April 2002

Board of Immigration Appeals (BIA) Pro Bono Project Update:

BIA Project Celebrates One-Year Anniversary!

BIA Pro Bono Project Participants Honored by EOIR

To mark the one-year anniversary of the BIA Project, on February 20, 2002, the Executive Office for Immigration Review (EOIR) recognized the outstanding pro bono efforts of several project participants at an awards ceremony at the law offices of Holland & Knight LLP, in Washington, D.C. The EOIR honored the private practitioner, law school, and law firm who represented the most BIA Project cases during 2001. These include, respectively, **Vikram Badrinath,** a private attorney in Tucson, Arizona; the **Appellate Litigation Clinic** at the Georgetown University Law Center; and the law firm of **Holland and Knight LLP**. In addition, 11 immigration practitioners who regularly screen the BIA Project cases in need of representation were recognized for their crucial role in the Project (see below). At the ceremony, CLINIC's Executive Director, Donald Kerwin, emphasized the importance of the BIA Project, the need for it to continue despite any restructuring changes that occur at the EOIR, and for the EOIR to continue to support the Project's critical work.

BIA Project Screeners honored by EOIR: Traci Hong (AILF) • Beth Werlin (AILF) • Alison Brown (Maggio & Kattar) • Michael Sozan (Arnold & Porter) • Elizabeth Quinn (Maggio & Kattar) • David Cleveland (Catholic Charities) • Beth Lyon (Villanova University School of Law) • Denise Gilman (Washington Lawyers Committee) • Karen Grisez (Fried Frank Harris Shriver &Jacobson) • Lindsey Stevenson (Capital Area Immigrants' Rights Coalition) • Thomas Hutchins (Immigrant and Refugee Appellate Center, LLC)

BIA Project New Email Address

Jon Fremont, Project Assistant at CLINIC, will be handling the mechanics of the BIA Project, including sending weekly case summaries to project participants and mailing case information to pro-bono lawyers who take on cases. In the future, case summaries will be emailed from: biaproject@cliniclegal.org. Please reply to this address when accepting a case.

The BIA Project is a collaborative effort of four non-governmental agencies and the Executive Office for Immigration Review. The Project is coordinated by the Catholic Legal Immigration Network, Inc. (CLINIC) and supported by the American Immigration Law Foundation (AILF), the National Immigration Project of the National Lawyers Guild (NIPNLG) and the Capital Area Immigrants' Rights (CAIR) Coalition.

Mentors Needed!!

CLINIC and the BIA Project's NGO Partners (the American Immigration Law Foundation, The National Immigration Project of the National Lawyers Guild and the Capital Area Immigrant Rights Coalition) are working hard to engage more private law firms in the Project, many of whom do not necessarily specialize in immigration. In order to involve this population, the Project has offered trainings to firms who promise to take on Project cases. The Project needs experienced BIA practitioners to serve as mentors to these attorneys. If you are able to serve as a mentor please contact Molly McKenna at CLINIC at mmckenna@cliniclegal.org or (202) 635-2567.

If you have received a decision on a BIA Project case and have not forwarded it to CLINIC, please do! Also, please forward a redacted version of your brief once it has been filed. Model briefs are extremely helpful to Project participants with limited BIA practice.

Board Hears Oral Argument on BIA Pro Bono Project Case

Cases involves an asylum-seeker's right to translation assistance

On January 17, 2002, the Board of Immigration Appeals (BIA) heard oral arguments on a BIA Pro Bono Project Case. The case involved the right of detained asylum-seekers to translation assistance outside of the Immigration Court to complete the application for asylum, Form I-589. Section 208.3(a) of 8 C.F.R. requires asylum-seekers to complete a Form I-589 in English in order to apply for asylum. However, the government does not provide interpretation assistance for such applications. For detained asylum-seekers, obtaining access to translation is particularly difficult.

The case argued before the BIA involved a Somali national who entered the United States without inspection. He appeared unrepresented throughout his proceedings.
In the Immigration Court, he verbally expressed a fear that he would be subject to persecution if returned to Somalia. The IJ provided him with a blank I-589 Form and continued the hearing several times to allow the Respondent time to complete the form. The Respondent stated through the Court's interpreter that he had been unable to complete the Form I-589 because he could not read or write English. The Court recognized that it could not order the INS to provide a translator, but warned the INS that it was considering terminating the removal proceedings because of the Respondent's inability to submit his asylum application in writing. The INS stated that the agency's position was that it had no obligation to provide the Respondent with a translator to complete the I-589. The IJ ultimately terminated proceedings in favor of the asylum applicant, stating that because the INS had declined to provide a translator, the Court could not order the Respondent removed to Somalia without being able to hear and adjudicate his claim. The INS appealed the IJ decision, and the case became part of the BIA Pro Bono Project. CLINIC matched the detainee with pro bono counsel from the law firm of Fried, Frank, Harris, Shriver & Jacobson, who on behalf of the Capital Area Immigrants' Rights Coalition, filed an amicus brief for the Respondent.

During the oral argument, counsel for the Respondent argued that the IJ correctly terminated proceedings, as it was the only viable solution to the dilemma. They highlighted the fact that once the Respondent had articulated a fear of persecution and requested asylum, it would have been fundamentally unfair and a violation of law for the IJ to order the Respondent removed without receiving his asylum claim in writing and adjudicating it.

The INS urged the BIA not to reach the translation issue, and to remand the case to the Immigration Court. It noted that since the Respondent was now represented, his attorney would be able to complete the I-589, thereby resolving the issue. In fact, the respondent only had representation before the BIA, not before the Immigration Court. The Board Members responded that the purpose of the oral argument was not only to reach a solution in this particular case, but to settle the issue for similar cases that would arise in the future.

Alternatively, the INS offered to transfer the Respondent to Arlington, VA, where the amicus curiae were located, so that they could represent the Respondent there. (The INS made no mention of this offer prior to the oral argument). However, when pressed, the INS refused to establish a policy for transferring detainees to areas where they could access family members or counsel who could provide translation assistance.

The Board asked if the NGO community and the private bar could provide translation assistance in such matters, through a "translator bank". Counsel for the Respondent pointed out the tremendous cost of such an undertaking. It also cited the fact that the U.S. government, not the private bar or the NGO community, was responsible for ensuring that due process was met.

The INS maintained that it was a conflict of interest for the agency to provide this type of translation assistance, and suggested that only a different agency within the DOJ could be responsible for such translation. Pro bono counsel for the Respondent pointed out that the INS provides translation assistance to asylum-seekers in the expedited removal context and for credible fear interviews. Another possible solution suggested by the Board involved the use of the Court interpreter to orally solicit answers to the I-589 questions on the record. Under this scenario, the IJ would ask the Respondent the I-589 questions during a hearing and the answers would become part of the record. It was noted however, that under the current asylum regulations an applicant had to submit a written I-589 in English.

The BIA has not yet issued a decision on this case. The case presents an important issue that would not have surfaced without the BIA Pro Bono Project. It also highlights the purpose of the Project. Had the detainee appeared pro se before the BIA, the IJ decision could have easily been overturned. Government statistics show that the BIA is more likely to sustain an INS appeal when the detainee does not have representation. Without the excellent legal background, skills and resources of the pro bono counsel, the issues presented in this case would not have been effectively identified, briefed or argued. The result of this case will certainly have an impact on asylum-seekers. CLINIC will provide updated information once a decision has been issued.

In a case involving a similar issue, the BIA recently refused to address the translation access issue for an asylum-seeker and instead remanded a Project case to the Immigration Court erroneously relying on the assumption that pro bono counsel would continue to represent the individual before the IJ. Because the pro bono attorney assigned to this case never agreed or intended to enter her appearance before the Immigration Court, she filed a motion to reconsider with the BIA. The motion highlighted that the Board's prior decision had been based on a misassumption that the asylum-seeker would be represented before the IJ. The BIA denied the motion. The pro bono attorney recently filed a second motion to reconsider with the Board.

The EOIR has stated that the entry of an EOIR-27 does not commit an attorney to representing an individual in the Immigration Court, as

representation before the IJ would require the completion and filing of the Form EOIR-28, Notice of Entry of Appearance before the Immigration Court. However, the BIA's decision in this case (and its subsequent denial of the motion to reconsider) is inconsistent with this long-standing policy. The BIA Project partners intend to discuss this with the EOIR to ensure that the Board does not make similar erroneous assumptions in the future.

Immigration Judges required to make competency determinations!

Beth Werlin and Nadine Wettstein of the American Immigration Law Foundation (AILF) represented a detained asylum-seeker who suffers from a severe mental disability before the BIA. The IJ had denied her asylum claim. Beth and Nadine argued that her case should be remanded to the Immigration Court because the Immigration Judge proceeded without determining whether she was mentally competent to appear at the hearing. They also argued that the respondent was unable to meaningfully participate in the hearing. They requested the appointment of a guardian and/or counsel as deemed appropriate. In its decision on this case, the BIA held that Immigration Judges are required to evaluate respondents' mental competency before conducting removal hearings and that guardians or representatives must be appointed for individuals who are not competent to represent themselves. The BIA then remanded the case with instructions for the IJ to assess whether the respondent was mentally competent to continue with her case pro se, and if not, to appoint a guardian or representative, and then hold a new removal hearing.

Though this decision is only the first step in establishing the right to appointed counsel in removal proceedings, nonetheless, it is a significant one. This is the first case we know about where the Board contemplated the appointment of a guardian or a representative. AILF now hopes to help formulate guidelines for determining whether a respondent "is mentally competent to meaningfully participate in her own hearing" and help establish a process by which Immigration Judges can make appropriate appointments of guardians and representatives.

IJ Grant of CAT Protection to Cuban National Upheld by BIA!

Jim Feroli represented a national of Cuba before the BIA who had been granted deferral of removal under the Convention Against Torture (CAT) by the IJ. The INS appealed the decision, stating that the IJ erred in finding the respondent credible and that the respondent failed to present documentation and witnesses in support of his claim. The BIA found that the INS only pointed to two aspects of his presentation that demonstrated his lack of credibility, and that his testimony was basically believable, consistent and sufficiently detailed. The Board also found that the respondent's failure to submit documentation was not fatal to his case and dismissed the INS appeal.

IJ Decision to Terminate Proceedings Upheld by BIA!

Vikram Badrinath represented an LPR before the BIA who had received two DUI convictions. The respondent had appeared pro se before the IJ, who terminated his removal proceedings, finding that his second offense did not meet the definition of a crime of violence under 18 U.S.C. § 16. The INS appealed the IJ's decision arguing that the second conviction was a felony, as it carried a potential and actual sentence of 18 months, and therefore involved a substantial risk that physical force be used in the course of committing the offense. This case was controlled by 3rd circuit law. Following the 3rd circuit's ruling in *Francis V. Reno*, the BIA dismissed the INS appeal, finding that the respondent's second conviction was neither a felony nor did it qualify as a "crime of violence" under 18 U.S.C. § 16.

INS Withdraws Appeals after Pro Bono Counsel File Briefs!

Several other project participants have represented LPRs with DUI convictions under the BIA Project. In each case, the IJ terminated proceedings against the respondents. In three cases controlled by 9th circuit law, the IJ terminated proceedings against the respondents following the 9th circuit's ruling in *U.S. v. Trinidad-Aquino* that a DUI is not a crime of violence under 18 USC § 16(b). The INS appealed the IJ's decision in each case. On appeal, one respondent was represented by Suzanne Riefman of Vinson & Elkins LLP. After she filed her brief, the INS withdrew its appeal. Esme Bashwinner of Holland & Knight LLP represented two additional respondents. In one case the INS withdrew its appeal, and in the other, the BIA dismissed the INS appeal.

In another case, the IJ terminated proceedings against an LPR who was convicted of DUI in Pennsylvania. The IJ found that the conviction was not an aggravated felony. The INS appealed, but just days after Ron Wada of Berry, Appleman & Leiden LLP filed his brief with the BIA, the INS withdrew its appeal as well.

Please share information about the BIA Project with colleagues who might be interested in participating. We need more volunteers to take on cases! Volunteers should contact Molly McKenna at CLINIC at (202) 635-2567 or mmckenna@cliniclegal.org.