Address by the Honorable Carlos T. Bea

Judge, U.S. Court of Appeals for the Ninth Circuit

To the Board of Immigration Appeals and Immigration Judges

August 10, 2007

Good morning; thank you for inviting me here to meet you.

Every immigrant has a story. You see before you an immigrant who was once under an order of deportation. You might be interested in the story and how I came to be ordered deported, but obviously was not.

When I was just five years old, in 1939, my older brother Al and I were playing on the beach in Biarritz, France - just across the border from our home town, San Sebastian, Spain - when my Mother came to get us because the Germans had marched into Poland. My uncle thought the Maginot line would hold, but my mother had seen of what the Germans were capable in the Spanish Civil War. She knew they wouldn't be stopped. And so, to protect her young boys, even though she was a 29 year-old widow herself, she packed us up and not long thereafter we left Lisbon, on a ship bound for Havana. The ship flew under a Portuguese flag; Portugal was neutral. The flag was kept lighted up at night so the German submarines would not sink us. The journey took 16 long days and nights, and was at times frightening. There was always the fear the Germans would decide we

were a threat and sink the ship. Every moment, we had to wear our life belts.

Alarms would sound from time to time, throwing everyone on board into a dither. I can now confess that perhaps some of the "sightings" of Nazi ships during that crossing MAY have been the product of the imagination of two very bored little boys.

After a brief stay in Cuba - my father and grandmother had been born in Matanzas - my mother decided we would come to California. My mother, you see, did not speak any English and she relied upon my brother Al and I, products of a Canadian nanny, to be her interpreters. She assured us that with cities named San Diego, Los Angeles, and San Francisco, everyone in California spoke Spanish. She was misinformed. Perhaps she was just premature.

I went to Stanford for my undergraduate and law degrees, and played basketball for Stanford while there. Little did I know basketball would help in my immigration case.

Now, how I came to be ordered deported.

As some of you old-timers and historians know, in 1939 and for some years thereafter, there was a "Western Hemisphere Preference" which made it easy for citizens of the American continents to seek resident visas in the U.S.. I had inherited Cuban citizenship from my father, although I had been born in Spain. So

I became a resident alien until 1952.

That year, as a sophomore at Stanford, and a basketball player, I made the Cuban Olympic team that played in the Games at Helsinki, Finland. I left for Havana without getting a re-entry permit, confident I could get a resident visa for return, as I had on earlier trips to Cuba. After the Games, I delayed my return for a year to play basketball in the European league with Real Madrid. When I went to get my visa at the U.S. Embassy in Madrid, I was asked why I was returning; I stated to go back to Stanford. I was given a Student Visa. I did not grasp this was a non-resident visa that would interrupt my resident status, until 2 years later when I attempted to get U.S. citizenship. Through a lawyer I filed an affidavit stating I intended to remain in the U.S.; that prompted the Service to start a deportation hearing.

The Hearing Officer - no IJs then - found against my petition to reinstate residency. He found I had voluntarily abandoned residency to avoid the U.S. military draft. My position: so reinstate my residency and draft me since at 21 I was of draft age! That did not convince him; he said I had intended to avoid the now-ended Korean War, and there would be no further wars. On appeal to the BIA in Washington, I attended the oral argument of the 5-judge Board. The Chairman was Mr. Finucane, who at the end of the oral arguments asked my attorney,

Marshall Kidder, if he could speak directly to me. You can imagine how nervous that would make an attorney—especially one who had not prepared his client! "Of course," said Mr. Kidder, with aplomb.

Chairman Finucane turned out to be an avid basketball fan. He wanted to know what position I had played on the Stanford varsity; what I thought about UCLA's famous coach, John Wooden, and why I hadn't played in the 1956 Games at Melbourne. The answer to the latter was one you would appreciate: I was on voluntary departure. Had I gone to the Games in Australia, I would never have been allowed back in the country. The chat with the Chairman augured well. A few months later the BIA found in my favor: the hearing officer had abused his discretion by NOT exercising his discretion to reinstate my residency. Only years later, when I started handling a few immigration cases, did I realize how unusual was this appellate finding.

Within a week of the BIA decision reinstating residency having become final, I received my draft notice.

Even though it has long been safe to live in Spain, I have not attempted to return there to live because I know the value of being an American citizen. There is no greater privilege, no greater opportunity.

We are a nation of immigrants and the subject is a vital one for all of us.

Every time an Albert Einstein invents a theory, an Arnold Schwarzenegger becomes a governor, or a rookie Hispanic judge writes a dissent, I am reminded that immigrants aren't just a previous generation long gone, they are an ever-changing contribution to our society, which really is a melting pot.

I thank you for taking on the extremely difficult task every day of deciding whose claims for asylum are real, and whose are just fabrications. Judging the credibility of a witness is one of the hardest things any judge acting as the trier of fact has to do. I know, I was a trial judge for 13 years. Fortunately, I could usually delegate that task to a wiser group than myself - the jury! For this reason, I have a particular sense of deference to the findings of the trial judge.

Judging immigration claims is an increasingly demanding task. However, I believe we can improve the efficiency and consistency of the process if we focus on a few pressing problems and explore areas of reform. The area I am most interested in is, of course, the appellate process, but first I want to talk about institutional problems at the IJ and BIA level.

The Crushing Workload of the IJs and BIA

There are approximately 230 Immigration Judges in America today. Last year, they decided over 350,000 matters, or roughly 1520 matters per judge. With 250 working days in a year, that comes to 6 matters a day. And I hear they did it

all without even being assigned one law clerk per judge. In some cases, 8 judges must share one law clerk. Of course the opinions are not as detailed as we appellate court judge would like, how could they be? Of course they don't have time to review all the documents in the record. It would help if the Attorney General were to fill the 35 vacant IJ seats that are vacant, create more spaces for Immigration Judges, and give each judge at least one law clerk. I think we would see fewer appeals if Immigration Judges were given the resources necessary to do a detailed, thorough, thoughtful job in the first place.

Approximately one year ago, the Attorney General made an attempt to increase the number of BIA judges from 11 to 15. But instead, today we have only 9 judges sitting. Why, I must ask, are 6 out of the 15 slots vacant? Last year, the BIA decided approximately 45,000 cases. If you divide that number by 9, you get a staggering 5,000 cases per judge. This means that even if each judge worked every single day of the year, without ever getting sick, or taking a vacation, they would still have to review 13.69 cases per day. This means that there can never be any meaningful review of the cases, and Congress might as well do away with the BIA. If the Executive and Congress want the BIA to be at all effective, they need fill at least those 6 slots, and they need to give each judge 4 law clerks dedicated to that judge, not to mention a larger central staff.

I have no idea how you have all been operating under such circumstances, and I applaud you for doing your best with so little. And now I would like to turn to the next level up, the petition for review process in the Courts of Appeal.

I would like to offer a suggestion for the **re-organization of petitions for review to the courts of appeal from the BIA**. It may not affect you directly, but I would like to air my thoughts in the hopes that you would give me your reactions either in the question period, in chats here, or in e-mails to me at the Ninth Circuit.

In May, 2006, Senator Specter advanced the proposal that all immigration petitions for review be concentrated in the Federal Circuit. This proposal raised issues of (a) needed capital expenditures for a new courthouse and staff quarters, (b) additional judges to handle the cases, and (c) the necessity of judges greatly to alter their caseloads to accommodate the number of petitions for review.

A second suggestion was the creation of a panel of circuit judges from all over the country to sit in Washington, DC to hear the cases. This would create the same issues as the Federal Circuit proposal, except possibly the need for additional judges.

I propose a third option.

At present, petitions for review to the Court of Appeals must be in the judicial circuit where the Immigration Judge completed the proceeding. The

current plan of appellate review has three problems: it prevents uniformity of decisions; it takes too long to process a case; and it may lead to forum shopping. We regularly see cases that were heard by an Immigration Judge a decade or more ago and, there is great inequality in case distribution. For instance, in 2006, while some circuits like the 8th and 10th had about 100 petitions for review filed, the 9th Circuit had 5,166 petitions filed. The 9th Circuit deals with 48% of all immigration petitions filed nationwide. This resulted in a great disparity in the number of petitions decided by each judge. In the 8th Circuit, each judge decided an average of just 4 petitions, while in the 9th, we decided an average of 110 petitions per judge. If properly distributed, each judge nationwide would decide approximately 37 petitions. Not only does the current system result in a backlog, but it requires the BIA judges to apply differing standards depending in what circuit the case originated, even where the underlying factual and legal issues are virtually identical.

When I was a trial lawyer, whenever a large number of cases all raising the same issue were filed, such as asbestos litigation, those cases could be assigned by a panel of judges, known as the Multi District Litigation Panel, to a particular court for pre-trial matters in order to assure uniformity of decisions, and to facilitate mediation. It occurs to me that, because immigration cases so frequently involve

the same legal issues, there should be certain procedural safeguards to ensure uniformity of treatment, and to capitalize on expertise.

My Proposal is for a new statutory system of distributing immigration cases among the courts of appeal so as to create nationwide uniformity of result and a more prompt resolution of the cases.

It would involve grouping cases with common issues and then assigning them to a Circuit Court for determination.

It would also establish a rule of nationwide precedent set by the designated Circuit Court unless and until overruled or modified by the Supreme Court or that circuit's en banc process.

I. Here's how it would work:

First, Congress would establish a Multi-Circuit Immigration Panel that is modeled, in some ways, after the Multi District Litigation Panel. Several judges from different circuits would be picked by the Chief Justice to the United States. Their meetings could take place by video conferencing. There would be no need to relocate the Circuit judges from their chambers.

Based on our experience at the 9th Circuit, a centralized staff in Washington DC would require approximately 20 staff attorneys to review and categorize the cases. I have extrapolated this number from the number of staff attorneys we

employ at the Ninth Circuit to perform similar tasks. Remember, we at the Ninth Circuit are handling 50% of ALL Immigration petitions for review filed nationwide.

The Panel's staff would spend approximately 1 hour on each case reviewing the petition for review and the administrative record, in which time the staff can accomplish the following tasks:

1. Determine type of case involved, *i.e*, whether claim of Asylum, Cancellation of Removal, Reopening of proceeding, etc.

2. Categorize the cases by the type of case and the country involved, *e.g.*, Indian Sikhs seeking asylum based on political persecution or Mexicans seeking cancellation of removal, aliens being removed because the IJ held they had committed an aggravated felony, Motions to reopen because of changed conditions affecting claims of asylum, adjustment of status account marriage, etc. That way, the circuit court judges assigned to a particular type of case could become experts on, for instance, a particular area of the world.

3. Finally, the staff could look at the petition for jurisdictional defects that would bar any circuit from hearing the case, such as a late petition, or one filed by an aggravated felon where there is clear law on point.

Result sought: Pursuant to instructions to staff from the Panel, all petitions

for review filed with the central staff in Washington D.C. would be reviewed and classified into discrete groups of similar cases. Groups of cases would be assigned by the Panel to Circuits based on the available number of Active and Senior judges.

The Panel would group cases involving similar issues, such as Christians from China seeking asylum on account of religious persecution, and assign all those cases to one Circuit for determination, regardless in which circuit the cases arose geographically. For cases that raise more than one issue, the staff would determine which issue appears the strongest. For cases involving removability based on a state criminal conviction, the case would be assigned to the Circuit in which that state is located.

I will now describe the Procedures of Circuits to which cases would be assigned by the Multi-Circuit panel.

First, petitions for review would be filed in the BIA, just as counsel file a notice of appeal in the district court now. This would automatically give the BIA notice that the record may need to be compiled. And I would encourage the BIA to consider allowing electronic filing, but not to make it mandatory.

Circuit Courts would deal with cases assigned by the Panel in their accustomed manner. As an example, in the 9th Circuit, the cases would be

assigned to the Staff Attorneys for them to determine which are suitable for summary adjudication and which are not. The remainder of the cases would be set for a hearing before panels. Preferably, similar issues would be set for hearing before one panel, *e.g.*, Indian Sikh persecution cases involving "changed country conditions" would be set before one panel that could handle up to 40 cases in one week.

Cases should not be sent to transferee courts in numerically limited batches because, unlike Multi District Litigation Panel cases, immigration petitions are constantly coming in. The Panel should decide what type of case should go to which court on a semi-annual basis, and then all petitions of that type should be sent to the transferee court as soon as possible once they are processed by the central staff. Otherwise, this system will add to the overall backlog of immigration cases.

Motions. Virtually every petition for review involves a motion to stay removal pending a ruling on the petition. We have noticed that the only petitioners who do not file such motions are the ones whose cases have jurisdictional problems, such as aggravated felons, where they are trying not to draw attention to their cases. Either the Panel would decide these motions, or the Circuit court needs to decide them. Either way, a temporary stay of removal needs to be in place

automatically upon the filing of the stay motion until the stay motion is ruled upon, similar to 9th Cir. G.O. 6.4c. Otherwise, the courts will get dozens of "emergency" motions for stay each day and they won't have the record to make an informed ruling on the motion. I realize there is a concern that allowing any sort of automatic stay encourages the filing of frivolous petitions for review, but I am hopeful that this proposal will speed up the appellate process overall, resulting in much shorter stays than those currently granted.

Better yet, I would encourage Congress to consider new legislation granting a stay of removal until the merits are resolved at the Circuit Court level. Currently, courts are looking at the merits twice—once for the stay motion and again to rule on the merits. This would free up time so that courts could resolve cases more quickly. It would also free up time for the staff at the Office of Immigration Litigation. We need to make the system more efficient as a whole.

The Panel will have to decide emergency motions filed before the case is assigned to a circuit court unless a monthly rotating motions panel of circuit court judges is established under the Panel or an automatic stay of removal is put into place by new legislation to allow a petitioner 30 days to file the petition for review after the BIA issues its final order of removal.

There would be no review of an order by the Panel, except by extraordinary

writ, pursuant to 28 U.S.C. § 1651, which would be decided by the Circuit Court to which the case was transferred.

Oral argument. I also propose that we expand the opportunity for counsel to appear at oral argument by video-conferencing. Because some attorneys and their clients would be far away from the Circuit Court to which the case is assigned, if the case were chosen for oral argument, under my proposal the Circuit Courts would give counsel the choice of appearing by video-conference. This would effect a cost savings for private and government counsel, as well as the parties.

Attorneys admitted to practice before the Immigration Court and any Circuit Court of Appeals would be able to represent their clients before the transferee court so each petitioner can have the counsel of his choice.

Rule of nationwide precedence. To be effective, legislative change would require Circuit Courts throughout the country to follow the holdings (not dicta) of Circuit Courts to whom the Panel has assigned cases, until overruled or modified by rulings of the Supreme Court. Of course, the assigned Circuit Court panel decision would be subject to review under the Circuit Court's *en banc* procedure. Initially, when analyzing questions of law, the transferee court should apply law of the circuit in which it is located.

The present proposal has the following **advantages**:

1. No capital expenditure for new courthouses. The cases would be distributed by the Panel to sitting judges in established courthouses.

2. The Circuits would distribute the cases under their normal procedures so that judges would not be overwhelmed solely with immigration cases.

3. The Panel would not have to sit in Washington DC. The members of the Panel would remain in their courthouses and convene by video-conferencing, when necessary.

4. It would require only about 20 additional staff attorneys to help the Panel, including supervisors.

5. It would result in substantial savings to counsel and parties in travel costs, and time away from offices.

And finally, this proposal would result in nation-wide uniformity of decision and the elimination of forum shopping.

I have no pride of authorship in this proposal. I do want to encourage people to come up with alternative proposals, much as Senator Spector did last year. For instance, some staffers on the Hill have put together some thoughts on having a Federal Immigration Appeals Court (FIAC) convene by video-conference to handle *all* immigration cases. Panels could be composed of judges from various

circuits. The staff could be centered in Washington, DC.

This proposal would remove the necessity of having different circuits determine which are precedential rulings by transferee courts, under my proposal. Still to be determined under this proposal are such questions as:

1. How would judges from each circuit be picked for three judge panels sitting in a "virtual court", joined by video-conference?

2. What appellate rules would apply to this Federal Immigration Appeals Court besides the Federal Rules of Appellate Procedure? Would the local rules of the several circuits be cobbled together?

3. How would the work load of the non-immigration calendar items be adjusted to allow for FIAC calendaring? Would an FIAC clerk have the same power to set calendar dates for a judge as has a Circuit Court clerk now?

4. Would the FIAC attorney staff have the same power to weight cases so that (a) summary adjudication matters could be presented to an Oral Screening Panel (as presently is the case in the Ninth Circuit), subject to a single-judge objection which leads to assignment to a merits panel, and (b) to weight merits panel cases evenly to distribute the work?

On a somewhat less theoretical scale, I would like to speak to the Immigration Judges in the audience to offer a few suggestions in no particular

order of importance, which may aid courts in reviewing your decisions.

Problems of Policing the Immigration Bar

Effective counsel is one of the procedural safeguards that ensures our advocacy system will achieve its ultimate goal of affording people a fair trial, and allowing the truth to surface.

But when unscrupulous attorneys coach their clients to lie, file false claims on their behalf, and file frivolous appeals, they clog the system and cause us all to have less time to focus on the claims that have merit.

When attorneys on either side of the docket waste the Immigration Court's time with frivolous filings, the IJs should have the ability to sanction them! Congress directed the Attorney General to enact regulations granting Immigration Judges such authority in 1996. *See* 8 U.S.C. § 1229a(b)(6)©).[1] It is curious that

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[1] 8 U.S.C. § 1229a(b)(6)(C) provides:

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

> (A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,
>
> (B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

appropriate regulations have not been implemented by the Executive Branch. Is it perhaps for fear an IJ might one day sanction one of the government's attorneys. Our government should expect its own attorneys to behave in a manner that comports with Federal Rule of Civil Procedure 11. If they meet this standard, then they have nothing to worry about. Rather than fear its own attorneys being sanctioned, the government should encourage any procedure that would allow the IJs to hold attorneys and "notarios" responsible for wasting everyone's time with frivolous filings, and sometimes for helping an alien file documents the attorney knows are forged, as in a case I heard just last month.

Although the immigration bar certainly has some of the best and most dedicated attorneys, it is also an area that attracts some of the worst. First, the clients tend to be uninformed about how the American justice system operates. They have few connections with business and community leaders who can inform them. They unquestioningly accept whatever the attorney tells them. Second, if malpractice is committed, the likely result is the client is removed and no

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> (C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.
>
> Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

malpractice suit is ever filed.

Therefore, we must be especially vigilant about policing the immigration bar.

It is my understanding that the resources used to discipline attorneys practicing in Immigration Court are very limited. Only one attorney is assigned by the EOIR to this task. On the local level, on a visit recently to the Immigration Court in Salt Lake City, I saw a list labeled "Disqualified Attorneys" on a bulletin board. This is valuable, because it can be seen by clients waiting to be heard outside the courtroom. It might be even more valuable if (1) it were translated into Spanish and (2) placed on the Immigration Court web site in both English and Spanish.

Effective representation is crucial, especially to an applicant seeking asylum. A recent study found that 64% of asylum applicants who were represented by counsel were denied, while 93.4% of un-represented applicants were denied.

Therefore, I would urge you to allocate more of your resources to this important area.

And we appellate courts must do a better job at our level of policing the attorneys who appear before us. We are somewhat slow to disqualify; too quick to rely on admonishments.

Now that we've discussed throwing out the attorneys who do not behave from court, I would like to discuss a proposal for reforming our policy on removing aliens who do not obey our laws from this country.

Aggravated Felons

When you as Immigration Judges are finding that a prior conviction qualifies as an aggravated felony under the INA, please list all the bases for that finding that are charged in the notice to appear. As long as the notice to appear gave the petitioner notice that there was more than one basis for a charge of removability, I would hope that you would use the belt and suspenders principle to support your decision in every way procedurally permissible.

For instance, if you find that a statutory rape conviction was a crime of violence, consider whether you should also find that it is the sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). I was on a panel that reviewed just such a case where we had clear law that a conviction under the State statute constituted the sexual abuse of a minor, but the Immigration Judge did not list sexual abuse of a minor as one of his findings. Hence, we could not consider it as a ground for removal. The sole permissible basis for removal was whether the prior felony was a crime of violence. Under the categorical analysis, it wasn't. The documents of conviction were insufficient to prove a crime of violence under the modified

categorical approach. The only document in the record that related the actual facts of the case was one we were not allowed to consider under binding Supreme Court law. This leads me to my next point.

When we are reviewing a state crime to determine if it is an aggravated felony, we first use the *Taylor* categorical approach. If we find that the state criminal statute under which the alien was convicted includes conduct outside of what constitutes the federal generic definition of that crime, we then turn to the modified categorical approach of *Taylor* and *Shepard*. If you haven't done so, please read *Shepard v. United States*, 544 U.S. 13 (2005).

Don't worry, I won't be assigning any other homework.

Under *Shepard*, a court may generally consider only "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." We may not consider the facts admitted in proceedings before you if they are only in the administrative record and not in the documents we can consider under *Shepard*.

I cannot begin to tell you how many times I have seen the facts of the crime detailed in a document that we—and YOU—are not allowed to consider in making our determination. If the proper documents were in evidence, we would have had

grounds to deny the petition, hence to affirm the order of removal. If you have a case where the government is charging an alien as being removable based on a conviction for a crime, and the government does not place into the record one of the documents that we are allowed to consider, or if the documents introduced into evidence do not contain a factual recitation of the crime committed, please consider whether it would be in the interests of justice to set the hearing for another date and order both sides to bring in the documents that you, and we, will need to conduct a modified categorical approach.

I have one last proposal for Congress that would make it easier to remove people who have been convicted of felonies. I propose a rule that anyone convicted of a felony, under federal or state law, who receives a sentence[2] of one year or more imprisonment would be removable at the Attorney General's discretion, regardless whether the alien actually serves that sentence. The rationale behind such a proposal is two-fold.

First, if someone is going to live in a particular jurisdiction, he is expected to know and abide by that jurisdiction's laws. If one violates the law of the jurisdiction one is in, one faces the consequences. Period. We already expect this,

[2] To include a sentence imposed but suspended on conditions of probation, but not to include, of course, sentences suspended before imposition.

and people are on notice that if they commit a crime that is considered by that jurisdiction to be a felony, then the consequences will be harsh. For instance, it is not a defense to a felony charge of theft in New York that the same crime would be only a misdemeanor in California. When in New York, we are all expected to abide by New York's laws. I see no reason aliens should be treated differently. Along with the privilege of living in this country goes the responsibility of abiding by its laws. In fact, as far as giving aliens notice, this rule would be more fair than our current system, under which some felonies are considered aggravated and some are not, while even some misdemeanors qualify as "aggravated felonies."

Second, this rule would eliminate the need for Immigration Judges to determine what is or is not an "aggravated" felony. The state and federal legislatures will draw that line for them in deciding what is a felony, and what is merely a misdemeanor. This would eliminate the multiple problems with the *Taylor* categorical analysis. If there are relatively minor crimes made felonies by over-zealous State legislators, that injustice is better addressed by specific exceptions to a general rule than by the present system of trying to list all the felonies that are "aggravated." Furthermore, the requirement that the person have received a sentence of one year or more would help to assure that only those whose crime was more than a misdemeanor would be removable.

If an alien commits a felony, he should not expect to continue to enjoy the privilege of living here.

ADR at the IJ level

As you know, currently, there is no formal mediation process at the Immigration Judge level, other than the fact that the government occasionally exercises its prosecutorial discretion to dismiss adjustment of status cases. But otherwise, there are no mediators to facilitate reaching an agreement.

I would advocate putting such a system into place. Both trial and appellate courts have had enormous success mediating cases. Instead of bogging the system down, which I understand is the concern, it actually speeds things up. Mediators are usually successful at resolving between one-fourth and one-third of all cases that come before them. Then the case is finished. There is no trial, no appeal. This frees up resources at all levels within the system, allowing judges and the government's attorneys to focus on the more difficult cases. Moreover, mediation would allow the system to avoid some of the more extreme results where, for instance, someone has been a contributing member to this country for most of his life, but doesn't technically meet all the requirements for cancellation of removal.

Adverse Credibility Findings

First, please remember that aliens are not presumptive criminals and you are

not tasked as gate-keepers, your value to be calculated by how many applicants you turn away. By and large, aliens come to this country to work and to raise families, not to plunder and pillage. Keep this in mind when you are listening to their stories.

I would also request that when you are going to make an adverse credibility finding, you stop and make yourself a list of each reason why, then give petitioner an opportunity to explain each discrepancy before relying upon it in your opinion. It is not only required in our Circuit, it is just plain fair. Don't worry about tipping off the alien to a contradiction so he can invent some cockamamie story on the spot. For every clever alien who is that quick-witted, there are ten honest but inarticulate souls who may be denied merited relief.

Last, use your evidence weighing skills and your experience, by all means. But also keep in mind the circumstances in which the aliens find themselves when weighing the merits of their cases. Their lack of resources and connections make more elaborate proofs difficult for them, without making what evidence they do produce untrustworthy.

Merits-Based Immigration

The last topic I would like to talk to you about is a merits-based path to permanent residency. You may be aware that such a system existed as part of the

Comprehensive Immigration Bill, which recently failed to make it through the Senate. At the risk of beating a dead horse, I offer a few thoughts.

Each year, hundreds of thousands of foreign students head to our shores to obtain a level of education at our colleges and universities that they cannot receive in their home countries. After they have benefitted from our education system, and their visas have expired, we order them to leave, as I was once ordered to leave, and return to their countries of origin. In doing so, we force these individuals to use the skills that they acquire here in America in countries that are eager to compete with the United States.

Something does not seem right about this picture. In this increasingly competitive, global marketplace, why are we training foreign students and then forcing them to use that training in countries that strive to surpass the United States? Should we not be opening up a path for the best and the brightest among them to stay in the United States permanently?

A merits-based immigration system would help alleviate this problem. The system would assign a number of points based on the potential immigrant's education level, whether they obtained that education in the United States, their English proficiency, an employment offer from a U.S. employer in a high demand or specialty occupation, the number of years of work experience they have, how

many years they have been here, and so forth. Those individuals who have the highest number of points for the merits-based visas allocated that year would get permanent residency.

Countries like Canada, the United Kingdom, and Australia have already adopted and utilized a similar system to their benefit. For example, the U.K. will grant a work visa automatically to anyone who graduates from one of the top 50 business schools. Why can't we offer a similar opportunity in the fields of science, technology or medicine?

I appreciate this is a pitch better made to legislators, but I wanted to make it to you in case your opinions are sought out by legislators and their staffers.

The United States is a nation that strives to provide an equal opportunity for all. Our country offers the hope of the American dream regardless of one's skin color, gender, religion, or national origin. I believe that an immigration system that awards permanent residency, not based solely on one's family ties to the United States, but based in part on one's ability to contribute to this nation will allow us better to fulfill that dream and help the United States succeed in the global marketplace.

Conclusion

Immigration law can have a profound impact on people. I recently read this

quote by a former Rumanian intelligence officer in the Wall St. Journal on August 7th:

> "On July 28, I celebrated 29 years since President Carter signed off on my request for political asylum, and am still tremendously proud that the leader of the Free World granted me my freedom. During these years I have lived here under five presidents—some better than others—but I have always felt that I was living in paradise. My American citizenship had given me a feeling of pride, hope, and security that is surpassed only by the joy of simply being alive. There are millions of other immigrants who are equally proud that they restarted their lives from scratch in order to be in this magnanimous country. I appeal to them to help keep our beloved America united and honorable."

I want to thank you for lending me your ear. I know your time is valuable. I will be here for a while afterwards and I would love to meet as many of you as possible and to hear what we on the Ninth Circuit Court of Appeals can do to make the overall immigration process better and more accurate.

Just as my family traveled here to escape the ravages of war, the world's refugees will continue to come to this great country; thank the Lord. I await the next law-abiding, hard-working family, full of hope and seeking only the promise of the opportunity to achieve their highest potential.

So I applaud you, as you go back to your court next week and the week after, and try to discern who is here legally, who just wants a better life for their family, who is not testifying credibly, and even who might be here to harm this

great country.

Thank you.

[Ed. Note: Judge Bea was born in 1934 in San Sebastian, Spain. He joined the Ninth Circuit on October 1, 2003.]