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New! @DOJ_EOIR is *finally* moving forward with its long-planned deployment of electronic filing at the immigration courts, through a new Notice of Proposed Rulemaking that may hopefully bring the agency into the 21st century.

Digging into it now.

https://t.co/f1itGIMseK

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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1208, 1214, 1240, 1245, 1246, 1292

[EOIR Docket No. 18–0203; Dir. Order No. 04-2021]

RIN 1125–AA81

Executive Office for Immigration Review Electronic Case Access and Filing

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Executive Office for Immigration Review ("EOIR") is proposing to implement electronic filing and records applications for all cases before the immigration courts and the Board of Immigration Appeals ("BIA"). The proposed rule would update the relevant regulations necessary to implement these electronic filing and records applications, including requiring certain users to file documents electronically and changes to service of process. EOIR further proposes clarifications to the regulations regarding law student filing and accompaniment procedures.

DATES: Electronic comments must be submitted and written comments must be postmarked or otherwise indicate a shipping date on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]**. The electronic Federal Docket Management System at *https://www.regulations.gov* will accept electronic comments until 11:59 p.m. Eastern Time on that date.

ADDRESSES: If you wish to provide comment regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125–AA81 or EOIR Docket No. 18–0203, by one of the two methods below.

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the website instructions for submitting comments.

In the new Notice of Proposed Rulemaking, EOIR is proposing to expand its e-filing pilot program (ECAS) to all immigration courts nationwide.

ECAS post-dates my time in immigration court so I'll defer to others on how well that system has worked so far.

II. Background

A. Introduction

Since July 2018, EOIR has been piloting a voluntary program to test electronic filing and records applications for certain cases filed with the immigration courts and the BIA. *See* EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018). Following this successful pilot at five immigration courts, EOIR is now proposing to permanently implement these electronic filing and records applications at the immigration courts and the BIA. This proposed rule would amend the regulatory sections necessary to implement the electronic filing and records applications.

EOIR proposes that all new cases in immigration courts which implement the new e-filing programs would get an "electronic Record of Proceedings" rather than a paper file.

BUT—this would only apply to NEW cases. The current 1.25 million cases would not be converted to electronic.

Following the launch of the electronic filing and records applications in each immigration court, all cases in which the Department of Homeland Security ("DHS") files a charging document in that court after the launch date are processed electronically, meaning that EOIR will maintain an eROP as the official record of proceeding for that case. Regardless of whether all parties are participating in the electronic filing and

[3] Charlotte was originally scheduled as a pilot location in September 2018, but the pilot there was cancelled due to Hurricane Florence. Similarly, York was moved from July 2018 to December 2018 to accommodate additional internal development to ensure ECAS functionality for detained courts.

records applications, EOIR will maintain an eROP for such cases. If a document is filed on paper, EOIR will scan the document into the eROP and maintain the eROP as the official record of proceeding. In addition, attorneys and accredited representatives may submit bond redetermination requests electronically with that court, which EOIR will then process electronically. For more information about the privacy risks associated with the eROP, and the measures EOIR has taken to protect this information, please see EOIR, *Privacy Impact Assessment for the eWorld Adjudication System*, 19-24 (Dec. 13, 2018), https://www.justice.gov/opcl/page/file/1120991/download.

Appeals of immigration judge decisions filed with the BIA will similarly be processed electronically following the launch of the electronic filing and records applications system at the BIA. Appeals of immigration judge decisions, appeals from DHS officer decisions,[4] and motions to reopen or reconsider filed with the BIA will follow existing legal process, but will be filed and processed electronically. All cases initiated at an immigration court or the BIA before the launch of the electronic filing and records applications in that location will continue to be processed in paper by EOIR, and will continue to require the parties to paper file documents in those cases. Similarly, if a case begins in an immigration court with an eROP, and then changes venue to an immigration court that has not yet implemented the electronic filing and records applications, that case will be converted to a paper record and processed in paper at the new court. In the future, EOIR may explore converting existing paper records into

Once the new electronic filing system is in place at a court, all attorneys (including DHS) will be required to file documents electronically, with limited exceptions allowing judges to accept some documents in open court.

BIA-accredited reps will have to opt-in to e-filing.

1. Who May File Electronically

This rulemaking proposes that electronic filing will become mandatory for DHS[6] and attorneys and accredited representatives who represent respondents, applicants, or petitioners before EOIR. By mandating electronic filing for attorneys and accredited representatives, EOIR will be able to maintain a complete electronic process for many cases from beginning to end. EOIR anticipates that this will create significant efficiencies for the parties and EOIR. For example, registered parties will be able to file

Under the proposal, law students and law grads who practice in immigration court would be required to file all documents through their attorney supervisor's account, and additionally mandate for the first time that the supervisor enter an appearance and appear for all hearings.

The proposed rule clarifies that all filings by law students must be made through an attorney or accredited representative who is registered with EOIR pursuant to 8 CFR 1292.1(f). As currently drafted, the regulations require "direct supervision" of law students, 8 CFR 1292.1(a)(2)(ii), but do not provide a clear definition of that term. Further, this rulemaking proposes that law graduates, currently required to have "supervision" under the regulations, 8 CFR 1292.1(a)(2)(iii), would also need to file through an attorney or accredited representative registered with EOIR. Law students and law graduates often provide representation through clinics or other short-term programs, which limits the length of their representation and can create confusion that affects the

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respondent when such short-term representation results in a change of counsel. With electronic filing, it is critical that the court can reach the supervising attorney and that the attorney is familiar with the proceedings, similar to the requirement that the clinic's address be provided for court communications rather than a student's personal address.

Importantly, the new regulation would provide that service is automatically completed if both parties are enrolled in the e-filing system.

That would mean no need to independently confirm proof of service in most cases—it would be automatically done by an electronic filing.

> In order to provide a simpler and more efficient filing process, EOIR proposes to complete service electronically on behalf of the parties for all cases in which both parties are using electronic filing. When a party successfully uploads a document to EOIR's electronic filing application and the other party is also using electronic filing in that case, EOIR's application will send the parties an electronic notification that the eROP has been updated. This will simplify the filing process for electronic filers by only requiring them to file their documents with EOIR in eligible cases rather than needing to execute multiple mailings to complete service requirements.
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> On the other hand, if another party is not participating in electronic filing for that particular case, EOIR's electronic filing application will alert the user that the opposing party is not participating in electronic filing for that particular case and remind the filer of the responsibility to complete service of process on the opposing party. Consistent with existing practice, the filer must include a certificate of service with each filing as proof of completed service on the opposing party.

Similarly, the regulations would be updated to allow EOIR to serve documents electronically, with the requirement of course that parties maintain an active email address. That means hearing notices, orders, and decisions would be filed electronically — like in most other courts.

EOIR also proposes to update the "service" definition to allow parties and EOIR the option to complete service electronically. In situations where the parties need to complete service outside of the electronic filing application, the parties may complete service electronically,[14] or by personal or mail service, which are the current options for completing service. EOIR anticipates that this will provide significant efficiencies to the parties by eliminating the need to print and mail documents to each other.

EOIR further proposes to serve EOIR-generated documents, such as orders, decisions, and notices, by electronic notification to parties that are participating in electronic filing. This notification will constitute completed service and begin the appeal clock, if applicable. If a party is not participating in electronic filing, EOIR will continue to serve EOIR-generated documents in person or by mail on that party.

In order for EOIR to effectuate electronic service, the parties must maintain a valid email address within the eRegistry application. If a user's email address changes, the user must immediately update the relevant eRegistry account and file a new Form EOIR-27 or EOIR-28, as applicable, in each case with the updated email address. EOIR will consider service completed when the electronic notification is delivered to the last email address on file provided by the user, similar to the existing paper mail service provision for Notices to Appear and hearing notices. *Cf.* INA 239(c), 8 U.S.C. 1229(c) ("Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien . . . .").

EOIR would also permit the use of electronic signatures on filing, and requests comment on the form of that.

First, EOIR proposes to accept documents with original, handwritten ink signatures, encrypted digital signatures, or electronic signatures, whether filing electronically or on paper. If filed electronically, the document may be signed with an encrypted, digital signature; an electronic signature; or an original, handwritten ink signature and then scanned for upload to the electronic filing application. If a user signs a document using an encrypted digital signature but EOIR's electronic filing application is unavailable, the user may print the document with the digital signature and paper file the document with the immigration court.

Second, EOIR proposes to allow users to sign their own name with a conformed signature on documents filed through EOIR's electronic filing application. Conformed signatures will not be accepted for anyone other than the user who is submitting the document. Conformed signatures typically consist of the user typing "/s/" and the user's name into the signature block. For example: "*/s/ John Smith*." By signing into the electronic filing application, the user has demonstrated that they have completed identity verification through the eRegistry process described in Section III.A.2., thereby allowing the use of a conformed signature. EOIR seeks public comment as to whether this

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[15] Digital signatures are defined as signatures performed via a recognized system that provides Personal Key Infrastructure (PKI) from the signer at the time of signing. EOIR Policy Memorandum 20-11, *Filings and Signatures* (Apr. 3, 2020), https://www.justice.gov/eoir/page/file/1266411/download (last visited Nov. 19, 2020). Electronic signatures are defined as signatures performed using a device that does not provide PKI at the time of signing (e.g., stylus and touchpad). *Id.* at 1 n.2. Any type of signature—wet, digital, or electronic—may be subject to a challenge in immigration proceedings to its authenticity, though EOIR expects that any such challenge will be brought only in good faith. *Id.* at 2. Additionally, any type of signature may be authenticated, as necessary, using any means identified in Federal Rule of Evidence 901. *Id.*

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safeguard, which employs all Department-mandated information security protocols, is sufficient, whether there are other more effective methods for identity-proofing online filers who do not have the same financial or U.S. "footprint" that can be used for remote verification of the person's identity, or whether the user should need to re-input credentials at the time of each electronic filing.

Sadly, EOIR would NOT expand the program where the BIA accepts payment for appeals electronically. You would still have to pay for applications with USCIS, but now you could scan the fee receipt and file that electronically.

D. Electronic Payments

EOIR imposes a fee for filing many types of documents. *See generally* 8 CFR 1103.7. Currently, the immigration courts do not directly accept fee payments for any documents that require a fee. Instead, filers must make these fee payments to DHS and then provide proof of the payment to the immigration courts. This proposed rule does not change this payment structure at the immigration courts. Under this proposed rule, electronic filers would be able to submit a scanned copy of the filing fee receipt as part of their electronic submission.

In contrast, the BIA directly accepts payments for certain documents that require a fee. *See generally* 8 CFR 1003.8. In October 2020, EOIR launched the EOIR Payment Portal, which allows users to make electronic payments for filings at the BIA, as provided in 8 CFR 1003.8. *See* EOIR, *EOIR Payment Portal* (Nov. 19, 2020), https://epay.eoir.justice.gov/. As a result, this rulemaking proposes to broaden the

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references to payments at the BIA in 8 CFR 1003.2 and 1003.3 in order to account for these changes.

Anyway, this looks like a welcome step towards @DOJ_EOIR moving into the 21st century. Electronic case filing, and the ability to review a file without having to go to the court in person, is desperately needed! But unfortunately, the proposal would only apply to new cases.