals involving detained aliens. Appeals for non-detained aliens have disproportionate processing delays due to the paralegal review, which EOIR attributes to the overall volume of appeals, the priority given to detained cases, and inadequate staffing levels. EOIR's completion statistics for appeals do not include the entire processing time to review and decide appeals. Therefore, significant delays in processing are not reflected in the statistics.

Below, we restate our overall recommendations for improving EOIR's management of the immigration courts and the BIA.

Recommendations

To improve its case processing and provide accurate and complete information on case processing, we recommend that EOIR:

1. improve reporting of immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect actual case length even when more than one court is involved;

2. eliminate case exemptions from completion goals to reflect actual case length, but identify case delays that EOIR considers outside the control of immigration judges;

3. develop immigration court case completion goals for non-detained cases;

4. analyze reasons for continuances and develop guidance that provides immigration judges with standards and guidelines for granting continuances to avoid unnecessary delays;

5. develop a process for tracking time that immigration judges spend on different types of cases and work activities;

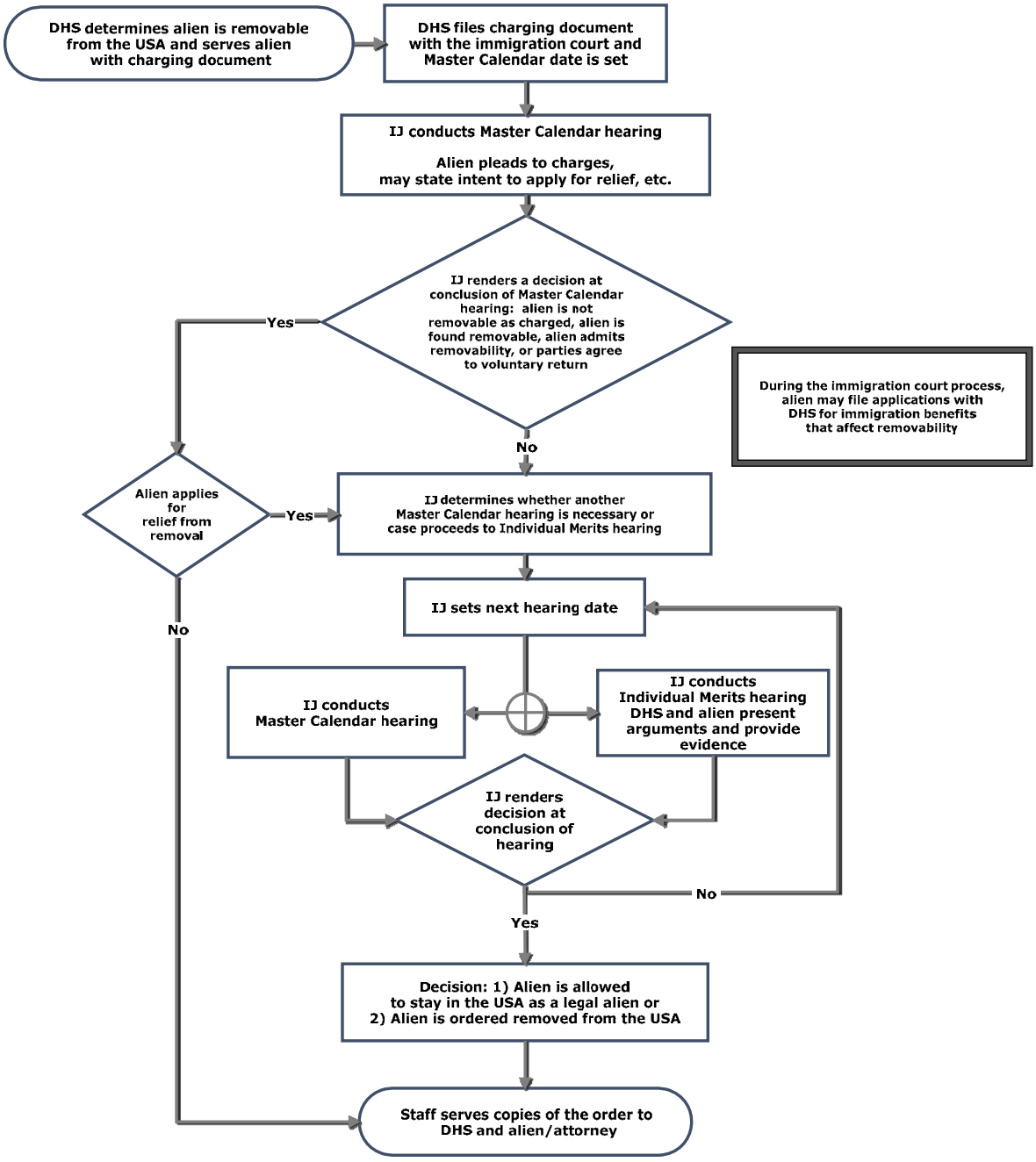
6. collect and track data on its use of staffing details of judges;

7. develop an objective staffing model to assist in determining staffing requirements and the allocation of positions among immigration courts;

8. consider seeking additional resources or reallocating resources to reduce delays in the processing of appeals for non-detained aliens; and

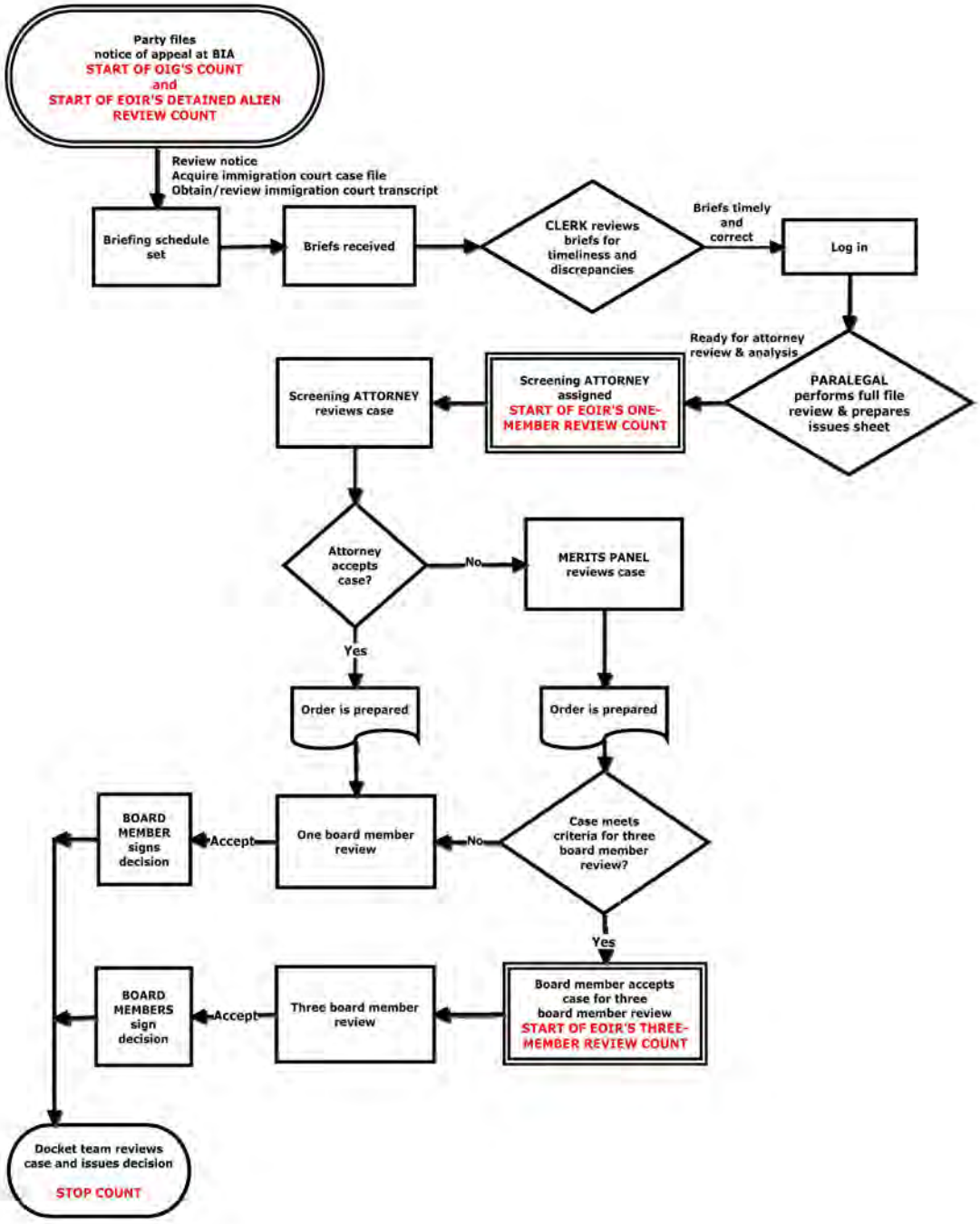
9. improve its collecting, tracking, and reporting of BIA appeal statistics to accurately reflect actual appeal processing times.

APPENDIX I: IMMIGRATION COURT PROCESS



Source: EOIR documentation and interviews.

APPENDIX II: BOARD OF IMMIGRATION APPEALS PROCESS



Note: This flow chart does not include every step in the process. It excludes, for example, actions as a result of defective submissions or board members returning orders to staff attorneys to be revamped.

Source: EOIR documentation and interviews.

APPENDIX III: OIG SAMPLE OF CLOSED CASES AT THE IMMIGRATION COURTS

To examine case processing at the immigration courts, we requested that EOIR provide us with specific data elements for a random sample of individual removal cases that were closed during calendar year 2009 at the following 10 immigration courts:

1. Arlington, Virginia;
2. Chicago, Illinois;
3. New York City, New York;
4. Seattle, Washington;
5. Tacoma, Washington;
6. Tucson, Arizona;
7. Eloy, Arizona;
8. Harlingen, Texas;
9. Port Isabel, Texas; and
10. San Diego, California.

We selected these 10 courts because they represent a mix in terms of size (as measured by the number of immigration judges at each court), geographical diversity, and because they collectively handle a wide spectrum of case types. We limited our request to removal cases because these cases account for the vast majority of cases that the immigration courts handle each year.[68] However, we did not include Institutional Hearing Program removal cases in our request because these cases involve criminal aliens serving sentences in prison for criminal convictions.[69]

In response to our request, EOIR provided us with over 30 data elements for 2,500 cases. After deleting some cases (for example, removing cases from the sample that did not have a final decision regarding whether or not an alien would be removed from the United States during calendar year 2009), the final sample was 1,785 cases. We used this sample to represent generally how the immigration courts process the caseload.

[68] According to EOIR's FY 2010 Statistical Year Book, removal cases accounted for 318,435 of the total of 325,326 cases received (98 percent) and 280,420 of the total of 287,207 cases completed (98 percent) at the immigration courts during FY 2010.

[69] According to EOIR, Institutional Hearing Program cases constitute only 2 percent of total removal cases.

We classified the sample of closed cases into types based on EOIR's categories. EOIR categorizes a case based on its status when the case is completed. However, those categories may not have been consistent throughout the time the case was pending at the courts. We found that some of the non-detained cases in our sample included cases in which the alien was initially detained but subsequently released from custody. Consequently, because an alien's custody status can change during the life of the case, we created a case type that EOIR does not use – that is, mixed custody. Table 4 provides information on the seven case types we analyzed.

Table 4: Case Types in OIG Sample of Closed Cases

No.	Case Type	Description	Number of Cases	% of Total
1	Detained without applications for relief from removal	Alien was detained during the entire case and did not seek relief from removal by submitting an application	691	39%
2	Detained with applications for relief from removal	Alien was detained during the entire case and sought relief from removal by submitting an application (other than asylum)	264	15%
3	Non-detained with applications for relief from removal	Alien was never detained and sought relief from removal by submitting an application (other than asylum)	223	12%
4	Non-detained without applications for relief from removal	Alien was never detained and did not seek relief from removal by submitting an application	209	12%
5	Mixed custody with applications for relief from removal	Alien was detained during a portion of the case and sought relief from removal by submitting an application	206	12%
6	Mixed custody without applications for relief from removal	Alien was detained during a portion of the case and did not seek relief from removal by submitting an application	109	6%
7	Asylum	Alien was never detained and sought relief from removal by filing for asylum	83	5%
Total			**1,785**	**100%**

Note: Percentages do not add to 100 due to rounding.

Source: Case sample data from EOIR.

Our analysis of case processing times was based on the amount of time that elapsed from when the DHS served the court with a copy of the notice to appear until the immigration judge rendered a decision to order the alien removed from the United States, grant relief, or terminate the case. It does not include the time a case was closed and later reopened, such as cases that were on appeal at the BIA or administratively closed.

Of the 1,785 cases in our sample, 146 were closed and later reopened (8 percent). Of the 146 cases, 50 cases (3 percent of the cases in our sample) were appealed to the BIA and remanded to the immigration courts; 45 cases (3 percent of the cases in our sample) were administratively closed and later reopened; 43 cases (2 percent of the cases in our sample) were closed due to a judge's decision and later reopened; 6 cases (0.3 percent of the cases in our sample) were administratively closed, appealed to the BIA, and remanded to the immigration courts; 1 case (0.1 percent of the cases in our sample) was closed and later reopened because it had an administrative closure and a decision; and 1 case (0.1 percent of the cases in our sample) was closed and later reopened because it had a decision and the immigration judge granted the alien temporary protected status.[70]

To determine the reasons and sources for continuances, including the amount of time cases were delayed by continuances, we analyzed continuance code data that was included in our sample of closed cases. When a case is adjourned, the immigration judge is required to use a two-digit code that indicates the reason for the continuance. Each continuance code assigns responsibility for the delay to one of the parties (alien, court, or the DHS). A court support staff member enters this code along with the date when the immigration judge granted the continuance into EOIR's automated case tracking system. To identify common reasons for alien-requested and DHS-requested continuances, we grouped continuance codes with similar descriptions.[71] We determined the amount of time a case was delayed by a continuance by counting the number of days that elapsed after the continuance until the next continuance or completion.

[70] Temporary protected status is a temporary form of relief from removal that takes the case off the court calendar until the DHS files a motion to reopen the case. The Secretary of Homeland Security has the authority to designate a foreign country's nationals for temporary protected status if adverse conditions preclude those nationals from safely returning home.

[71] As of March 2009, there were a total of 62 continuance codes.

APPENDIX IV: PENDING CASELOAD AT THE IMMIGRATION COURTS

To determine the age and characteristics of the immigration courts' pending caseload, we requested that EOIR provide us with specific data elements for every removal case that was pending (except Institutional Hearing Program removal cases) on an agreed-upon date. In response, EOIR provided us with 7 data elements (including case type and the date each case was originally received at the immigration court) for 252,925 cases in which a final decision regarding whether an alien would be removed from the United States had not yet been reached on August 3, 2010. According to EOIR, these cases were all of the removal cases that were pending at the immigration courts on that date. We limited our review to removal cases because these cases account for the vast majority of cases that the immigration courts handle each year.

We believe that the data characteristics on one day are sufficiently similar to any other day within a reasonable time frame. Therefore, we are using these data to represent generally the condition of the immigration court's pending caseload at that time.

EOIR classifies its cases by type, and we used the same case types to categorize the pending caseload. EOIR's classification of a case is determined by the status of the alien as of the case's last completion.[72] The case types are either that the alien is detained or not detained and either the alien has applied for relief from removal or not. The case types may or may not be the type the cases started as or what they may end up to be when a final decision is rendered because aliens may be released from detention or submit or withdraw applications for relief from removal while the cases are pending.

To determine the amount of time a case was pending, we counted the number of days that elapsed from when the DHS served the court with a copy of the notice to appear until August 3, 2010. Consequently, our analysis of the age of the pending caseload on that date includes the time that elapsed for those cases that were outside the control of the courts; that is, for cases appealed to the BIA and remanded back to the courts or cases administratively closed and later reopened. However, we believe that these cases represent a small percentage of all cases and therefore would not have a significant impact on the overall age of the pending caseload.

[72] We asked EOIR to provide us with the case types as of August 3, 2010, even though the cases were still pending.

APPENDIX V: EOIR RESPONSE TO DRAFT REPORT

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

September 14, 2012

MEMORANDUM

TO: Jason R. Higley
Acting Assistant Inspector General for
Evaluation and Inspections
Office of the Inspector General

FROM: Juan P. Osuna
Director
Executive Office for Immigration Review

SUBJECT: EOIR's Response to the OIG's Report: *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*

The Executive Office for Immigration Review (EOIR) has examined the Department of Justice (DOJ), Office of Inspector General's (OIG) Draft Audit Report, entitled: *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* (Report). EOIR recognizes the OIG's effort to ensure that the public is aware of EOIR's caseload and its efficient processing of cases. EOIR's mission remains focused on adjudicating immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.

General Response

The main focus of the Report is a criticism of the manner in which EOIR analyzes and reports its data both for internal performance measurement and external performance reporting. The report's conclusion that EOIR's external reporting could be clearer is well taken and the agency intends to report the additional information recommended by the Report. As noted below, the agency last year came to the same conclusion and is working to enhance its data reporting. However, the Report also concludes that these reports are necessary in order for the agency to identify performance areas that require improvement, without any specific information on how those reports could be used to identify areas for improvement or assist management in the efficient processing of cases, and this is where EOIR disagrees with many of the Report's conclusions.

The Report conflates the distinction between the external clarity of EOIR reports and their internal usefulness. The Report concludes that EOIR's performance reports are "incomplete" and "overstate accomplishments." However, the OIG misunderstands the purpose of the management reports. As an initial matter, case completion reports are intended to measure court workload so that the agency can more effectively balance resources among the immigration courts to accomplish its mission. These reports were never intended to promote the agency's accomplishments to the public but instead were developed as internal tools to provide the courts and EOIR management with critical information about the processing of cases.

The OIG report claims that the agency overstates the number of matters opened by the immigration court and the number of cases completed by the agency. EOIR does not overstate the number of matters and receipts received by the courts. The agency's Statistical Yearbook, published annually on the agency's website, defines all terms and explains each of its statistical conclusions. The term "matter" and the term "receipt" are clearly defined in the agency's reporting statistics and are intended to communicate the amount of work received by the courts from the actions that define those terms. EOIR Statistical Yearbook 2011 at B1. By disagreeing with the agency's clear and public definition of a "completion," the report confuses what EOIR statistics actually measure with what the OIG believes EOIR should measure.

The Report also characterizes EOIR performance reports as "inaccurate" but never specifically states where the data is inaccurate. In actuality, the report's concern about EOIR data is not with its accuracy but with its usefulness. There were no specific findings of statistical flaws in EOIR's data or in its reports, just a suggestion about what additional information the OIG believes would be useful to the public and additional ways in which the agency's data can be reported. To the extent that the OIG believes that the agency's public reporting could be made clearer, the agency is willing to publically report information as suggested in the Report. However, EOIR strongly disagrees with statements that the agency's internal management reports are "inaccurate."

Specific Inaccuracies

- On p. 29, the Report states that "[t]he Department of Justice's costs also rise as time spent processing cases increases, as do the costs for those representing the aliens." The Report does not provide any factual support for this statement. EOIR believes that it would be helpful if the OIG would be willing to share the analysis that led to this conclusion as we have not necessarily reached the same conclusion.

- Also on p. 29, the Reports states: "Delays in case processing for detained cases also increase associated DHS detention costs." This appears to suggest that there are delays in detained case processing, yet the OIG did not analyze or comment

upon delays in detained case processing. Indeed it would be hard pressed to do so as detained cases are resolved with exceptional speed through the system, as the OIG's own chart shows. *See* Report, p. 28, Figure 5.

- The Report contains flowcharts intended to illustrate the agency's case processing (Figure 13; Appendix I; Appendix II). These flowcharts indicate that their source is EOIR. EOIR did not create these flowcharts for the OIG. Instead, the agency provided technical information and subsequent corrections to the charts that were created by the OIG.

The Report's Recommendations

Recommendation 1: Improve reporting of immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect actual case length even when more than one court is involved.

EOIR concurs in this recommendation.

The Report reaches specific conclusions regarding EOIR's definition of a "completion" and the effect that definition has on both internal performance measurement and external performance reporting. The Report first criticizes EOIR's determination to report "cases as completed even when no decisions have been made whether to remove the aliens from the United States" and that EOIR does not count the total time it takes to complete each case from the date the Notice to Appear is filed in court to the date of a final order of removal.

The hearing or hearings conducted at the immigration court that receives the Notice to Appear, including any motions, require administrative work, research, and a decision by the judge. For example, with regard to a motion to change venue, the judge reviews the history of the case, listens to previous hearings, examines reasons cited by counsel or the respondent, balances competing factors (e.g., administrative convenience, expeditious treatment of the case, location of witnesses, cost of transporting witnesses and evidence, and locations of the respondent and counsel), and determines if there is "good cause" to change venue based on regulations and case law, such as *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992). While the decision on a motion to change venue is not a final decision on the alien's removability, it is important to take into account these types of decisions in measuring employee and court performance because the above actions use judge and support staff time. In other words, not every decision made by an Immigration Judge in a given case is a decision on whether to order the alien removed. Yet these other types of decisions, including changes of venue, motions, bonds, and others, require substantial judge and staff time, and thus are relevant to assessments about the efficiency of particular courts.

In addition, EOIR focuses on decisions at each court location because each case is separately managed at the local court level throughout the country. If a case begins anew at a second court, for example through change of venue or transfer, the judge must review all of the actions taken previously, listen to prior hearings, and the staff must update all data entry. It is, for all practical purposes, a new case at the receiving court. By using completion data for each court, as opposed to the total time to complete each case, EOIR can pinpoint the efficiencies at each location. A single measurement that measures the date the Notice to Appear is filed to the date there is a final adjudication on the case would mask whether there was an unreasonable delay in the case's progress as it moved from one court location to another.

EOIR recognizes that the data collected in its CASE system and analyzed for internal performance measurement is now being used to communicate information to the public regarding the agency's case processing and performance. As a result of EOIR's own recognition of the limitations of the performance reporting it provides and an understanding that we may need to communicate our performance to the public differently, in September 2011 the Director created the EOIR Data Working Group to address these issues. As mentioned in the Report, the Data Working Group met from October 2011 to June 2012 and anticipates producing a report for the Director with recommendations on external reporting measurements in the fall of 2012.

To the extent that the Report concludes that the agency report case specific information along with court specific information, EOIR concurs in this recommendation and will begin reporting immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect case length by the end of FY 2013.

Recommendation 2: Eliminate case exemptions from completion goals to reflect actual case length, but identify case delays that EOIR considers outside the control of immigration judges.

EOIR concurs in this recommendation.

The Report criticizes the usefulness of the agency's completion goals in ensuring that cases are completed in a timely manner because a percentage of our cases are exempted from our goals. We first note the ultimate validity of this criticism is based on how "timeliness" is defined. EOIR determined that in order for completion goals to constitute a valid internal performance measure of timeliness, we should exclude the time periods when cases are delayed for reasons outside of an Immigration Judge's control. Therefore, as an internal performance measure, our completion goals, with exemptions, accurately measure the Immigration Judges' and courts' performance in this area.

In the cases studied by the Report, OIG found that 39 percent of the Department of Homeland Security's (DHS) requests for continuances were granted to complete mandatory background investigations and security checks of aliens seeking relief from removal. The Report also states that these continuances averaged 132 days. The Report does not say how measuring length of what amounts to a mandatory continuance in an overall performance measure of an Immigration Judge's ability to process a case would assist agency management in analyzing efficient case processing or whether an Immigration Judge is completing a case in a timely manner. An Immigration Judge cannot grant relief without completed background checks and has no control over how long these checks may take at DHS.

However, if it is the Report's conclusion that completion goals are also meant to inform the public as to how many cases the agency can complete in a set amount of time, without taking into consideration any of the delays outside of the control of the Immigration Judge, we accept that this information may be useful and the agency will begin to engage in this reporting by the end of FY 2013.

Recommendation 3: Develop immigration court case completion goals for non-detained cases.

EOIR partially concurs in this recommendation.

The Report states that EOIR abandoned all goals for non-detained cases, with the exception of asylum cases, and consequently has no measures for assessing performance of courts processing primarily non-detained cases. That conclusion is incorrect for various reasons. First, it minimizes the impact of asylum cases on our caseload. While asylum cases may account for less than half of the caseload at some of our courts that primarily process non-detained cases, asylum cases are very time intensive and generally take more processing time and immigration court resources than other non-detained cases.

Second, the change in case completion goals was made to clearly communicate the agency's priorities, and as the Report acknowledges, EOIR's emphasis on detained cases is proper. It appears that the OIG believes that our completion goals, as a whole, should be set to serve as a measure of our performance as opposed to a communication of the agency's priorities. However, we note that the Report does not provide any analysis of how this information can be used internally to assist the agency in efficient overall processing of cases. EOIR believes that some examination of how this information can be used to assist management in analyzing efficient case processing must be done before committing to establishing additional goals. Therefore, EOIR will examine whether establishing additional goals would assist in measuring agency performance and serve as a useful management tool for identifying the need for efficiencies in certain areas. EOIR will complete this assessment by the end of FY 2013.

Recommendation 4: Analyze reasons for continuances and develop guidance that provides immigration judges with standards and guidelines for granting continuances to avoid unnecessary delays.

EOIR partially concurs in this recommendation.

In response to the January 2012 working draft report's inference that the agency could place clear and definite limits on continuances across all cases, EOIR responded by advising the OIG that controlling caselaw regarding a showing of "good cause" for a continuance found due process concerns implicated by any approach that placed greater emphasis on case management concerns than fairness. While acknowledging that EOIR informed the OIG of the well-established body of law regarding continuances, the Report did not analyze those precedents before continuing to assert the belief that EOIR should provide further direction on the use of continuances. In particular the OIG continues to suggest that EOIR provide guidance with regard to what qualifies as good cause for granting continuances, and to the extent possible, identify what is reasonable in terms of the number and length of continuances in frequently-encountered circumstances. A reading of even some of the relevant federal caselaw establishes that the recommendation in the Report is legally problematic.

In *Hashmi v. Attorney General of United States*, 531 F.3d 256 (3rd Cir. 2008), after multiple adjournments, an Immigration Judge denied a continuance request finding that he had an obligation to complete cases in a reasonable amount of time and the goal for completion of the type of case before him had already been exceeded by almost a year. The United States Court of Appeals for the Third Circuit held that reaching a decision about whether to grant or deny a motion for a continuance based solely on case-completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary.

In *Baires v. INS*, 856 F.2d 89 (9th Cir. 1988), an Immigration Judge denied a request for a continuance finding that the timing of the request would result in administrative inefficiency if granted. The United States Court of Appeals for the Ninth Circuit found that the Immigration Judge's inflexibility deprived the alien of a fair opportunity to present his case.

In *Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008), an Immigration Judge denied a request for a short continuance for the alien to comply with fingerprinting requirements where the case had been continued seven times over the course of 2 ½ years and the Immigration Judge had specifically informed the alien's attorney at a prior hearing that the fingerprinting requirements had to be met prior to the next hearing. The Ninth Circuit found no inconvenience to the Immigration Court in granting the continuance and found that the denial of another continuance entirely deprived the alien of an opportunity to

present her case. The Ninth Circuit stated that, "As frustrating as delays may be, an immigrant's right to have her case heard should not be sacrificed because of the IJ's heavy caseload." *See id.* at 1295.

In *Varpetyan v. Holder*, 406 Fed. Appx. 236 (9th Cir. 2010), an Immigration Judge denied a continuance requested at the hearing by substitute counsel who asserted he needed time to familiarize himself with the case. The Ninth Circuit disregarded the import of the three continuances previously sought by the alien that had been granted and found no inconvenience to the government in granting another continuance. The Ninth Circuit noted that the interest in administrative efficiency cannot justify the pretermission of alien's claims where other factors militate strongly in the alien's favor.

In *Freire v. Holder*, 647 F.3d 67 (2nd Cir. 2011), the agency denied the alien's motion to reopen for reasons grounded in an inefficient use of court resources, finding that it would be injudicious to grant a continuance to await a decision on a matter over which it had no control. The Court found that the facts of record relevant to the motion for continuance had not been adequately considered.

Finally, in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board of Immigration Appeals, in responding to the Third Circuit decision set forth above, identified a multitude of factors to be considered by Immigration Judges in assessing whether good cause for a continuance to pursue an adjustment of status application has been established. The Board expressly stated that compliance with an Immigration Judge's case completion goals is not an appropriate factor in deciding a continuance request. Moreover, the Board cautioned that the number and length of prior continuances were not alone determinative and had to be considered under the totality of the circumstances.

As an administrative tribunal, subject to the controlling authority of the federal circuit courts of appeal, EOIR is bound to follow the guidance of federal courts concerning the facts to be considered in every case in assessing whether good cause for a continuance has been established. Similarly, Immigration Judges are also bound to follow the guidance of the Board in addressing motions for continuance. In this regard, EOIR has provided guidance to Immigration Judges through decisions of the Board that set forth specific factual scenarios that do or do not constitute good cause for a continuance, such as *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983), *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992), *Matter of Hashmi*, *supra*, and *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012).

Consistent with the above review of federal and administrative caselaw, any policy guidance by EOIR that seeks to limit the granting of continuances generally by pre-determining the reasonableness of a continuance request based upon the number and length of previous continuances, and a desire to meet case completion goals, is an

approach doomed to failure upon judicial review. The federal courts and the Board have stressed that such considerations cannot override the specific facts underlying each individual request for a continuance without impinging upon the fundamental fairness of the removal proceedings.

Thus, while setting forth a mechanized policy consistent with the approach urged by the Report would unquestionably have the effect of reducing the number of continuance requests granted by Immigration Judges, the end result would not be the more efficient disposition of cases before the Immigration Judge envisioned by the Report. Rather, by providing aliens who might otherwise have no factual or legal basis for disputing the Immigration Judge's decision in their removal proceedings with a legitimate basis for appeal grounded in administrative and federal circuit precedent, the policy directive envisioned by the Report would likely increase both the total number of appeals and the number of successful appeals from Immigration Judge decisions based solely on the denial of continuance requests, unnecessarily keeping otherwise meritless cases pending through the appeals and remand process for years past the date those cases would ordinarily have been concluded.

However, EOIR will develop specific training to be presented to the Immigration Judges in 2013 that will provide them with an update on the case law related to continuances. Such training will include written materials that the Immigration Judges can then refer to when adjudicating cases. This training will be implemented in FY 2013.

Recommendation 5: Develop a process for tracking time that immigration judges spend on different types of cases and work activities.

Recommendation 6: Collect and track data on its use of staffing details of judges;

Recommendation 7: Develop an objective staffing model to assist in determining staffing requirements and the allocation of positions among immigration courts.

EOIR concurs with recommendations 5, 6, and 7.

EOIR recognizes that as the agency grows along with its caseload, there is a need to constantly evaluate staffing models and work activities. The agency has discussed with other court systems for many years the usefulness of a study on weighted case methodology and the associated costs with commissioning a study and implementing its recommendations. Under the current Departmental budget, and the agency's limited resources and personnel, we have not allocated the substantial financial resources required for such a study, prioritizing other agency needs. However, the agency will engage in a study to examine weighted case methodology, to include a process for tracking time that immigration judges spend on different types of cases and work activities, as well as objective staffing models for the determination of staffing

requirements and the allocation of positions among immigration courts. The agency will begin a caseload study during FY 2013.

Recommendation 8: Consider seeking additional resources or reallocating resources to reduce delays in the processing of appeals for non-detained aliens.

EOIR partially concurs in this recommendation.

While the Report acknowledges that the Board of Immigration Appeals completed more appeals of Immigration Judge decisions than it received, it also found that appeals involving non-detained aliens took long periods to complete and concludes that the difference between detained and non-detained processing times for appeals of Immigration Judge decisions is due to delays in paralegal review of non-detained cases. EOIR believes that the Report does not provide a complete picture and oversimplifies the resource implications of the Board's varied caseload.

While the Report notes that the Board gives priority to processing detained cases, the Report's narrow focus on non-detained Immigration Judge case appeals does not recognize the extent to which detained cases drive the workload of the Board and draw resources away from non-detained cases. Detained cases are labor intensive because they are urgent and fluctuate in volume according to DHS enforcement priorities and initiatives.

In addition, the Report only partially captures the Board's actual caseload because its analysis focuses solely on Immigration Judge case appeals. In addition to Immigration Judge case appeals, the Board reviews the bond decisions of Immigration Judges, appeals from DHS immigrant visa petition decisions and other DHS decisions, motions to reopen and motions to reconsider Board decisions, attorney discipline decisions, recognition and accreditation decisions, and interlocutory appeals. These other matters comprise over half of the Board's workload. *See* EOIR FY 2011 Statistical Year Book, at T2.

A good example of the workload implications of the Board's varied caseload is appeals from DHS decisions. These cases involve the same resource commitment as Immigration Judge case appeals, and they have risen both dramatically and erratically in the past decade. In fiscal year 2011, the Board received over 8,700 visa petition appeals, which constituted almost 25% of the Board's overall case receipts for FY 2011. *See* EOIR FY 2011 Statistical Year Book, at T2. Incorporating these appeals into the Board's overall workload significantly impacts the pace of the Board's adjudication of non-detained Immigration Judge case appeals since, given the priority that the agency gives detained cases, the Board necessarily draws from resources allocated to non-detained appeals. Furthermore, it is difficult to put permanent workload management measures in place to address the DHS appeals due to the fact that the volume of these appeals is difficult to predict. For example, during the five-year period studied, the Board

experienced dramatic fluctuations in the numbers of receipts of visa petition appeals (FY 2006 – 5,918; FY 2007 – 3,980; FY 2008 – 2,851; FY 2009 – 3,986; FY 2010 - 8,584; FY 2011- 8,705). *See* EOIR FY 2010 and 2011 Statistical Year Books, at T2.

The Board strives to process as many cases as it can, within the confines of fairness, agency priorities and existing resources. To that end, the Board has found through experience that its attorneys and Board Members can sustain a processing workload of roughly 4,500 assigned cases at any one time. Thus, as the Board completes cases, it assigns additional cases to its attorneys and Board Members – thereby maintaining a peak production that can balance volume and due process.

Thus, the Report should not conclude that adding paralegals is what is needed to improve non-detained case processing time. More paralegals processing more cases will not result in faster case completion rates. Additional paralegal resources are of limited value without a corresponding increase in other personnel – legal staff to draft orders, Board Members to sign orders, and administrative personnel to staff the process. Therefore, EOIR does not believe that a reallocation of resources would assist the Board in processing cases quicker. Instead, in order for Board cases to be processed in a shorter amount of time, additional paralegals, legal staff, and other personnel are required. EOIR will continue to ask for additional resources in its next budgetary request, as it has for many years.

Recommendation 9: Improve its collecting, tracking, and reporting of BIA appeal statistics to accurately reflect actual appeal processing times.

EOIR concurs with this recommendation.

EOIR believes that in order for the Board to increase its performance, it must continue its current success in processing more cases than it receives, resulting in a reduction of the pending caseload. Such reduction in the pending caseload will result in fewer numbers of cases awaiting assignment to attorneys and Board Members, allowing cases to be assigned more quickly. For that reason the monthly tracking of the pending caseload number is one of the main performance measures Board managers utilize. However, to the extent it is the Report's conclusion that it would also be useful to the public to report total appeal processing time, the agency is willing to report this information by the end of FY 2013.

APPENDIX VI: OIG ANALYSIS OF EOIR RESPONSE

The Office of the Inspector General provided a draft of this report to the Executive Office for Immigration Review (EOIR) for its comment. EOIR's response is included in Appendix V to this report. The OIG's analysis of EOIR's response and the actions necessary to close the recommendations are discussed below.

GENERAL COMMENTS

In its response, EOIR states that our conclusion that its external reporting could be clearer is well taken and EOIR intends to report the additional information recommended by the report. EOIR, however, disagrees with our conclusion that EOIR's public reports "overstate" the actual accomplishments of the immigration courts. EOIR states that since the terms "matter," "receipt" and "completion" are clearly defined in its Statistical Year Book, the amount of work received and completed by the courts is not overstated.

As we found in our review, EOIR counts completions when case actions occur that do not result in decisions to order the removal of aliens from the United States or to grant them relief from removal. We concluded that by reporting these actions as completions, EOIR obscures the actual number of immigration cases it receives and completes each year. Further, EOIR's method for counting case length underreports actual case processing times and results in EOIR counting certain cases as meeting its completion goals when, in fact, they did not. When cases are moved from one immigration court to another, each court's processing time is considered separately when assessing whether the case processing time met goals.

We recognize that there may be legitimate management reasons for tracking the number of proceedings completed within a particular timeframe at individual courts.[73] However, contrary to EOIR's claim in its response that these "reports were never intended to promote the agency's accomplishments," we found that EOIR used the results of its case completion goal reports in the Department's annual Performance and

[73] EOIR's contention in its response that case completions as currently measured are helpful to EOIR in measuring individual court workload and performance is itself questionable given the way EOIR counts the data. For example, an immigration court that transfers a case to another venue within the case completion goal time period receives equal credit for meeting EOIR's performance goals as a court that substantively resolves the case within the same case completion goal time period.

Accountability Report and congressional budget submission. Further, we found it did so without adequate explanation of what the reports were measuring.[74] We concluded that the use of the information in this manner overstated EOIR's accomplishments. Moreover, we found that by tracking cases in this manner, EOIR itself does not have an accurate measure of the total time taken to render a decision on removability in each case.

EOIR also questioned our conclusion that as time spent processing cases increases, the Department of Justice's costs rise, along with the costs for those representing the aliens. Because there are direct and indirect costs associated with adjudicating each immigration case, we believe it is self-evident and reasonable to conclude that as the amount of time the court takes to adjudicate a case rises, the associated costs also rise. Similarly, we believe it is self-evident and reasonable to conclude that delays in detained case processing increase associated DHS detention costs.

Below we provide the summary of actions necessary to close this report.

Recommendation 1: EOIR improve reporting of immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect actual case length even when more than one court is involved.

Status: Resolved.

EOIR Response: EOIR concurred with this recommendation and stated it will begin reporting immigration court data to distinguish decisions on the removal of aliens from other case activities and reflect case length by the end of FY 2013.

OIG Analysis: EOIR's planned actions are responsive to our recommendation. Please provide documentation on the status of this effort by March 29, 2013.

[74] For example, the definitions of the terms "completion" and "proceeding" are fundamental to how EOIR measures accomplishments, but they are not explained in the Performance and Accountability Report or congressional budget submission. The term "completion" is explained in the Statistical Year Book, but does not appear until the fourth chapter, well after numerous completion statistics have been presented. The term "proceeding" is defined in the Statistical Year Book's glossary as "the legal process conducted before the immigration court and Board of Immigration Appeals." We found this definition to be lacking in clarity and easily subject to being misinterpreted as including the entire proceeding from EOIR's initial receipt of the case until EOIR rendered its final decision.

Recommendation 2: EOIR eliminate case exemptions from completion goals to reflect actual case length, but identify case delays that EOIR considers outside the control of immigration judges.

Status: Resolved.

EOIR Response: EOIR concurred with this recommendation and stated it will begin reporting this information publicly by the end of FY 2013.

OIG Analysis: EOIR's planned actions are responsive to our recommendation. Please provide documentation on the status of this effort by March 29, 2013.

Recommendation 3: EOIR develop immigration court case completion goals for non-detained cases.

Status: Resolved.

EOIR Response: EOIR partially concurred with the recommendation. EOIR states that it must examine how the information can be used to assist management before committing to establishing these goals. As a result, EOIR proposes an alternative in which it will examine whether establishing these goals would assist in measuring agency performance and will serve as a useful management tool for identifying the need for efficiencies in certain areas. EOIR will complete this assessment by the end of FY 2013.

OIG Analysis: We believe that having completion goals for all cases, regardless of whether the alien is detained, would assist EOIR in monitoring its performance in resolving cases in a timely manner. However, we believe it is reasonable that EOIR first examine how it would use the goals before developing case completion goals for non-detained cases. We therefore have determined that EOIR's planned actions are responsive to our recommendation. Please provide documentation on the status of this effort by March 29, 2013.

Recommendation 4: EOIR analyze reasons for continuances and develop guidance that provides immigration judges with standards and guidelines for granting continuances to avoid unnecessary delays.

Status: Unresolved.

EOIR Response: EOIR partially concurred with this recommendation. EOIR stated that the OIG inferred that EOIR could

place clear and definite limits on continuances across all cases. As an alternative to the recommendation, EOIR suggested that it develop training for immigration judges that provides them with an update on case law related to continuances.

OIG Analysis: EOIR's planned actions are partially responsive to our recommendation. We believe EOIR's plan to develop training for immigration judges that provides them with an update on case law related to continuances would have some benefit. However, we do not agree with EOIR's claim in its response that the report recommends that EOIR issue a "mechanized policy" on continuances or guidelines for immigration judges that "pre-determine" the reasonableness of a continuance. To the contrary, our report recognizes that continuance decisions are complex and fact-dependent. Rather, as indicated in the report, we believe that even if immigration judges are appropriately following case law in ruling on continuances, providing guidance on the use of continuances and what is reasonable in terms of the number and length of continuances also would be beneficial for immigration judges. Thus, EOIR should examine the reasons for continuances and develop related guidance to further assist immigration judges in making decisions on granting continuances. Please provide a response on EOIR's planned actions to resolve this recommendation by January 18, 2013.

Recommendations 5, 6, and 7: EOIR develop a process for tracking time that immigration judges spend on different types of cases and work activities.

EOIR collect and track data on its use of staffing details of judges.

EOIR develop an objective staffing model to assist in determining staffing requirements and the allocation of positions among immigration courts.

Status: Resolved.

EOIR Response: EOIR concurred with these recommendations. EOIR stated that it will institute a study on weighted case methodology, which will include a process for tracking time that immigration judges spend on different types of cases and work activities, as well as objective staffing models for the determination of staffing requirements and the allocation of positions among immigration courts. The agency will begin a caseload study during FY 2013.

OIG Analysis: EOIR's planned actions are responsive to our recommendation. Please provide documentation on the status of this effort by March 29, 2013.

Recommendation 8: EOIR consider seeking additional resources or reallocating resources to reduce delays in the processing of appeals for non-detained aliens.

Status: Unresolved.

EOIR Response: EOIR partially concurred with this recommendation. EOIR stated that it does not believe a reallocation of resources would assist in processing cases quicker. Instead, it believes additional paralegals, legal staff, and other personnel are required. It proposes asking for additional resources in its next budgetary request.

OIG Analysis: EOIR's planned actions are not fully responsive to our recommendation. In EOIR's response, it states that the OIG should not have concluded that adding paralegals is what is needed to improve the appeal processing time for non-detained aliens. However, our report does not make that conclusion. Although we found that the paralegal review process for detained aliens averaged only 8 days compared to the 294 days for non-detained aliens, we recommended that EOIR re-examine its process and all of its resource allocations (not just for paralegals) in non-detained cases to determine the appropriate number of personnel that are needed to process those cases more quickly. While we understand that EOIR intends to seek additional resources, we also believe that EOIR should take all possible steps to maximize the use of the resources it has received. Please provide documentation on the status of this effort by January 18, 2013.

Recommendation 9: EOIR improve its collecting, tracking, and reporting of BIA appeal statistics to accurately reflect actual appeal processing times.

Status: Resolved.

EOIR Response: EOIR concurred with this recommendation. EOIR stated if the OIG concluded that it would also be useful to the public to report total appeal processing time, the agency is willing to report it and will do so by the end of FY 2013.

OIG Analysis: EOIR's planned actions are responsive to our recommendation. Please provide documentation on the status of this effort by March 29, 2013.