

Telephonic/ Video Conference

Hearings

I. Overview

A. Generally

B. Advantages

C. Control of Proceedings By the Immigration Judge

D. Authority

E. Credibility and Due Process Concerns

II. Telephonic Hearing Checklist

A. Pre-Hearing (Master/Individual)

B. Prior to Commencement of Hearing

III. Hearing Procedure

A. Generally

IV. Post Hearing Actions

A. Orders

B. Service of Decision

C. Miscellaneous

V. Bond/Custody Telephonic/Video Conference Hearing Procedure

A. Generally

B. Appeal Rights

TELEPHONIC HEARINGS / TELEVIDEO HEARINGS

I. OVERVIEW

A. GENERALLY

1. Traditionally, telephonic hearings are conducted at the Immigration Court having administrative control (Administrative Control Court) by the presiding Immigration Judge by telephone to a detail city where the DHS and the alien are present. The Immigration Court having administrative control is the one that creates and maintains Records of Proceedings within an assigned geographical area. All documents and correspondence pertaining to a Record of Proceeding shall be filed with the Immigration Court having administrative control over that Record of Proceeding matter and shall not be filed with any other Immigration Court. 8 C.F.R. § 1003.11. When a charging document is filed with an Administrative Control Immigration Court, the proceedings may actually take place in a location other than where the charging document is filed. Thus, it is important to record the actual location of the hearing. OPPM No. 04-06.

As a general rule, these are master calendar and custody/bond hearings. Contested full evidentiary hearings on the merits may be conducted telephonically only with the consent of the alien. INA §240(b)(2)(B). The alien is advised of her rights and pleadings of the alien are taken on the record by a tape recorder at the Administrative Control Office. In some instances, the case may be heard and completed on the merits. In other instances, the case is scheduled for an individual hearing on a date when the Immigration Judge visits the detail city. Witness testimony may also be taken telephonically when requested by motion and granted by the Immigration Judge.

2. The Institutional Hearing Program (IHP) has utilized telephonic hearings in both state and federal correctional institutions. Telephonic hearings in the IHP provide several benefits,

including limiting the necessity of prisoner movement, thereby enhancing security, and improving the ability of counsel to represent detained aliens.

3. Video Conference hearings are conducted in much the same way except that the Judge can see what is happening in the hearing room instead of relying what she hears over a speaker telephone. Video Conference hearings are being successfully conducted on a regular basis in 31 courts. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) specifically authorizes Video Conference hearings. INA § 240(b)(2)(A)(iii), as added by IIRIRA.

EOIR has adopted video conferencing on a national level. A headquarters Immigration Court conducts hearings by video conference on a regular basis.

B. ADVANTAGES

Telephonic hearings are an effective and efficient way for the Court to do business. They are cost effective as they require no travel or per diem expenditures. They enable Judges to resolve many minor or uncontested cases. By using telephonic hearings to narrow the issues prior to actually traveling to a detail city, the Immigration Judge can ensure that travel to the detail city will result in hearing individual cases on the merits or where a dispute exists among the parties.

TeleVideo hearings can, in the Judge's discretion, eliminate the need for in person hearings. This results in a more efficient use of a Judge's calendar time.

C. CONTROL OF PROCEEDINGS BY THE IMMIGRATION JUDGE

1. It is essential that the Immigration Judge maintain full control of the proceedings whether held telephonically or via Video Conference. For example, an alien that is unrepresented may be subject to prompting by others should the Judge have failed to state at the outset how the proceedings will be conducted.

a. It is recommended that the Judge announce prior to the calling of the first case for the day what she expects of the parties on the other end. The Judge sets the tone for the proceedings on the other end. All parties on the other end must be instructed to speak loudly and clearly. A test should be done with the tape recorder both in the courtroom and on the other end to make certain that the parties are being properly recorded to avoid transcriptions that have a number of "indiscernible" notations on them.

b. Tests of recording equipment and sound should also be conducted with Video Conference equipment as well to make certain that an audible and accurate transcription of the proceedings is being created.

2. In the event that an order is issued or a case reset as a part of the telephonic proceeding, care must be taken to have the respondent present for the purpose of receiving a verbal advisal of rights, including failure to appear for a subsequent hearing, failure to depart in compliance with a grant of voluntary departure, and that failure to appear for removal. The person with the alien at the other end will have to furnish the written advisals after the Judge has given the oral advisals. Written advisals under IIRIRA are given in the English language and no other.

D. AUTHORITY

Section 240(b) of the Act, as added by IIRIRA makes specific statutory provisions for both telephonic hearings and video conference hearings. Under IIRIRA an alien does not have the right to an in-person hearing where video conferencing equipment is used.

The regulation at 8 C.F.R. § 1003.14 provides that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” EOIR has been conducting hearings via video conference for over ten years. Circuit courts regularly address whether a hearing comports with due process in petitions for review and no court has ever found that a hearing conducted via video conference deprived a respondent of a full and fair opportunity to present his case. In *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002) the petitioner asserted that the use of video conferencing in his asylum hearing violated his right to due process. The court denied the petition even though there were numerous technological problems with the equipment in that case. While acknowledging the problems with the equipment throughout the proceeding, the court stated that it was clear that, throughout the proceeding, the IJ made a sincere effort to understand petitioner’s testimony and provided him with numerous opportunities to elaborate and to clarify it.

1. Background: Exclusion, Deportation and Rescission.

a. Prior regulations at 8 C.F.R. § 3.25(c) (1995) provided that: "An Immigration Judge may conduct hearings via video electronic media or by telephonic media in any proceeding under 8 U.S.C. §§ 1226, 1252, or 1256, except that contested full evidentiary hearings on the merits may be conducted by telephonic media only with the consent of the alien."

b. Following sections 240(b)(2)(A) and (B) of the Act as added by IIRIRA, the regulations now distinguish between video electronic media hearings and telephonic hearings, and do not require consent to the video electronic media hearings. Therefore, for removal proceedings, video electronic media hearings are within the discretion of the Immigration Judge. The current regulation at 8 C.F.R. § 1003.25(c) (2005) provides that:

An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien. A telephonic hearing in absentia and therefore without respondent's consent has been found permissible. *Matter of Villalba*, 21 I&N Dec. 842 (BIA 1997).

2. Custody/Bond

a. The regulations at 8 C.F.R. § 1003.19 (2005) permit an Immigration Judge in his or her discretion, to conduct a custody/bond determination by telephone.

b. It is the policy of the Office of the Chief Immigration Judge (OCIJ) to conduct all master calendar hearings in detail cities telephonically. The reasons for this are set forth in paragraph B above. Bond hearings require immediate attention and therefore are always conducted telephonically to detail cities unless the Immigration Judge is present at the detail city when a request for a custody/bond hearing is made.

E. CREDIBILITY AND DUE PROCESS CONCERNS

1. The demeanor of witnesses in telephonic hearings, despite the inability to observe the appearance of the witness, can still be judged by other factors, such as the inherent plausibility of the testimony, the tenor of the witness's voice, inconsistencies and contradictions in testimony and specificity of testimony. See, e.g., *Babcock v. Unemployment Division*, 696 P.2d 19, 21 (1985).

2. Although the subject of an administrative hearing has the right to give oral testimony, actual physical presence is not required. See *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975).

II. TELEPHONIC HEARING CHECKLIST

A. PRE-HEARING (Master/Individual)

1. Proceedings may not commence until the charging document has been received by the Immigration Court having administrative control over the city or site where the hearing is to be held. See 8 C.F.R. § 1003.14(a) (2005) The exception to this rule is the conducting of a bond/custody hearing which may be held before the Immigration Court receives the charging document. Note that the respondent must have been served with the charging document for all hearings except for bond/custody proceedings.
2. Prior to the telephonic hearing date the Immigration Judge should encourage parties to conduct a pre-trial conference to reach stipulations and narrow issues for consideration by the Court. This will shorten the length of the hearing.
3. Require all parties to exchange documentary evidence and other documentation.
4. Ad-hoc telephonic conferences can be useful to ensure that all parties are ready to proceed as scheduled at a detail city. This mechanism is a useful tool when a case is on a call-up calendar and before the Immigration Judge to determine if applications have been timely filed and/or a Form I-130 or Form I-751 has been properly adjudicated by USCIS.

B. PRIOR TO COMMENCEMENT OF HEARING

1. Ensure that the parties and the interpreter (if one is present) are all positioned so that you can hear them clearly through the speaker and they can hear you. This will also afford an opportunity to check the clarity of the connection.
2. Many connections will be made by means of a telecommunications satellite. This means that the speaker's voice must travel to the satellite for retransmission to the receiving phone. This entire procedure takes only about three seconds but it is important that you instruct the parties to pause three seconds before speaking, thus ensuring that the entire statement is recorded. Instruct the parties to identify themselves before speaking.

III. HEARING PROCEDURE

A. GENERALLY

1. An Immigration Judge who conducts a hearing either telephonically or through video conference must create a clear record of where the hearing is taking place. At the beginning of each session of the hearing, the Immigration Judge must identify himself or herself for the record. The Immigration Judge must note that he or she is sitting via telephone or video

conference and identify the specific hearing location where he or she is conducting the hearing (i.e., the location where the case is docketed for hearing). All hearing locations are published in the Office of the Chief Immigration Judge's Administrative Control List. This list is made available to the public pursuant to 8 C.F.R. § 1003.11, and is available on the Executive Office for Immigration Review's Intranet and Internet. OPPM No. 04-06.

2. The Immigration Judge should note the location of the respondent, the respondent's counsel or representative, if any, and counsel for the DHS, in order to create a clear and complete record. OPPM No. 04-06.

3. The circuit law that is to be applied to proceedings conducted via telephone or video conference is the law governing the hearing location (i.e., the location where the case is docketed for hearing). OPPM No. 04-06.

4. Start the recorder and make the usual opening statement for the record, reciting the name and "A" number of the case, the date of hearing, your name, the names of the representatives and the name and language of the interpreter. It is also appropriate to state for the record that the hearing is being held telephonically or by video conferencing, giving your location and the location of the parties.

5. Proceed as though conducting an in-person hearing. Inform the alien of his or her right to be able to hear all of the proceedings.

6. It would then be appropriate to have the parties state any stipulations for the record.

7. Mark the exhibits. The first exhibit for the record is almost always the charging document. Mark it in evidence, stating for the record that you have done so.

8. Schedule a date for the individual hearing (next available date when you or another detail judge will be sitting in the detail city) and give notice of date, time, and location of the hearing to the parties. In certain prison settings security concerns of the institution may frown upon this practice, however, in many prison settings, hearings require adjournment because the prison custodian has failed to deliver a hearing notice. If the Immigration Judge gives out the hearing notice, then lack of notice to the alien ceases to be an issue. Unless untimely notice of a hearing is waived by the alien, the statutory time frames for notice depending on the type of proceeding must be observed, and the hearing continued if necessary.

9. In instances where an individual telephonic hearing has been held:

a. Once the record is fully developed as to all issues and after the parties have rested, render your decision.

b. Use the appropriate form to memorialize your decision. If you use a Form EOIR-6 or 7, you must dictate a complete oral decision unless the alien accepts your decision and waives appeal. If appropriate, enter a written form order, clearly stating the reasons for your decision. Give the alien the appeal date, have the party on the other end serve the alien with the appeal form as well as the fee waiver form and serve copies of your order on the parties by mail.

c. It is recommended that you staple a yellow "Rush--Detained at Government Expense" card on the front of the ROP. Certain unscrupulous attorneys and representatives have been known to file appeals checking the "non-detained" box on the appeal form attempting to secure release of an alien in custody. When the ROP is properly noted as a detained case, an appeal if filed timely is placed on a fast track at the BIA.

d. Once the decision is entered, ascertain which party, if any, wishes to reserve appeal. If appeal is reserved, the forms should be given to the respondent or counsel and have the record reflect that this has been done. Then, close the hearing. It is recommended that in all settings that the Judge furnish appeal forms directly to the alien and explain the process to the alien. The BIA is now strictly imposing filing deadlines and appeals are routinely dismissed if they are not timely filed.

IV. POST HEARING ACTIONS

A. ORDERS

1. Any order or decision by an Immigration Judge in a hearing conducted through telephone or video conference where the case was docketed for a hearing location (as opposed to an administrative control court/base city court) must include the hearing location (not the administrative control court/base city court) in the caption. The order or decision must include a statement that the hearing was conducted through video or telephone conference and a statement that sets forth the administrative control court and address for purposes of correspondence and post-hearing motions. OPPM No. 04-06.

B. SERVICE OF DECISION

1. If you have entered a summary written decision on Form EOIR-6 or 7, or other form at your location, ensure that copies of the decision are mailed to the parties immediately, and that the appeal date is clearly noted on the lower left hand corner of the order. If appeal is waived, circle on the order that appeal has been waived by both parties. This has great significance as when appeal is waived, the order becomes administratively final. See Matter of Shih, 20 I&N Dec. 697 (1993); see also Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

2. If you have rendered an oral decision, you should prepare a memorandum of the decision and serve it on both parties. The CASE system has separate memorandum of decision forms for Exclusion, Deportation, and Removal.

C. MISCELLANEOUS

The normal clerical procedures should be completed, including the posting of the hearing calendar, assembly of the exhibits, putting all tapes in the tape envelope, and instructing the clerk on the disposition of closed files. In the case the use of a contract interpreter, (you most likely will not have a Court interpreter present) the burden is on you to get the file to the correct place.

V. BOND/CUSTODY TELEPHONIC/ VIDEO CONFERENCE HEARING PROCEDURE

A. GENERALLY

1. Application to review bond determinations must be made to one of the following Courts in this order: (1) Where the alien is detained; (2) to the Immigration Court having jurisdiction over the place of detention; (3) the Immigration Court having administrative control over the case; or (4) to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court. 8 C.F.R. § 1003.19(c) (2005).

2. The hearing need not be recorded. See *Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977) (The primary consideration in a bail determination is that the parties be able to place the facts before an impartial judge as promptly as possible. There is no requirement for a formal "hearing." Informal procedures, even telephonic "hearings," are encouraged so long as prejudice does not result.) Generally the bond/custody hearing is not recorded unless the hearing is complicated, testimony is taken, and the Judge feels it appropriate to record. If the hearing is recorded, follow the procedure outlined in section III of this chapter.

3. Advise the alien of the nature and purpose of the proceedings and her legal rights, including service of List of Free Legal Services Providers. Verify that the alien has requested a bond/custody redetermination hearing and instruct the parties on how you wish them to proceed. It is suggested that the Judge advise the alien that the request for a redetermination of the bond/custody can result in an increase as well as a decrease in the bond amount.

4. Specifically, you should determine what the alien is seeking -- the reduction of bond and/or changes in conditions, and the reasons why reduction and/or change is appropriate. You should also determine the position of the DHS and why the DHS has taken that position.

5. Avoid the tendency toward a formal hearing unless you feel it critical to the decision. Bond hearings should be brief. The Transitional Period Custody Rules (TPCR) expired on October 9, 1998. Generally, DHS must pick up an alien after the conclusion of the hearing and hold the alien without bond until removal. INA § 236(c). Certain exceptions exist, however, they apply to aliens that cannot be readily removed from the United States. After October 9, 1998, the INA as amended by IIRIRA imposes the duty of detention on the DHS in almost all circumstances.

6. As an option, you may wish to use a Custody Redetermination Questionnaire that you have designed based on the factors and cases presented in the Benchbook. Render your decision and record your order on Form EOIR-1, advising parties of appeal rights.

7. Follow regular post-trial procedures and serve the order on parties by mail.

B. APPEAL RIGHTS

1. If an appeal is taken, it is required that you make a written memorandum of your oral decision for review by the Board of Immigration Appeals.

2. No fee is required for a bond appeal.