



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

December 8, 2003

Charles Carter
Editor-in-Chief
National Law Journal
105 Madison Avenue
New York, New York 10016

Dear Editor:

Your article, "Immigration Appeals Surge," reports that recent procedural reforms at the Board of Immigration Appeals have caused a steep increase in appeals to the courts. As you noted, the number of appeals arising from the reduction of the Board's backlog has begun to taper off, and there is reason to believe that they will continue to decline. First, the Board has largely completed its backlog of cases and has issued fewer decisions in recent months. Second, many of the recent appeals raise due process challenges to summary affirmances under the procedural reform regulation. The courts have thus far uniformly rejected such challenges.

Your article refers to a Study done for the ABA by the law firm of Dorsey and Whitney. The Study finds that the rate of reversals of Immigration Judge decisions by the Board has changed from one in four appeals before the spring of 2002 to one in 10. The Study suggests that this change in the rate of reversals is a result of the procedural reforms and reflects less careful review of cases by the Board. These suggestions are incorrect for a number of reasons. First, and surprisingly, the Study relies on outdated and unsubstantiated data from a Los Angeles Times article published in January 2003. Moreover, even if the statistics were accurate, they cover only the first few months before and after implementation of the procedural reforms, a period during which the Board was focused on resolving cases in the backlog identified as most amenable to single-member review. No information is provided for appeals after October 2002, which is just one month after the procedural reforms took effect.

An additional reason why the foregoing statistics are inaccurate is that they include summary affirmances of Immigration Judges' decisions in cases appealed by the Department of Homeland Security as well as by the alien respondent. Therefore, some summary affirmances by the Board are favorable to the alien. Finally, reductions in the numbers of decisions favorable to aliens must be assessed in light of recent changes to immigration law which impose significant new barriers to eligibility for relief from removal. The definition of "aggravated felony," an offense which bars nearly all relief from removal, has been greatly expanded; some forms of relief from removal have

been eliminated; eligibility requirements for other forms of relief have been adjusted to exclude applicants who might once have qualified. For all these reasons, the Study's observation concerning the number of appeals sustained has little bearing on the quality or correctness of the Board's decisions.

Nor does the Study otherwise justify a finding that the procedural reform regulations have affected the overall quality and reliability of the Board's decisions. The Study refers to five court of appeals decisions reversing the Board, asserts that the Immigration Judge's decision in each case contained "obvious" error, and characterizes these five decisions as "illustrative" of the problems of the summary affirmance procedure. The Board decided over 60,000 cases in calendar year 2002, almost 40% by summary affirmance. The selection of five reversals in summary affirmance cases obviously sheds little light on the quality of review in the vast majority of cases the Board decides.

The Study narrowly focuses on the role of the Board to the exclusion of the important role of the Immigration Judge in making the initial findings of fact and conclusions of law. Many of the appeals to the Board are from cases which have been correctly resolved by an Immigration Judge in a detailed written decision. Such cases are amenable to resolution in a short order by a single Board member. The more complex and difficult cases are referred for panel review. The ultimate fairness and timeliness of the procedure afforded aliens in immigration proceedings must be assessed in its entirety, including the full hearing and detailed decision afforded by the Immigration Judge, the initial appeal to the Board, the opportunity to seek reconsideration to point out alleged error to the Board, as well as the opportunity for certain aliens to appeal to the federal courts.

To the extent the Study suggests that the Board is superficially reviewing large numbers of cases, it is simply wrong. The Board Members and attorneys are dedicated professionals who realize that much is at stake in the cases before us and understand that the Board is often their last recourse before removal. We remain committed to applying the procedural reform regulations in a fair and conscientious manner.

Sincerely,

A handwritten signature in cursive script that reads "Lori Scialabba".

Lori Scialabba
Chairman, Board of Immigration Appeals