DORSEY & WHITNEY LLP

STUDY CONDUCTED FOR:

THE AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION POLICY,
PRACTICE AND PRO BONO

RE:

BOARD OF IMMIGRATION APPEALS:
PROCEDURAL REFORMS
TO IMPROVE CASE MANAGEMENT
This Study was submitted to the American Bar Association Commission on Immigration Policy, Practice and Pro Bono on July 22, 2003.

This Study has not been considered or approved by the House of Delegates or the Board of Governors of the American Bar Association. It does not purport to state the policy or views of the Association.
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SOURCES AND METHODOLOGY

The American Bar Association’s Commission on Immigration Policy, Practice and Pro Bono requested Dorsey & Whitney LLP to research, investigate, and prepare this Study concerning the 2002 “Procedural Reforms” at the BIA.

The American Bar Association (“ABA”) is a voluntary, national membership organization of the legal profession. Its more than 410,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of non-lawyer associates in allied fields.

The ABA’s Commission on Immigration Policy, Practice and Pro Bono (“the Commission”) directs the efforts of the ABA to ensure fair treatment, and full due process rights, for immigrants, refugees and other newcomers in the United States. The Commission monitors and analyzes legislative and regulatory proposals, and advocates for improvements; provides continuing education and information to members of the legal community and the public; and develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide legal representation for individuals in immigration proceedings.

Dorsey & Whitney LLP (“Dorsey”) is a large, multi-specialty law firm with offices in the United States, Canada, Europe, and Asia. It represents some of the largest corporations in the world, and, through its pro bono program, some of the poorest individuals. Very few of Dorsey’s 750 lawyers practice immigration law. In fact, Dorsey’s immigration practice generates less than one-half of one percent of Dorsey’s revenues.

Approximately 50 Dorsey lawyers and paralegals participated in the research, investigation, and preparation of this Study. All Dorsey lawyers and paralegals participated pro bono. As the ABA directed, they approached the project without preconceived notions or conclusions, and they sought information from all sources and sides.

Dorsey lawyers conducted or sought scores of interviews with past and present officials of the Department of Justice, the Executive Office of Immigration Review (“EOIR”), and the BIA; with all members of the United States Senate’s Subcommittee on Immigration, Border Security, and Citizenship and their staffs; with all members of the United States House of Representatives’ Subcommittee on Immigration, Border Security, and Claims and their staffs; with court clerk’s offices in all federal circuits; with individual immigration lawyers and groups, especially the American Immigration Law Foundation (“AILF”) and the Federation for American Immigration Reform (“FAIR”); and with academic experts. Several persons who were interviewed are not named in this Study, at their request. Several persons, including all current employees of EOIR, were instructed not to speak to Dorsey lawyers. See Appendix 2. Some did anyway. We thank all of those who spoke with us, whether for attribution or not, whether Republican or Democrat, whether AILF or FAIR.

Dorsey lawyers and paralegals also collected and reviewed many hundreds of documents in preparing this Study — including Congressional hearing transcripts, court opinions, legal briefs, Immigration Judge and BIA rulings, and law review articles. We appreciate the donation
of free Westlaw time we received for this study from West, a Thomson business. We also reviewed internal memoranda produced pursuant to our requests under the Freedom of Information Act. Several of those documents, or the data derived from them, are attached to this Study as appendices.

Near the end of this Study, we highlight five individual cases illustrating the problems created by too-rapid BIA “affirmances without opinion,” which are now encouraged or required by the “Procedural Reforms.” In each case, a non-citizen was ordered expelled from the United States by an Immigration Judge, who made a patently obvious mistake. The BIA failed to catch and correct the mistakes; instead, in each case, the BIA summarily affirmed the erroneous decision without opinion or explanation. The non-citizens appealed the BIA summary affirmances to the federal circuit courts. The federal circuit courts dug back to the Immigration Judge opinions, saw the obvious errors, reversed, and remanded back to the BIA to do “what the BIA should have done” in the first place:

- Yong Tang, a leader of the Tiananmen Square protest beaten senseless during interrogations by Chinese police before he fled to the United States, was ordered expelled because an Immigration Judge did not believe his testimony “in a few respects.” Also, the Immigration Judge concluded, because Mr. Tang was working in the United States for a company run by persons of Chinese extraction, he would not reasonably fear persecution upon his return to China. The entire basis of this remarkable conclusion, the Immigration Judge admitted, was “a feeling.” The BIA summarily affirmed and never issued a written opinion. The United States Court of Appeals for the Third Circuit had to review the original Immigration Judge’s opinion “as though it were that of the BIA.” The Third Circuit reversed and remanded, finding the Immigration Judge’s decision to be based on “inferences, assumptions, and feelings that range from overreaching to sheer speculation.”

- Azim Tuhin, a political activist, fled his native Bangladesh after being beaten many times by the police. He was ordered expelled because, according to the Immigration Judge, he had fled “prosecution, not persecution.” The BIA summarily affirmed. The United States Court of Appeals for the Seventh Circuit reversed and remanded, noting that the Immigration Judge never even mentioned Tuhin’s multiple beatings, and concluding that the Immigration Judge’s view that prosecution and persecution are mutually exclusive “seems to be based on a fundamental misunderstanding of the law.”

- Diland Herbert, a citizen of Trinidad and Tobago, was ordered expelled by an Immigration Judge who proceeded in absentia, even though Herbert’s lawyer had filed a motion for continuance, even though Herbert’s family was present, and even though Herbert was on the way (delayed by traffic in a heavy rainstorm). The BIA summarily affirmed. The United States Court of Appeals for the First Circuit reversed and remanded, finding that proceeding in

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absentia under such exceptional circumstances was “arbitrary and capricious.”

- Zebenwork Haile Georgis, a citizen of Ethiopia, was ordered expelled by an Immigration Judge, despite the many arrests, beatings, and rapes by police in Ethiopia of her family members and others involved with her in a political group opposed to the Ethiopian government. The Immigration Judge based his expulsion order largely on discrepancies of dates in Ms. Georgis’s testimony as to when her family members and colleagues were arrested, beaten, or imprisoned. The BIA summarily affirmed the expulsion order. On appeal, the United States Court of Appeals for the Seventh Circuit pointed out that Georgis was referring to the Julian calendar used in Ethiopia, which is more than seven years different from the Gregorian calendar used in the United States, and that “everyone, and not just Georgis, seemed unclear about converting the dates from Ethiopian to Gregorian.” The Seventh Circuit vacated the expulsion order, remanded to the BIA, and “strongly urge[d] the BIA to assign a different judge to Georgis’s case on remand.”

- Adel Nagi El Moraghy, a Coptic Christian Egyptian national, sought asylum in the United States because of fears of persecution by Islamic fundamentalists if he were returned to Egypt. Mr. El Moraghy described a series of beatings he had suffered in Egypt and testified that he would be a “marked man” if he returned because, while in Egypt, he had been a friend of a Muslim woman. The Immigration Judge did not make any finding as to Mr. El Moraghy’s credibility and did not address his past persecution at all. However, the Immigration Judge ordered Mr. El Moraghy deported. The basis for the Immigration Judge’s decision, to the extent it could be discerned, was that the United States Department of State “country reports,” which described a history of violent assaults against Coptic Christians in Egypt, did not mention Mr. El Moraghy by name. The BIA summarily affirmed. The United States Court of Appeals for the First Circuit reviewed the Immigration Judge’s opinion directly, found an “absence of reasoned discussion,” and remanded to the BIA. In remanding, the First Circuit observed that the BIA’s “affirmance without opinion” procedure had inflicted a cost “that will be borne mostly by the courts, which have done what the BIA should have done.”

In highlighting these five illustrative cases, we do not wish to suggest that these are the only errors that have been committed. They are illustrative only. Indeed, the “Procedural Reforms” clearly make such mistakes, sometimes fatal mistakes, more likely to happen and more difficult to detect.

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3 See Herbert v. Ashcroft, 325 F.3d 68 (1st Cir. 2003).
4 See Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003).
The “Procedural Reforms” were officially effective on September 25, 2002, so, at the time this Study was released, less than one year had passed. This Study, therefore, can only provide a snapshot—an early snapshot—of the adverse impacts the “Procedural Reforms” are having. The data suggest that the adverse impacts, particularly on aliens and on the federal courts, will worsen, not improve, as additional time passes.

THE BOARD OF IMMIGRATION APPEALS

History

Systematic federal regulation of immigration and naturalization began in 1891, when Congress established the office of Superintendent of Immigration in the Treasury Department.\(^6\) Immigration functions resided in the Treasury Department until 1903 and then in the Department of Commerce and Labor until 1906. The Bureau of Immigration and Naturalization was established in 1906 and transferred to the new and separate Department of Labor.\(^7\)

The origins of what was to become the BIA date from 1922, when the Secretary of Labor established a board to review immigration cases and to make recommendations to the Secretary for their disposition. This Board of Review provided an opportunity for oral argument, submission of briefs, and more thoughtful consideration of the cases. It was a unit of the Department of Labor from 1922 to 1940.

In 1940, Congress moved the regulation of immigration from the Department of Labor to the Department of Justice. Under the authority of the Attorney General, the Board of Review became the BIA. The BIA was delegated the authority to make final decisions in immigration cases, subject only to possible review by the Attorney General. In 1983, a Justice Department reorganization created the EOIR and placed the BIA under the umbrella of that office.

As a practical matter, the BIA is the chief administrative law body for immigration law. However, the BIA is not—and has never been—a statutory body. It exists only by virtue of the Attorney General’s regulations.\(^8\) As the Attorney General’s creation, the Attorney General defines and modifies the BIA’s powers. Some have criticized the BIA’s uncertainty of status and have urged that it be given statutory recognition and certainty.\(^9\) To date, Congress has not acted on such proposals.

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\(^7\) Act of March 4, 1913, § 3, 34 Stat. 596.
\(^9\) For a discussion of the history regarding proposals to establish an Article I immigration court, see 1 CHARLES GORDON, STANLEY MAILMAN, STEVEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05 (2003) [hereinafter IMMIGRATION LAW AND PROCEDURE].
The BIA has nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges or by District Directors of the legacy Immigration and Naturalization Service (“INS”) ¹⁰

**Duties and Responsibilities**

The BIA is a quasi-judicial body with exclusively appellate functions. It historically has served two purposes: deciding appeals of individual cases and issuing precedential decisions for guidance to the Service and the Immigration Judges.¹¹

BIA decisions were historically made by three-member panels, because the BIA itself considered “the deliberative process available through three-Member review” to be essential.¹² These BIA panels had appellate jurisdiction in the following cases:¹³

1. Decisions of Immigration Judges in most exclusion cases;
2. Decisions of Immigration Judges in most deportation cases;
3. Decisions of Immigration Judges in most removal cases;
4. Decisions of Immigration Judges on applications for the exercise of discretion in waiving excludability or deportability for certain residents returning to an unrelinquished domicile of at least seven years;
5. Decisions involving administrative fines and penalties;
6. Decisions on petitions for approval of preferred immigration status by reason of relationship to a citizen or resident alien, or decisions revoking the approval of such petitions;
7. Decisions on applications for waiver of inadmissibility for temporary entrants;
8. Determinations relating to detention, bond, or parole of a respondent;
9. Decisions of Immigration Judges in proceedings for discipline of attorneys or accredited representatives;

¹⁰ On March 1, 2003, the INS was eliminated when the Department of Homeland Security (“DHS”) was created. Most of the INS’s functions were taken over by three new DHS Bureaus: the Bureau of Citizenship and Immigration Services (“BCIS”), the Bureau of Immigration and Custom Enforcement (“BICE”), and the Bureau of Customs and Border Protection (“BCBP”). Unless the context requires specificity, throughout this Study the INS and the successor DHS Bureaus will be referred to collectively as “the Service.” The BIA itself continues to be a part of the Department of Justice.


¹² Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members 3 (Aug. 28, 2000) [hereinafter Schmidt Memorandum] (copy produced by EOIR to Dorsey & Whitney pursuant to Freedom of Information Act request and attached as Appendix 3).

¹³ 8 C.F.R. § 3.1(b) (1999).
(10) Decisions of Immigration Judges in rescission of adjustment of status cases;

(11) Decisions of Immigration Judges in asylum cases;

(12) Decisions of Immigration Judges relating to temporary protected status; and

(13) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals from that list.

The Attorney General conferred on the BIA the authority and discretion to the extent necessary and appropriate for the disposition of cases. The BIA conducted de novo review of factual issues, though it did not hear testimony and would ordinarily limit its review to matters developed on the record, remanding cases when further fact-finding was deemed necessary. As stated by former BIA Chairman Thomas Finucane:

Unlike appellate courts, on questions of fact the Board is not limited to a determination if there was substantial evidence upon which the finding of the Special Inquiry Officer was based. The Board has the power and authority to review the record and make its own conclusions as to facts. . . . In a word the Board may make a de novo review of the record and make its own conclusions and findings irrespective of those made by the Special Inquiry Officer.

Thus, before 2002, the BIA could make its own independent determination on questions of fact and law and on whether discretionary relief should be granted. The BIA also had discretion to grant oral argument if requested. It could confirm or alter the Immigration Judge’s rulings on discretionary relief and award discretionary relief. The BIA issued a written decision that was supposed to discuss the evidence and the reasons for the BIA’s determination sufficiently so that a reviewing court would know its basis.

BIA decisions bind all DHS employees and officers and all Immigration Judges who administer the Immigration and Naturalization Act. Selected decisions may be designated by a
majority vote of the permanent BIA members as precedents to be followed in future proceedings.\(^\text{19}\)

The BIA’s decision closed the case administratively unless the case was further reviewed by the Attorney General—a very rare occurrence.\(^\text{20}\) BIA decisions can be modified or overruled by subsequent BIA decisions, by the Attorney General, or by the federal courts.

**Members of the Board of Immigration Appeals**

Each of the board members of the BIA is rated for title, series, and grade in the Federal Service as a “Board Member, SL-905.”\(^\text{21}\) As such, each member of the BIA is required to have at least a J.D. law degree and be an active member of a state bar or the bar of the District of Columbia with a minimum of seven years of professional legal experience, at least one of which would be equivalent to the GS-15 level in the federal civil service.\(^\text{22}\) When selecting from the field of qualified applicants as recently as 2000, the Justice Department indicated that the following four factors would be used for quality ranking:

1. Comprehensive knowledge of the field of immigration laws, including the Immigration and Nationality Act regulations, and administrative and judicial case law;
2. Excellent analytical, decision making, and writing ability;
3. Proven ability to manage cases; [and]
4. Proven ability or potential to function effectively in high-volume collegial decision-making environment.\(^\text{23}\)

Although “comprehensive knowledge of the field of immigration laws” is set forth as the first qualification of a BIA judge, recently the Justice Department has selected members for the BIA who have had no prior immigration law or administrative law background. In February 2002, before the House Judiciary Committee’s Subcommittee on Immigration and Claims, the Honorable Lauren R. Mathon, a member of the BIA from 1995-2001 and, before that, an Immigration Judge and an INS trial attorney, testified:

> Although the number of [BIA] Board Members greatly expanded over the past few years, four of the Board Members appointed in

\(^\text{19}\) *Id.* Only a very small percentage of decisions that the BIA issues in any given year are deemed of precedential value. In 2002, 25 decisions were selected as precedential; in 2001, 19 were so designated; and, in 2000, only 18 received that status. *Operations of the Executive Office for Immigration Review (EOIR): Hearing Before the Subcommittee on Immigration and Claims of the Committee of the Judiciary, 107th Cong. 57 (2002) [hereinafter EOIR Hearing] (statement of the Honorable Michael Heilman, former member of the Board of Immigration Appeals), Attorney General and Board of Immigration Appeals Precedent Decisions, available at http://www.usdoj.gov/eoir/efoia/bia/biaindex.htm.*

\(^\text{20}\) 8 C.F.R. § 3.1(d)(2) (1999)


\(^\text{22}\) *Id.*

\(^\text{23}\) *Id.*
the last two years had no immigration background or expertise. It took them time to learn a new body of law and become proficient at their work, and during this time the number of cases which could otherwise be reviewed and adjudicated decreased.24

In the Justice Department’s Public Affairs Office press release of September 25, 2001, the EOIR announced the professional backgrounds of three appointments to the BIA (Kevin A. Ohlson, Frederick D. Hess, and Roger Pauley). The two common denominators for these three appointments seem to have been a significant period of service on law enforcement and prosecutorial functions within the Department of Justice Criminal Division combined with the absence of any prior immigration law experience or background. Mr. Pauley had served more than 27 years, Mr. Hess had served more than 19 years, and Mr. Ohlson had served more than a decade in the Criminal Division before their respective appointments to the BIA. None appears to have previously held any other administrative or immigration law functions in the federal government.

On the other hand, during 2003, five experienced BIA members with immigration expertise have “left” or shortly will “leave” the BIA. The circumstances of their departures were not disclosed. Paul Schmidt had a long career in the INS general counsel’s office, then eight years experience on the BIA, including six years as chairman. Gustavo Villageliu, a Cuban immigrant himself, had been practicing immigration law since 1978, as a BIA staff attorney, then an Immigration Judge, then a BIA Member. Cecilia Espenoza, before joining the BIA, had been a professor of immigration law and legal services attorney. Noel Brennan, prior to being appointed to the BIA, had been a deputy assistant attorney general in the Department of Justice, responsible for community justice programs, and a longtime pro bono and legal services lawyer. John W. Guendelsberger was also a professor of immigration law and legal services lawyer before his appointment to the BIA.

THE BOARD OF IMMIGRATION APPEALS BACKLOG

Historical Data

During the 1990s, the United States had record immigration: 9,095,417 people immigrated, more than any decade in American history.25 Also during the 1990s, the number of aliens expelled from the United States more than quadrupled.26 Most of these aliens were expelled because they entered the United States illegally, were unauthorized to stay in the United

25 See Appendix 4.
26 See Appendix 5, 6.
States, or committed criminal acts while in the United States. In any event, the numbers of expulsion proceedings skyrocketed, from 30,039 in 1990 to 185,731 in 2000.

At the BIA, the number of appeals filed per year more than doubled (from 12,823 in 1992 to 29,972 in 2000). The number of appeals decided per year increased as well, but did not double (from 11,720 in 1992 to 21,498 in 2000). The backlog, as a result, grew significantly during the 1990s (from 18,054 in 1992 to 63,763 in 2000).

Causes of the Backlog

The backlog was caused by a number of factors, principally: (1) the increased case load at the BIA; (2) the frequent, significant changes in United States immigration laws; and (3) the number of members and other staffing issues at the BIA. While each of these will be addressed here in turn, and independently, it is likely that they worked in combination to create the backlog.

The Increased Caseload at the BIA

One factor commonly mentioned as leading to the backlog is the increasing number of new appeals that the BIA receives. The BIA case load has increased significantly over the past ten years. A large part of this increase appears due to the increase in the number of Immigration Judges from 75 Judges in 1987 to over 225 Judges in 2003.

The number of judges whose work is reviewed by the BIA, therefore, has tripled. By FY 2001, the larger cadre of Immigration Judges was able to handle more than 284,000 matters.

The rate at which Immigration Judge decisions were being appealed to the BIA has also increased: from 10.9% in FY 1996 to 15.7% in FY 2001.

Both factors (a 300% increase in the number of Immigration Judges and a 50% increase in the rate at which their decisions are being appealed) have led to a steep increase in cases being handled by the BIA.

Changes in United States Immigration Law

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27 See Appendix 7.
28 See Appendix 6.
29 See Appendix 8.
30 See Appendix 9, 10.
31 See Appendix 11, 12, 13.
32 EOIR Hearing, supra note 19, at 9 (statement of the Honorable Lauren Mathon).
33 See id. at 21 (statement of Kevin Rooney).
34 See id. at 22 (statement of Kevin Rooney, Director, Executive Office of Immigration Appeals).
The second factor commonly mentioned for the increase in the backlog at the BIA is the changing legal landscape. There have been a number of new statutes relating to immigration, some of which complicated matters. Recent changes in U.S. immigration law have included:

- Immigration Reform and Control Act of 1986 (IRCA);
- Immigration Act of 1990 (IMMAct 90);
- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA);
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA);
- Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA);
- Haitian Refugee Immigration Fairness Act of 1998 (HRIFA);
- Victims of Trafficking and Violence Protection Act of 2000 (VTVPA);
- Legal Immigration and Family Equity Act of 2000 (LIFE); and
- Patriot Act of 2001.35

Number of Members and Other Staffing Issues

Another factor mentioned with respect to the increase in the BIA backlog is the number of BIA members and other staff personnel. One expert has stated that the “existing backlogs are not necessarily the result of inefficiency, but rather reflect a lack of resources. . . . [and that] [e]liminating board members will not resolve backlog problems. It’s like saying that the way to reduce traffic on Interstate 95 is to eliminate two lanes of the four-lane highway each way.”36

Some, however, have testified before Congress or otherwise expressed their belief that there have in fact been too many members on the BIA.37 One former BIA member stated before


36 See EOIR Hearing, supra note 19, at 24 (statement of Stephen Yale-Loehr, co-author of IMMIGRATION LAW AND PROCEDURE, supra note 9).

37 See id. at 13 (statement of the Honorable Michael Heilman) (“I think it is clear at this point that the [BIA] has too many members.”); see also Letter from Federation for American Immigration Reform to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 4 (Mar. 20, 2002) [hereinafter FAIR Comments] (“Currently, the 400% increase in members since 1995 has resulted in conflicting opinions, delays
Congress that the increase in the number of members often led to “issues apparently resolved one month . . . becoming unresolved as [new members and] new votes and new voting patterns appeared.”

The Department of Justice itself, many times, under both Democratic and Republican administrations, indicated that increasing the number of BIA Members was “necessary because of the Board’s increasing caseload” and that more Members would “maintain an effective, efficient system of appellate adjudication.” That departmental judgment was apparently reversed during 2002, when, in promulgating the “Procedural Reforms,” the Department of Justice declared:

It is now apparent that this substantial enlargement – more than quadrupling the size of the Board in less that seven years – has not succeeded in addressing the problem of effective and efficient administrative adjudication, and the Department declines to continue committing more resources to support the existing process.

The Department of Justice did acknowledge the perception of some “that the reduction could be perceived as part of a design to eliminate Board members with whom the Attorney General disagrees . . . “ In response, the Department noted, accurately, that the Attorney General has the power to eliminate any member he chooses, as a matter of his discretion, without being bound by seniority, immigration experience, or anything else.

Disadvantages of Having a Backlog

When Attorney General Ashcroft announced the “Procedural Reforms” in February 2002, he stated that “[a] mission of the Department of Justice is enforcing our immigration laws fairly, deliberately and without delay.” In spite of the differences of opinion as to why the backlog arose or how it should best be resolved, there appears to be almost universal agreement that the backlog is a problem, for all parties involved.

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38 EOIR Hearing, supra note 19, at 17 (statement of the Honorable Michael Heilman). See id. at 16 (“Growth has also characterized the BIA as an institution, to the point that it bears no real resemblance to the body that was known as the BIA for about the first 50 years of its existence. . . . It was inevitable that the ability of the BIA to issue precedent decisions, to say nothing of useful decisions, would be lowered as the number of Board Members increased.”); see also Dorsey & Whitney’s Summary of Interviews with Congressional Staffers (Apr. 29, 2003) (“They observed that the backlog had increased at the same time that the number of board members had increased. They noted that the statistics did not indicate that the backlog was the result of too little manpower to handle the cases. Rather, they explained that the increase in the number of judges seemed to cause an increase in the backlog.”).


41 Id. at 54,893.

42 Id.

43 Press Release, Department of Justice, DOJ Unveils Administrative Rule Change to Board of Immigration Appeals in Order to Eliminate Massive Backlog of More than 56,000 Cases (Feb. 6, 2002).
Delay is bad for law-abiding aliens, particularly when they are detained throughout the course of appeals, and particularly when they have children. Delay is also bad for all Americans, when it allows those who threaten our safety or security to remain here when they should be expelled.

The Department of Justice also believes that the backlog creates an “unfair enforcement” of immigration laws, harming those aliens who may have a strong basis for appeal while permitting some respondents to remain in the United States illegally to “acquire additional equities and to abuse the immigration system.”

Previous Efforts to Combat the Backlog

Various efforts have been made to combat the backlog of cases before the BIA. The earliest of these primarily involved increasing the number of positions on the Board from 5 to 23. Other efforts included attempts by the BIA Chairman, in 1995-2000, to implement and enforce time limits. As noted above, these efforts were not very successful; the backlog increased by close to 30,000 cases during the 1995-1999 period alone.

THE “STREAMLINING RULES” (1999)

Summary Affirmances

In 1999, the BIA began a new attempt to deal with its rapidly increasing caseload. Its so-called “Streamlining Rules,” set forth in 8 CFR Part 3, became effective on October 18, 1999.

The “Streamlining Rules” made a number of changes in BIA procedure. Single BIA members were empowered to dispose of a wide range of “procedural or ministerial issues.” Most importantly, under the “Streamlining Rules,” permanent BIA members could act alone in affirming certain decisions of Immigration Judges and the Service without opinion.

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44 See EOIR Hearing, supra note 19, at 29 (statement of Stephen Yale-Loehr); see also Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 385 (9th Cir. 2003) (noting that the court had repeatedly “directed the BIA to give particular attention to whether a deportation will disrupt the lives of children, especially those who have remained in the country during their early formative years due to the delay caused by the INS or BIA.”) (citing Casem v. INS, 8 F.3d 700, 703 (9th Cir. 1993); Gutierrez-Centeno, 99 F.3d 1529, 1534 (9th Cir. 1996); Prapavat v. INS, 662 F.2d 561, 563 (9th Cir. 1981)).

45 See FAIR Comments, supra note 37, at 4.

46 See id. at 4 (statement of the Honorable Sheila Jackson Lee, a Representative from the State of Texas).

47 See Schmidt Memorandum, supra note 12.

48 See Schmidt Memorandum, supra note 12.

49 The procedural rules governing the BIA appeal process prior to the enactment of the “Streamlining Rules” were codified at 8 C.F.R. §§ 1.1-3.11 (1999) and are attached as Appendix 15.


Chairman was empowered to “designate certain categories of cases as suitable for review [by a single member, without opinion]. . . .” 53

For cases within the “certain categories” designated by the BIA Chairman, the single BIA member to whom the case was assigned could summarily affirm the decision of the Service or the Immigration Judge, without an opinion, if the BIA member determined:

- that the result reached in the decision under review was correct;
- that any errors in the decision under review were harmless or nonmaterial; and that (A) the issue on appeal was squarely controlled by existing BIA or federal court precedent and did not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.54

While an affirming order without an opinion did not necessarily imply approval of all of the reasoning of the decision under the “Streamlining Rules,” it signified the BIA’s conclusion that any errors in the decision of the Immigration Judge or the Service were “harmless” or “nonmaterial.”55

Implementation of the “Streamlining Rules” (1999-2001)

The “Streamlining Rules” authorized the chair of the BIA to designate “certain categories” of cases as appropriate for single member affirmance without opinion. From the fall of 1999 through the spring of 2002, the two BIA Chairs (Paul Schmidt and Lori Scialabba) did precisely what the rules contemplated, i.e., designated “certain categories.” As Chairman Schmidt informed all BIA members on August 28, 2000:

First, the designated categories are similar to “mining claims.” They define areas where it preliminarily appears likely that we will locate cases appropriate for streamlining. But, not every case in a category actually will be suitable for streamlining. The three regulatory criteria [correct result; any errors are immaterial; controlling precedent or insubstantial factual and legal questions] always must be faithfully applied. When in doubt, the best practice is to refer the case for three-Member review.

Second, the categories set forth below are intended to be flexible. They can, and will, be expanded, contracted, or redefined on the basis of our experience during the Pilot Program. Streamlining is a dynamic process where the Board Members exercise substantial control over what cases are appropriate for our full, three-Member decision docket. By resolving legal issues and issuing clear,

53 Id.
timely, easily understandable precedents covering certain types of recurring legal issues we can promote due process and the type of high-quality judicial decision-making below that is consistent with a streamlined appellate process.

On the other hand, statutory changes, regulatory changes, or new Federal Court decisions could create substantial legal issues in areas once thought to be “settled law.” Thus, it is likely that some categories of cases once thought to be appropriate for streamlining may, as a result of such changes, once again require the deliberative process available through three-Member review.56

Chairman Schmidt designated “certain categories” of cases as appropriate for summary affirmance without opinion by a single BIA Member.57 After Mr. Schmidt stepped down as Chairman, effective April 9, 2001,58 his successor, Acting Chairman Lori Scialabba also designated “certain categories,” beginning on the first day of her service as chair and continuing through 2001.59

The “Streamlining Rules” had immediate effect. During FY1999 and FY2000, the BIA completed roughly 8,000 fewer cases than it received each year, and the backlog grew. During FY2001, the BIA completed roughly 3,000 more cases than it received, and, during FY2002, the BIA completed roughly 13,000 more cases than it received, and the backlog in each year declined.60

**Independent Auditor Assessment of “Streamlining Rules” (December 2001)**

EOIR and the BIA retained Andersen LLP (“Andersen”) to evaluate the effectiveness of streamlining. Andersen investigated both objective and subjective factors, submitted a “Streamlining Pilot Project Assessment Report,” and conducted an “Exit Briefing” to present its findings on December 13, 2001.

In its Report and Exit Briefing, Andersen reported that streamlining had contributed to a 53% increase in the overall number of BIA cases completed during its implementation period (September 2000 through August 2001) and that streamlining had helped reduce the average number of days it takes for a BIA case to be processed from “Intake” to “Completed at BIA.”61

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56 Schmidt Memorandum, supra note 12, at 2-3.
57 Id. at 3-8. See also Memorandum of Paul W. Schmidt, Chairman of the BIA, to all BIA Members (Nov. 1, 2000) (produced by EOIR to Dorsey & Whitney pursuant to Freedom of Information Act request) (attached as Appendix 17).
58 Press Release, U.S. Dep’t of Justice, Schmidt Steps Down as Board Chairman (Mar. 20, 2001) (attached as Appendix 18).
60 See U.S. Dep’t of Justice, EOIR, Statistical Yearbook 2002 Fig. 22 (2003) (attached as Appendix 20).
From the data that was available, Andersen stated its belief that streamlining had not adversely affected aliens.\textsuperscript{62}

Andersen’s conclusion was that “the overwhelming weight of both the ‘objective’ and ‘subjective’ evidence gathered during the conduct of this study indicates that the Streamlining Pilot Project has been an unqualified success.”\textsuperscript{63} Andersen recommended that “the program should remain viable and can be sustained based solely upon the stream of incoming cases.”\textsuperscript{64}

\textbf{Implementation of the “Streamlining Rules” (2002)}

Despite Andersen’s favorable report, the Department of Justice, on February 19, 2002, published proposed rules that would eventually become the “Procedural Reforms” — far more extreme measures.

Less than a month later, on March 15, 2002, Acting Chairman Lori Scialabba designated new, broad, important “categories” as appropriate for affirmance without opinion by a single BIA member, including asylum cases.\textsuperscript{65}

Then, on May 3, 2002, Acting Chairman Scialabba, after citing the general prerequisites for streamlining (correct decision; errors immaterial; controlling precedent or insubstantial factual/legal questions), stopped defining “certain categories of cases”; instead, she designated “all cases”:

I hereby designate the following categories of cases to be appropriate for affirmance without opinion by a single Board Member exercising the authority of the Board of Immigration Appeals in accordance with 8 C.F.R. §3.1(a)(7)(ii)

A. All cases involving appeals of Immigration Judge decisions over which the Board of Immigration Appeals has jurisdiction and which meet the criteria set forth above.

B. All cases involving appeals of Immigration and Naturalization Service decisions over which the Board of Immigration Appeals has jurisdiction and which meet the criteria set forth above.\textsuperscript{66}

In essence, by designating “all cases,” Ms. Scialabba was implementing much of the proposed “Procedural Reforms” four months before they were officially effective.

\textsuperscript{62} \textit{Id.} at 10.
\textsuperscript{63} \textit{Id.} at 13.
\textsuperscript{64} \textit{Id.} at 2.
\textsuperscript{65} Memorandum of Lori L. Scialabba, Acting Chairman, to all BIA Members, (Mar. 15, 2002) (produced by EOIR to Dorsey & Whitney pursuant to Freedom of Information Act request) (attached as Appendix 22).
\textsuperscript{66} Memorandum of Lori L. Scialabba, Acting Chairman, to all BIA Members, (May 3, 2002) (produced by EOIR to Dorsey & Whitney pursuant to Freedom of Information Act request) (attached as Appendix 23).
Summary of “Procedural Reforms” 67 

According to the Department of Justice, the “Procedural Reforms” were intended to “revise the structure and procedures of the Board of Immigration Appeals, provide for an enhanced case management procedure, and expand the number of cases referred to a single Board member for disposition.” 68 The preamble to the proposed rules states that the “Procedural Reforms” are intended to: (1) eliminate the backlog of approximately 55,000 cases pending before the BIA, (2) eliminate unwarranted delays in the adjudication of administrative appeals, (3) utilize BIA resources more efficiently, and (4) allow more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions. 69 

In promulgating the final version of the “Procedural Reforms,” the EOIR stated that the purpose of the BIA as an entity is to “identify clear errors of fact or errors of law in decisions under review, to provide guidance and direction to the immigration judges, and to issue precedential interpretations as an appellate body, not to serve as a second-tier trier of fact.” 70 With this redefined role in mind, the “Procedural Reforms” make a number of changes to the BIA appeal process:

- The use of single-member review of Immigration Judge decisions is expanded, making such review the rule rather than the exception for all cases except those falling within one of five enumerated categories;

- De novo review of factual issues by the BIA is eliminated; an Immigration Judge’s factual findings are now subject to a clearly erroneous standard of review;

- The use of summary dispositions is expanded to include mandatory dismissal of appeals filed for improper purposes or without arguable basis in fact, and the ability to affirm without opinion is increased;

- The size of the BIA is reduced from 23 members to 11; and,

- Various case management practices to be followed by the BIA are set forth, including rules for simultaneous filing of briefs and time limits for disposition of appeals.

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67 See Final Rule, supra note 40.
69 Id. at 7310. In an advance summary of the proposed rule, a fifth objective – enhancing the quality of BIA decisions – was identified. See Letter from American Immigration Lawyers Association, to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ (Mar. 20, 2002) (commenting on the proposed Procedural Reforms) [hereinafter AILA Comments]. This fifth objective was dropped for unknown reasons from the published version of the proposed rule.
70 Final Rule, supra note 40, at 54880.
Single-Member Review

The “Procedural Reforms” mandate that single-member review shall be the “dominant method of adjudication for the large majority of cases before the Board.” The traditional three-member panel is characterized by the EOIR as “cumbersome and time-consuming” and as “expend[ing] an excessive amount of resources.” Expansion of single-member review is explained as the means by which the Board will “be able to concentrate greater resources on the more complex cases that are appropriate for review by a three-member panel, and … to focus greater attention on the issuance of precedent decisions that provide guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.”

Consequently, review by a single board member is now the norm, not the exception: all appeals are assigned to a single BIA member unless the case meets the standards for assignment to a three-member panel. Under the “Procedural Reforms,” the Chairman designates a screening panel (consisting of a “sufficient number” of BIA members, staff attorneys, or paralegals who are authorized to adjudicate appeals as provided for in the regulations). All cases are subject to initial screening by the screening panel, which determines whether the appeal should be given single-member review or referred to a three-member panel. If single-member review is assigned, that single BIA member then determines the appeal on the merits, unless upon further review that member determines that the case really is appropriate for referral to a three-member panel for decision.

The screening panel may assign cases for review by a three-member panel only if the case presents one of the following circumstances:

(i) The need to settle inconsistencies between the rulings of different immigration judges;

(ii) The need to establish precedent construing the meaning of ambiguous laws, regulations, and procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

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71 See id. at 54879 (noting that the “streamlining process undertaken by the Board has provided the best opportunity to manage the Board’s backlog. Over 58% of all new cases in 2001 were sent to be summarily decided by single Board member review through streamlining.”).
72 Id. at 54879.
73 Id.
74 8 C.F.R. § 3.1(e) (2003).
75 Id.
77 8 C.F.R. § 3.1(e)(3) (2003); see also infra IV.A.2-5, IV.A.6. If the single member does determine that the case really should be referred to a three-member panel, it must be for one of the same six reasons the initial screening panel must use.
(v) The need to review a clearly erroneous factual determination by an immigration judge; or
(vi) The need to reverse the decision of an immigration judge or the Service, other than reversal under § 3.1(e)(5).

En banc proceedings are possible, but are not favored under the “Procedural Reforms.” The primary purpose of an en banc proceeding is identified by the EOIR as interpretation of the Immigration and Nationality Act through precedent decisions. Thus, an en banc proceeding is to “occur only when necessary to address an issue of particular importance or to secure or maintain consistency of the BIA’s decisions.” The BIA may on its own motion, by a majority vote of the permanent members, or by direction of the Chairman, consider any case en banc, or reconsider any case already reviewed by a three-member panel.

Elimination of De Novo Review of Factual Issues

The “Procedural Reforms” eliminate the BIA’s de novo review of factual issues, requiring Members to accept the factual findings of the Immigration Judge, including findings as to the credibility of testimony, unless they are “clearly erroneous.” The introduction and consideration of new evidence in proceedings before the BIA is prohibited. The only recourse for a party asserting that the BIA cannot properly resolve an appeal without further fact-finding is a motion for remand to the Immigration Judge, or where appropriate to the Service, for additional fact-finding.

The rationale given for this change in the BIA’s authority is EOIR’s assertion that the vast majority of Immigration Judge decisions are “legally and factually correct.” Thus, the “Procedural Reforms” recognize “the primacy of immigration judges as factfinders and determiners of the cases before them.” Under the “Procedural Reforms,” no other independent de novo factual reviews are permitted.

This change does not, however, preclude the BIA from “reviewing mixed questions of law and fact, including, without limitation, whether an alien has established a well-founded fear of persecution or has demonstrated extreme hardship, based on the findings of fact made by the

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78 8 C.F.R. § 3.1(e)(6) (2003); see also 8 C.F.R. § 3.1(e)(5) (2003) (providing for reversal by a single-member when “consistent with and required by intervening Board or judicial precedent, or by an intervening final regulation”).
79 Final Rule, supra note 40, at 54880. To convene the full BIA en banc, a majority of the permanent BIA members constitute a quorum of the BIA. See 8 C.F.R. § 3.1(a)(5) (2003) (codifying “Procedural Reforms”).
80 Final Rule, supra note 40, at 54880.
82 Id.
84 8 C.F.R. § 3.1(d)(3)(iv) (2003) (although the board can take “administrative notice of commonly known facts such as current events or the contents of official documents”).
86 Final Rule, supra note 40, at 54880 (quoting former Board member Michael Heilman’s House testimony that the “overwhelming percentage of immigration judge decisions . . . [are] legally and factually correct”).
87 Id.
Questions of law, of discretion, and of judgment remain subject to de novo review. Moreover, “all other issues on appeal from decisions of immigration judges” may be reviewed de novo, although it is currently unclear how broadly this category of “all other issues” will be interpreted and applied in practice. Additionally, all questions arising on appeal from decisions issued by Service officers may be reviewed de novo.

Summary Dismissals

The “Procedural Reforms” expand upon the summary dismissal procedure as it existed under the “Streamlining Rules.”

Whether heard by a panel or a single BIA member, the “Procedural Reforms” added another category of appeals subject to mandatory summary dismissal – where it is determined that the appeal was filed for an “improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law.”

Affirmance Without Opinion

When a case is determined to be appropriate for single-member review, under the “Procedural Reforms” the reviewing BIA member “shall affirm” a decision by the Service or Immigration Judge without an opinion under the following circumstances:

(i) if the Board member determines that the result reached in the decision under review was correct;

(ii) any errors in the decision under review were harmless or nonmaterial; and

(iii) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

In the event the BIA member determines that affirmance without opinion is appropriate, the BIA issues a summary order that must read as follows: “The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.” An affirmance without opinion merely approves the result reached in the

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While such an order “does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board’s conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.” If the BIA member to whom an appeal is assigned determines that affirmance without opinion is not appropriate, the BIA member “shall issue a brief order affirming, reversing, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel.”

Reduction of Size of Board of Immigration Appeals

As noted above, prior to the “Procedural Reforms” the BIA had attempted to address the “mounting backlog of cases” by increasing the number of permanent Board Members on several occasions – from five permanent positions to twelve in 1995, with further incremental increases to a total of twenty-three permanent positions in 2002. Significant staff increases accompanied the expansion of the BIA.

In promulgating the “Procedural Reforms,” the EOIR noted that the addition of new BIA members had not “appreciably reduced the backlog of cases.” The “Procedural Reforms” reduced the number of BIA positions to eleven.

Case Management Procedures

The “Procedural Reforms” require the Chairman to establish a case management system for the expeditious resolution of all appeals. The most significant modification of case management procedures is the imposition of a series of time limits geared toward expediting the adjudication process.

The “Procedural Reforms” shorten the briefing calendar from thirty days to twenty-one days. Appeals involving aliens who are not detained follow a sequential briefing schedule, as before, but appeals involving detained aliens are now to be briefed concurrently, and reply briefs are only permitted by leave of the BIA. The BIA may, upon written motion and for good
cause, extend the period for filing a brief or reply brief for up to 90 days, and the BIA has the discretion to consider a brief that has been filed out of time.

The BIA is required to dispose of all appeals assigned to a single BIA member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel. In exigent circumstances, the Chairman may grant an extension of up to 60 days. If a 60-day extension is granted and the panel is unable to issue a decision with the additional 60 days, the appeal shall either be assigned to the Chairman or the Vice-Chairman for a final decision within 14 days or shall be referred to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the 60-day extension period, the majority decision is rendered without that dissent or concurrence attached. If a BIA member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system, the Chairman shall notify the Director of EOIR and the Attorney General.

A “grandfather clause” of sorts was built into these time limits for cases ready for adjudication as of September 25, 2002. If such a case is not completed within the established time lines, the Chairman may grant an extension of up to 120 days. The other exception to the time limits involves cases where an impending decision by the Supreme Court of the United States or by a U.S. Court of Appeals “may substantially determine the outcome of a case or group of cases pending before the Board.” In such cases, the Chairman has the discretion to hold the case until such decision is rendered.

The “Procedural Reforms” also limit oral argument to those appeals determined by a three-member panel or by the BIA sitting en banc. It is at the discretion of the three-member panel or the en banc BIA to hear oral argument. Consequently, the three-member panel or BIA sitting en banc may decline to consider oral argument. No criteria are articulated for when oral argument is appropriate. No oral argument is allowed in appeals assigned for disposition by a single BIA member.

Public Reaction to the “Procedural Reforms”
Public reaction to the “Procedural Reforms” has been expressed in a variety of forms — most notably, comments submitted prior to the promulgation of the final rule and a lawsuit filed by the Capital Area Immigrants’ Rights Coalition (“CAIR”) and AILA.

Comments

The comment period for submissions regarding the Procedural Reforms, as proposed on February 19, 2002, was 30 days. During this time, the EOIR received 68 comments. Most comments were strongly opposed to “many or most of the specific provisions of the proposed rule.” Based upon these comments, the EOIR did make some modifications to the final rule, but proceeded with the promulgation of the “Procedural Reforms” largely as proposed.

Due Process

Numerous comments (both those in support of and those against) expressed concerns about the due process implications of the “Procedural Reforms.” Some comments expressed the concern that the “Procedural Reforms” emphasize production by members of the BIA to the detriment of quality and due process. Several comments noted the lack of an internal review standard to assure quality, accuracy and consistency, as well as the incentive for members to “rubber stamp” decisions by Immigration Judges in order to handle their enormous caseloads within the time constraints imposed by the reforms.

Several of the comments submitted argued that the “Procedural Reforms” endangered a respondent’s right to due process under the Supreme Court’s balancing test in Mathews v. Eldridge. As the EOIR noted, many comments focused on one prong of this balancing test — the “nature of the interest of the individual, particularly in asylum and related cases where the respondents assert that the respondent will be persecuted, his or her life or freedom will be threatened, or that he or she will be tortured, if returned to his or her country of origin.” As Senators Edward Kennedy and Patrick Leahy wrote:

The interests at stake are significant, especially for asylum seekers, who may face persecution or even death, and long-time residents,

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118 Proposed Rule, supra note 68, at 7310 (identifying March 21, 2002 as the deadline for submission of written comments).
119 Final Rule, supra note 40, at 54879 (noting that the EOIR received sixty-eight timely submissions and five untimely submissions).
120 Id. at 54881.
121 See, e.g., Letter from United States Representative George W. Gekas (Chairman, Subcommittee on Immigration and Claims), to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 3 (Mar. 21, 2002) [hereinafter Gekas Comments]; Letter from ACLU, to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ (Mar. 21, 2002) (opposing the proposed rules and urging that they be rescinded) [hereinafter ACLU Comments]; see also Final Rule, supra note 40, at 54881; Letter from United States Representatives John Conyers, Jr. (Ranking Member Committee on Judiciary) and Sheila Jackson Lee (Ranking Member Subcommittee on Immigration and Claims) to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 4 (Mar. 21, 2002) [hereinafter Conyers & Jackson Lee’s Comments].
122 See, e.g., AILA Comments, supra note 69, at 8-9 (noting a “fear that Board Members would be forced to rubber-stamp IJ decisions without thorough and thoughtful review and analysis” due to the increased caseload and urging an increase, rather than a cut, in the size of the Board).
123 424 U.S. 319, 341-47 (1976); see, e.g., Letter from the American Bar Association, to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 7 (Mar. 18, 2002) [hereinafter ABA Comments]; see also AILA Comments, supra note 69, at 4-5.
124 Final Rule, supra note 40, at 54881.
who may face permanent separation from family and the loss of all that makes life worth living.\textsuperscript{125}

The EOIR and groups in support of the “Procedural Reforms,” such as the Federation for American Immigration Reform (“FAIR”), objected to this focus on the interests of the individual. FAIR commented:

[The] image of BIA appellants as simple-minded, ignorant or bewildered victims is a false stereotype promoted by the immigration bar and communal organizations. In fact, appellants are typically a self-selected and resourceful group far more knowledgeable about our immigration system than most highly educated citizens, and have no scruples about gaming the system. They are fully aware that an appeal can be filed at no cost, and has the effect of automatically suspending an immigration judge’s deportation order for months or often years.\textsuperscript{126}

The EOIR also suggested that this focus on due process was misplaced, as most cases appealed to the BIA involve applications for relief from removal, not removal itself, and thus the “process that is due is not a process related to the government’s efforts to remove the respondent from the United States.”\textsuperscript{127} For the EOIR, that raises “questions whether \textit{Mathews} is the appropriate touchstone in light of the unique nature of the Act as the tool for managing the intersection of foreign and domestic interests regarding aliens.”\textsuperscript{128}

\section*{BIA Independence and Size}

Another major area of concern identified in the comments submitted involved the role and independence of the BIA after the enactment of the reforms. According to these comments, the “Procedural Reforms” were the “latest in a number of actions taken by the Department of Justice in recent months that share a common theme of undermining the independence and authority of the Executive Office of Immigration Review.”\textsuperscript{129}

Equally troubling, according to these comments, were the reduction in size of the BIA (a decision often referred to as “counterintuitive”) and the undefined process by which the Attorney General would determine who would be dismissed or reassigned in order to reduce the number of board members from 19 to 11.\textsuperscript{130} AILA noted that this reduction in the size of the BIA:

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\item[125] Letter from Senator Edward M. Kennedy (Member, Committee on the Judiciary) and Senator Patrick J. Leahy (Chairman of the Committee on the Judiciary), to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 1 (Mar. 21, 2002) [hereinafter \textit{Kennedy & Leahy’s Comments}].
\item[126] \textit{FAIR Comments}, supra note 37, at 4.
\item[127] \textit{Final Rule}, supra note 40, at 54881.
\item[128] Id. at 54881-82.
\item[129] \textit{ACLU Comments}, supra note 121, at 2; see also \textit{Final Rule}, supra note 40, at 54882 (noting that comments expressed concern that the reforms “would adversely affect the fairness or effectiveness of the Board’s adjudications by limiting the independence and perceived impartiality of the Board”).
\item[130] See, e.g., \textit{Conyers & Jackson Lee’s Comments}, supra note 121, at 3; \textit{AILA Comments}, supra note 69, at 9. At the time the “Procedural Reforms” were promulgated, the authorized size of the BIA was 23 members, but there were only 19 sitting members.
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is bound to be perceived by some as political extortion. It creates the perception that the Attorney General will, after reviewing the Board Members’ efforts during the transition period, eliminate those more independent-minded members. The perception will be that, by eliminating independent-minded BIA Members, the Attorney General seeks to create a BIA even more receptive to the legal positions of the INS than is presently the case. Such a perception will insure litigation, more appeals and generally detract from the public perception of impartiality necessary to maintain the integrity of the removal process.\footnote{AILA Comments, supra note 69, at 9-10.}

Comments opposed to the reduction in the number of members of the Board agreed that the enormous caseload would prevent thorough and careful review of cases.

Neither the reduction in size nor the process by which the BIA was reduced was a concern for those in support of the “Procedural Reforms.” Those comments submitted in support of the reforms generally applauded the reduction in size as increasing the potential efficiency and effectiveness of the BIA.\footnote{See, e.g., FAIR Comments, supra note 37, at 4 (reserving opinion on the exact number of BIA members needed to operate the appeals process efficiently).} One of those commenters noted that “reducing the number of Board members should increase the coherence of the Board’s decisions and facilitate the \textit{en banc} process, thereby improving the value of Board precedent.”\footnote{Gekas Comments, supra note 121, at 8.} The Department declined to modify the provisions of the rule reducing the size of the BIA to accommodate concerns about the reduction in number. It stated its belief that expansion of the Board had been to the detriment of cohesiveness, collegiality, and uniformity of its decisions.\footnote{Final Rule, supra note 40, at 54894.}

Affirmance Without Opinion

The increase of the instances in which a single BIA member may summarily affirm decisions of an Immigration Judge without a written opinion was also the focus of many comments. Contribution to inconsistent treatment of cases among BIA members, “cheapening” of the justice provided, failure to provide a rationale to respondents, and the possibility of increased remands by the federal courts were among the concerns raised.\footnote{See, e.g., ACLU Comments, supra note 121, at 4 (arguing that “[d]ecisions affirmed without critical debate will not only result in injustice in that particular case but will also frustrate the goal of more timely adjudication”). ABA Comments, supra note 123, at 3 (articulating a concern that affirmances without opinions “creates an incentive to rubber stamp” Immigration Judge decisions).} Some comments recommended that dispositions of certain categories of cases, such as asylum cases and Convention Against Torture cases, should always be accompanied by written decisions.\footnote{See, e.g., Final Rule, supra note 40, at 54888.} The EOIR relied on data derived from the original streamlining initiative to rebut concerns about an increase in remands by the federal courts, noting that no overwhelming increase in remands...
resulted from the summary affirmances by single members of the BIA under the “Streamlining Rules.”

The EOIR dismissed concerns about failure to provide a rationale to respondents on the basis that any summary affirmation by a single member necessarily meant that the member concluded any error was harmless or immaterial.

Time Limits

Comments also expressed concerns about proposed changes to require simultaneous briefing in all appeals and shorter periods for briefing and the rendering of decisions. The shorter time to decide cases was viewed as possibly leading to rushed and incorrect decisions. Based upon these submissions, the Department modified the final rule so that it continues to permit sequential briefing in cases involving respondents not in detention. It did not change the time frames in other respects.

The CAIR and AILA Lawsuit

CAIR and AILA challenged the new BIA regulations on the grounds that the issuance and the implementation of the new BIA regulations violated the Administrative Procedure Act, 5 U.S.C. §§ 552 et seq. (the “APA”). CAIR and AILA argued that the Department of Justice failed to engage in “reasoned decisionmaking,” as required by the APA, by ignoring comments and evidence adverse to the new rules and by failing to provide an adequate reasoning for the reforms. In December 2002, CAIR and AILA moved for a summary judgment on the merits. Concurrently, the Department of Justice moved to dismiss the action on the grounds that the court lacked jurisdiction because CAIR and AILA lack standing to bring the action and that the new regulations are “committed to agency discretion by law” and are thus not subject to the APA. The Department of Justice also moved for summary judgment, arguing that the new regulations were consistent with the APA. Oral argument was held on February 25, 2003. While these motions were pending, it was reported that the removal of five BIA members was to occur on March 25, 2003. CAIR and AILA sought to enjoin the removal of the BIA members on a variety of grounds. The motion for the preliminary injunction was denied.

On May 21, 2003, the United States District Court for the District of Columbia denied CAIR and AILA’s motion for summary judgment, granted the Department of Justice’s motion for summary judgment, and denied the Department’s motion to dismiss. The court held that

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137 See id. at 54885.
138 Id.
139 See, e.g., AILA Comments, supra note 69, at 21 (urging that the BIA retain its 30-day briefing schedule for all appeals).
140 See Final Rule, supra note 40, at 54896.
141 See id. at 54895.
143 See id. at *4 n.6 (referencing March 31, 2003, ruling denying CAIR and AILA’s request for an emergency injunction prohibiting the Attorney General from implementing a reduction in the BIA’s size).
144 See generally id. The opinion held that CAIR had associational standing to bring suit on behalf of its members and that this action of the Department of Justice was subject to judicial review.
the Department’s enactment of the Procedural Reforms was “not arbitrary or capricious, or otherwise in violation of the law.”

The plaintiffs had argued that three aspects of the final rule were arbitrary and capricious: (1) “the decision to adopt the streamlining provision as the dominant method of adjudication;” (2) “the provision reducing the size of the Board from 23 members to 11;” and (3) “the six-month transition period designed to reduce the Board’s backlog.” The court addressed each of these issues in turn.

First, the court held that the Department made a reasoned decision to adopt the expanded streamlining procedures articulated in the “Procedural Reforms” based upon three factors which, although “not altogether free from doubt,” tended to support the Department of Justice’s decision: (1) “Andersen’s favorable audit of the streamlining initiative,” (2) “Congressional testimony reflecting a continued need for Board reform,” and (3) “the Department’s own internal statistics and assessment.” The court concluded that the Department’s “decision to expand the streamlining procedure to most Board cases is supported ‘by substantial evidence.’”

Second, the court held that the Department of Justice’s decision to reduce the size of the BIA was influenced by “two important intervening events . . . that convinced the Department to adopt a revised policy of Board reduction: Arthur Andersen’s favorable audit of the 1999 streamlining project and the February 6, 2002, hearing on immigration reform before the House Subcommittee on Immigration.” It found that based upon these two events, the Department’s conclusion to reduce the size of the BIA was reasonable and appropriate as the Department had “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.”

Finally, the court examined the challenge to the six-month transition period. The court rejected the plaintiffs’ argument “because its statistical basis is flawed and does not recognize the positive impact streamlining has already had on the case backlog.”

At the time this Study was released, there had been no appellate review of the district court’s judgment or reasoning.

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145 See id. at *21.
146 Id. at *9.
147 Id. at *10.
148 Id. at *15.
149 Id. Reliance on the Andersen Report as support for the “Procedural Reforms” seems misplaced. The Andersen Report actually concluded that the “Streamlining Rules” had been an “unqualified success” and “should remain viable and can be sustained…” That report does not discuss or support a reduction in the number of BIA board members. See Andersen Report, supra note 74. The Andersen Report does not support the 2002 rule changes; rather, the Andersen Report seems to provide a reason not to promulgate them.
151 Id. at *20. The court also noted that because the extended transition period was close to completion, plaintiffs’ challenge to this aspect of the Procedural Reforms was not timely. Id. at *21, n.23.
“PROCEDURAL REFORMS”: LEGAL CONCERNS

The United States Supreme Court has “repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”\textsuperscript{152} It has also “long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”\textsuperscript{153} The power over aliens has been characterized as political in nature, and thus “subject only to a narrow judicial review.”\textsuperscript{154} For this reason, the Supreme Court has repeatedly held that, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”\textsuperscript{155}

Nonetheless, the Department of Justice may not promulgate rules that are “arbitrary and capricious” or that deprive aliens of due process.

Legality of the Rulemaking

The Administrative Procedure Act forbids agency actions that are arbitrary or capricious, or otherwise contrary to law.\textsuperscript{156} The agency must show a rational connection between the facts it finds and the choice it makes,\textsuperscript{157} and its reasoning must be internally consistent.\textsuperscript{158} “An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute.”\textsuperscript{159}

The BIA Procedural Reforms promulgate at least two changes of course: (1) decreasing, rather than increasing, the number of BIA judges, and (2) designating virtually all appeals, rather than specific types of appeals, for single judge review.

In 2001, the Department of Justice “sought to aid the Board in reducing its burgeoning caseload by increasing its size . . . to 23 Board Members.”\textsuperscript{160} The Department declared that adding new Members was “necessary to maintain an effective, efficient system of appellate adjudication” in light of the Board’s substantial caseload.\textsuperscript{161} The increasing caseload was regarded as attributable to expansion of the Immigration Judge system and “frequent and

\textsuperscript{153} Fiallo, 430 U.S. at 792 (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)); see also Reno v. Flores, 507 U.S. 292, 305 (1993) (holding “[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government”).
\textsuperscript{154} Fiallo, 430 U.S. at 792.
\textsuperscript{156} 5 U.S.C. § 702.
\textsuperscript{158} Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 370-71 (1998); see also Engine Mfrs. Ass’n v. EPA, 20 F.3d 1177, 1182 (D.C. Cir. 1994).
\textsuperscript{159} Airmark Corp. v. FAA, 758 F.2d 685, 691-92 (D.C. Cir. 1985) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).
\textsuperscript{160} Final Rule, supra note 40, at 54894.
significant changes in the complex immigration laws.” In 2002, however, the Department declared that the futility of Board expansion was “clear,” “evident,” and “apparent,” explaining that prior Board expansion “has not effectively reduced the existing case backlog.”

Much like its decision regarding BIA size, the Department’s decision to streamline almost all decisions is a reversal of its prior findings. The Department rejected this broad approach in 1999, concluding that “a move to single-Member adjudication of nearly all cases would make it more difficult to maintain the consistency of adjudication that the Board attempts to provide.”

As discussed above, the United States District Court for the District of Columbia has held that, despite these course changes, the “Procedural Reforms” were properly promulgated. As of the writing of this Report, no appellate review of that decision has occurred.

**Constitutionality and Legality of “Affirmances Without Opinion”**

The provision of the “Procedural Reforms” receiving the most attention from individual litigants raising legal challenges has been the expanded use of the “affirmance without opinion” procedure. As discussed above, this procedure requires a single BIA member to affirm, without opinion, the decision of the Service or the Immigration Judge where the BIA member determines: (1) the decision under review was correct; (2) that any errors in the decision were harmless or nonmaterial; and (3) either (a) the issues on appeal are squarely controlled by existing precedent and do not involve a novel fact situation or (b) the issues raised on appeal are not so substantial that the case warrants issuance of a written opinion in the case.

Because this procedure allows the BIA to affirm the Immigration Judge without further opinion even when it disagrees with the Immigration Judge’s reasoning, comments during the rulemaking process and litigants challenging the rules in court have alleged that the procedure does not properly provide a reviewing court with a decision for review. This is asserted to be: (1) a violation of due process; (2) a violation of fundamental administrative law; and (3) a failure to provide the courts with a means of determining whether the BIA is following its own regulations. These grounds will be addressed below in turn.

**Due Process**

The broad authority of Congress and, by its delegation, the Attorney General in the area of immigration is not unlimited. It is “well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” This is true of all aliens, “whether their presence here is lawful, unlawful, temporary, or permanent.” “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful

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162 Final Rule, supra note 40, at 54879.
163 Id. at 54894.
164 Streamlining Rules, supra note 50, at 56139.
165 See generally CAIR Opinion, supra note 143.
166 8 C.F.R. § 3.1(e)(4) (2003).
manner.’”169 What constitutes such process will be different in different circumstances, and due process only “calls for such procedural protections as the particular situation demands.”170

The Mathews Court held that “[r]esolution of the issue whether the administrative procedures provided are constitutionally sufficient requires analysis of the governmental and private interests that are affected.”171 Specifically, the Court identified three factors to be considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.172

The Supreme Court applied the Mathews analysis to the immigration context in Landon v. Placencia.173 There, although the Court remanded the case for further consideration of the factors, it found that the alien’s interest was a “weighty one.”174 An alien in a removal proceeding “stands to lose the right ‘to stay and live and work in this land of freedom.’” 175 The Court also found, however, that “the government’s interest in efficient administration of the immigration laws at the border also is weighty.”176 It further noted that the broad control over matters of immigration exercised by the executive and the legislature “must weigh heavily in the balance.”177 Accordingly, the Court cautioned that “the role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.”178

Several courts of appeals have determined that the due process required in adjudicative immigration contexts includes: (1) an entitlement to fact-finding based on a record produced before the decision-maker and disclosed to the litigant; (2) the ability to make arguments on her

170 Mathews, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
171 Id.
172 Id. at 335.
174 Id. at 34.
175 Id. (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)); see also, e.g., Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (noting “an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country”); Padilla-Agustin v. INS, 21 F.3d 970, 974 (9th Cir. 1994) (holding “the private liberty interests involved in deportation proceedings are among the most substantial”).
176 Landon, 459 U.S. at 34.
177 Id.
178 Id. at 34-35.
own behalf; and (3) the right to an individualized determination of her interests.\textsuperscript{179} In addition, due process has been held in this context to guarantee the right to an impartial decision-maker.\textsuperscript{180}

Litigants who seek to establish that the affirmance without opinion procedure is a violation of due process point to a series of Supreme Court cases finding that an agency’s statement of reasons is one of several minimal due process requirements that must be observed in administrative proceedings in which a liberty interest is at stake.\textsuperscript{181} At least two circuits, the Tenth and the Seventh, have held that BIA decisions which do not provide a meaningful opportunity for judicial review “can be considered so deficient as to deny the petitioner due process.”\textsuperscript{182}

Some courts have held that an alien has no due process right to any administrative appeal at all.\textsuperscript{183} As one federal circuit court said, “[t]he Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review.”\textsuperscript{184} It is “immigration proceedings as a whole,” rather than one part of them, that are governed by due process.\textsuperscript{185} An alien is entitled to due process in “deportation proceedings.”\textsuperscript{186}

Due process challenges to the affirmance without opinion procedure have been denied in the five circuits that have addressed the issue\textsuperscript{187} In \textit{Albathani v. INS}, for example, although it noted that “[i]mmigration decisions, especially in the asylum cases, may have life or death consequences, and so the costs of error are very high,”\textsuperscript{188} the First Circuit also noted that an alien does not have any constitutional right to an administrative appeal at all.\textsuperscript{189} It concluded that the regulations “do not render the scheme a violation of due process or render judicial review impossible,”\textsuperscript{190} apparently because it understood due process requirements to apply to the entire administrative process as a whole, rather than to the appeal process in an isolated fashion. As

\begin{itemize}
\item \textsuperscript{179} See Torres-Aguilar \textit{v. INS}, 246 F.3d 1267, 1270 (9th Cir. 2001); Abdulai \textit{v. Ashcroft}, 239 F.3d 542, 549 (3d Cir. 2001); Llana-Castellon \textit{v. INS}, 16 F.3d 1093, 1096 (10th Cir. 1994); Rhoa-Zamora \textit{v. INS}, 971 F.2d 26, 34 (7th Cir. 1992).
\item \textsuperscript{180} Torres-Aguilar, 246 F.3d at 1270.
\item \textsuperscript{182} Llana-Castellon \textit{v. INS}, 16 F.3d 1093, 1098 (10th Cir. 1994); Rhoa-Zamora \textit{v. INS}, 971 F.2d 26, 36 (7th Cir. 1992); see also Paramasamy \textit{v. Ashcroft}, 295 F.3d 1047, 1050-51 (9th Cir. 2002) (tying the due process requirement of an “individualized determination” to a requirement that the BIA “provide a comprehensive reason for its decision sufficient for us to conduct our review and to be assured that the petitioner’s case received individualized attention”).
\item \textsuperscript{183} \textit{Albathani} \textit{v. INS}, 318 F.3d 365, 376 (1st Cir. 2003); \textit{Mendoza v. Attorney General}, No. 02-13235, 2003 WL 1878422, at *4 (11th Cir. Apr. 16, 2003); \textit{Guentchev v. INS}, 77 F.3d 1036, 1037-38 (7th Cir. 1996). See also \textit{Abney v. United States}, 431 U.S. 651, 656 (1977) (holding there is no constitutional right to appeal in criminal cases).
\item \textsuperscript{184} Guentchev, 77 F.3d at 1037-38.
\item \textsuperscript{185} Ramirez-Alejandre \textit{v. Ashcroft}, 319 F.3d 365, 380 (9th Cir. 2003).
\item \textsuperscript{187} See Carriche \textit{v. Ashcroft}, ___ F.3d __, 2003 WL 21639040, at *1, *4 (9th Cir. July 14, 2003); \textit{Mendoza v. Att’y Gen.}, No. 02-13235, 2003 WL 1878422, at *4 (11th Cir. Apr. 16, 2003); \textit{Abera v. INS}, No. 02-2206, 2003 WL 1861566, at *1 (4th Cir. Apr. 11, 2003); \textit{Soadjede v. Ashcroft}, No. 02-60314, 2003 WL 1093979, at *2-*3 (5th Cir. Mar. 28, 2003); \textit{Albathani}, 318 F.3d at 377. The Third Circuit will consider this issue en banc in \textit{Dias v. Ashcroft}, No. 02-2460, after having refused to consider it in \textit{Tang v. Ashcroft}, 2003 WL 1860549 (3d Cir. Apr. 4, 2003) (holding that the summarily affirmed Immigration Judge’s decision was wrong and thus not reaching the constitutionality issue).
\item \textsuperscript{188} \textit{Albanathi}, 318 F.3d at 378-79.
\item \textsuperscript{189} Id. at 376.
\item \textsuperscript{190} Id. at 377.
\end{itemize}
discussed more fully in the following section, the court found that the requirement of a reasoned statement applies to the agency in its entirety rather than to individual components of the agency, such as the Board. \(^{191}\) Relying on the fact that, under the reform regulations, when there is an affirmance without opinion, the Immigration Judge’s underlying decision provides the statement of reasons and is the final agency determination, the court found that the affirmance without opinion scheme does not violate due process or administrative law. \(^{192}\)

Most recently, the Ninth Circuit followed the First Circuit’s *Albathani* opinion, saying: “Its careful reasoning is persuasive and, like the other courts of appeal that followed, we embrace its rationale.” \(^{193}\) The Ninth Circuit acknowledged that non-citizens “have understandable concerns about the streamlining process, particularly in light of the congressional limitations on federal court review.” \(^{194}\) And, the Ninth Circuit indicated that it is “not unsympathetic to these concerns,” but those concerns were not deemed sufficient to conclude that streamlining violated the non-citizens’ statutory or constitutional rights. \(^{195}\)

**Administrative Law**

It is a “fundamental rule of administrative law” that an administrative agency must provide a reasoned explanation for its actions. \(^{196}\)

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency’s actions; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. \(^{197}\)

The reviewing court must “know what a decision means” before it can decide “whether it is right or wrong.” \(^{198}\) This is necessitated by the rule that a reviewing court may not substitute alternative grounds to uphold agency action. Rather, it “must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” \(^{199}\)

As noted above, the *Albathani* court found that this requirement refers to “agencies in their entirety,” not individual components of agencies, thus finding that “*Chenery* does not

\(^{191}\) Id.

\(^{192}\) Id.

\(^{193}\) Carriche, 2003 WL 21639040, at *2.

\(^{194}\) Id.

\(^{195}\) Id. at *3.


\(^{197}\) Id.

\(^{198}\) Id. (quotation omitted).

\(^{199}\) Id. at 196; see also *Fed. Power Comm’n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (holding “an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself”).
require that this statement come from the BIA rather than the IJ." At least nine of the federal circuits have held that the BIA can adopt the decision of the Immigration Judge without further opinion. If the BIA comes to the conclusion that the Immigration Judge “got it right,” it need not “go through the idle motions of dressing the IJ’s findings in its own prose.” As the D.C. Circuit held, summary affirmance for the reasons given by the Immigration Judge is “not only common practice, but universally accepted by every other circuit to have addressed the issue.”

The situation presented by the new affirmance without opinion procedures, however, is distinguishable from that presented in each of these other cases. Where, in the past, summary affirmance has been approved, the BIA has explicitly adopted the reasoning of the Immigration Judge, typically using the following language: “based upon and for the reasons set forth in the IJ’s decision.” Under the affirmance without opinion regulations, on the other hand, the BIA member is required to state, “The Board affirms, without opinion, the result of the decision below.” The BIA member must affirm without opinion where all the necessary factors are satisfied, even where she disagrees with the reasoning of the Immigration Judge. As the First Circuit found in Albathani, “this means that courts of appeals are forced to review a decision which may or may not contain the reasoning of the BIA.” As stated above, the First Circuit concluded that this did not prevent a meaningful review because the courts continue to have the record and the Immigration Judge’s decision, which the regulations declare to be the “final agency determination,” upon which to base their review.

It is not at all clear, however, that this is the correct result. Litigants challenging the regulations contend that the Immigration Judge’s decision, regardless of what the regulation states, is not in fact the final decision of the agency; they argue that the agency has not finally ruled until the BIA has spoken. At least two circuits have held in the past that the “final order” of the agency for purposes of review is that of the BIA. As the Third Circuit explained:

Congress has granted [the federal courts] power to review only “final order[s] of removal.” Because an alien facing removal may appeal to the BIA as of right, and because the BIA has the power to conduct a de novo review of IJ decisions, there is no “final

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200 Albathani v. INS, 318 F.3d 365, 377 (1st Cir. 2003).
201 See, e.g., Giday v. INS, 113 F.3d 230, 234 (D.C. Cir. 1997); Chen v. INS, 87 F.3d 5, 7-8 (1st Cir. 1996); Prado-Gonzalez v. INS, 75 F.3d 631, 632 (11th Cir. 1996); Urokov v. INS, 55 F.3d 222, 227-28 (7th Cir. 1995); Alaelua v. INS, 45 F.3d 1379, 1382 (9th Cir. 1995); Maashio v. INS, 45 F.3d 1235, 1238 (8th Cir. 1995); Panrit v. INS, 19 F.3d 544, 545-46 (10th Cir. 1994); Arango-Adadono v. INS, 13 F.3d 610, 613 (2nd Cir. 1994). These circuit decisions, of course, are upholding BIA decisions reached by three-member BIA panels, not single-member affirmances.
202 Chen, 87 F.3d at 7.
203 Giday, 113 F.3d at 234.
204 Giday, 113 F.3d at 234; Chen, 87 F.3d at 7-8; Prado-Gonzalez, 75 F.3d at 632; Urokov, 55 F.3d at 227-28; Alaelua, 45 F.3d at 1382; Maashio, 45 F.3d at 1238; Panrit, 19 F.3d at 545-46; Arango-Adadono, 13 F.3d at 613.
207 Id. at 377.
209 Id. at 377-78.
order” until the BIA acts. Accordingly, we now expressly hold that the “final order” we review is that of the BIA.210

The Ninth Circuit has previously made a key distinction between affirmances of Immigration Judge’s decisions based upon the reasons therein and affirmances of Immigration Judge’s decisions without clearly adopting the Immigration Judge’s reasoning.211 In the latter circumstance, the Ninth Circuit has held the BIA has not fulfilled its obligation to “provide reasons for its decision to deny relief.”212

A problem with these decisions, however, is their apparent reliance on the fact that they were decided when the BIA exercised de novo review. Indeed, the rationale in the Castillo holding is that “the BIA has the power to conduct a de novo review of the record, to make its own findings, and to determine independently the sufficiency of the evidence, and for us to review the IJ’s decision under our deferential substantial evidence test would deprive the petitioner of the BIA’s de novo review of his case.”213

Despite its conclusion in Albathani that the affirmation without opinion procedures do not run afoul of the law, the First Circuit did find a serious policy flaw in the affirmation without opinion regulations. Because of the requirement that a court may consider only the grounds relied on by the agency in reviewing its actions, it cannot approve what it considers the proper result before the Immigration Judge if the Immigration Judge’s rationale is improper. “In short, if the BIA identifies an alternative satisfactory ground for upholding denial of asylum in a case with an otherwise unsatisfactory decision by the IJ, it must state it or risk remand.”214 The “Procedural Reforms,” however, do not allow the BIA member to state an alternative satisfactory ground. Rather, where the result is correct and the error in the decision was harmless or nonmaterial, the BIA member “shall” affirm the decision without opinion.215 Thus, the regulation requires the BIA member to make affirmances which she knows, if appealed, will be remanded. As the court found in Albathani, once such remand inevitably occurs, “the agency will not, in the end, have saved any time or effort.”216

Violation of the Regulations

Litigants challenging the “Procedural Reforms” have also argued that the affirmation without opinion procedure does not provide a way for courts to police the BIA to see that it is actually following its own regulations. In other words, despite the fact that the “Procedural Reforms” set forth a number of requirements that must be met before summary affirmation may be granted,217 the BIA member is prohibited from setting forth his reasons for determining why those criteria have been met in a particular case. Thus, the argument goes, there is no way for
the reviewing court to analyze whether such a determination is appropriate under the regulations in any given case. The Attorney General responds that the BIA member need give no reasons for the decision to decide a case summarily because that decision to decide summarily is completely within the agency’s discretion.

The APA establishes a “presumption of judicial review” for those adversely affected by agency actions. As discussed above, however, the APA does not allow judicial review where the action is “committed to agency discretion by law.” While the Supreme Court has cautioned that this is a “very narrow exception” to the presumption of reviewability, it has traditionally considered certain categories of administrative decisions to be committed to agency discretion, including: the decision whether to institute proceedings; the decision whether to grant reconsideration of an action because of material error; and the decision to terminate an employee in the interest of national security. The Attorney General argues that the decision to decide an administrative appeal summarily falls within this line of cases and is indistinguishable from an agency decision whether to grant reconsideration.

In *ICC v. Locomotive Engineers*, the Supreme Court concluded that refusal of a request for reconsideration because of material error was the type of agency decision traditionally committed to agency discretion. In so holding, the Court relied on “the impossibility of devising an adequate standard of review for such agency action.” The Court also reasoned:

[W]here no new data but only “material error” has been put forward as the basis for reopening, an appeal places before the court precisely the same substance that could have been brought there by appeal from the original order – but asks them to review it on the strange, one-step-removed basis of whether the agency decision is not only unlawful, but so unlawful that the refusal to reconsider it is an abuse of discretion.

This type of review, the Court held, would “serve no purpose.”

The BIA decision whether to decide summarily appears materially distinct from the ICC’s decision whether to reconsider, in several important respects. Unlike the situation in *ICC*, the courts of appeals have frequently overturned BIA determinations of harmless error. In addition, in order to decide a case summarily, a Board member must determine not only that any errors by the Immigration Judge were harmless, but also either that: (a) the issue on appeal is

222 *Id.* at 282.
223 *Id.*
224 *Id.* at 279 (emphasis in original).
225 *Id.*
226 See, e.g., *Colemenar v. INS*, 210 F.3d 967, 973 (9th Cir. 2000); *Podio v. INS*, 153 F.3d 506, 511 (7th Cir. 1998); *Bui v. INS*, 76 F.3d 268, 270 (9th Cir. 1996); *Sewak v. INS*, 900 F.2d 667, 670 n.7 (3d Cir. 1990).
squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (b) the factual and legal questions raised are not so substantial that the case warrants a written decision. These seem to create reviewable issues for a court of appeals. Indeed, the only circuit to address the reviewability of a summary decision has determined that it may review the Board’s execution of its own regulations under these circumstances. Accordingly, it is possible that Board determinations of whether to decide an appeal summarily will be regarded as reviewable. Combined with the requirement that the court of appeals rely solely on the rationale of the agency in approving its actions, this would seem to require remand in every case for the BIA to explain its actions, once again making the regulations seem “unreasoned” in this respect and thus calling into question the rulemaking process.

In Alibarni, however, despite being squarely presented with this issue, the court sidestepped the question. The First Circuit held that its review of the Immigration Judge’s determination established that any error in the decision to proceed summarily in that case would have been harmless as “[t]here was a basis for affirmance and for summary affirmance.” The court held that only if there were evidence of systemic violation by the BIA of its regulations would the court be forced to address the issue of whether the decision to proceed summarily is committed to agency discretion. This suggests that, as a practical matter, courts may review the underlying Immigration Judge’s decision to determine if both affirmance and summary affirmance are appropriate and will only address the affirmance without opinion rule itself if widespread violations can be shown. Review of the BIA member’s summary affirmance in this fashion, however, appears to sidestep the requirement that an appellate court consider only the rationale actually relied on by the agency in reaching its decision.

“PROCEDURAL REFORMS”: PRACTICAL EFFECTS

The “Procedural Reforms” may well reduce the BIA backlog. Unfortunately, because the BIA backlog reduction is achieved by depriving aliens of meaningful agency review, aliens are seeking meaningful review in the federal circuit courts, causing a backlog to develop in the courts.

Reducing the BIA Backlog

The number of BIA decisions per month increased steeply between June 2000 and October 2002.

227 Mendoza v. Att’y Gen., No. 02-13235, 2003 WL 1878422, at *4-*5 n.7 (11th Cir. Apr. 16, 2003) (citing Gonzalez-Oropeza v. Att’y Gen., 321 F.3d 1331, 1332 (11th Cir. 2003)).
229 Alibarni v. INS, 318 F.3d 365, 378 (1st Cir. 2003).
230 Id.
232 See Appendix 24.
The number of appeals granted or remanded (usually, favoring the alien) remained steady: under 1,000 per month.\textsuperscript{233} The steep increase in BIA decisions was essentially all accounted for by a steep increase in the number of appeals denied (usually, favoring the government). Appeals denied rose from less than 2,000 per month to around 4,000 per month.\textsuperscript{234}

Before the spring of 2002, approximately one in four appeals was granted; since then, approximately one in ten appeals is granted.\textsuperscript{235}

During 2002, BIA affirmances not only increased quantitatively; they also changed qualitatively. Through the end of 2001, approximately 10\% of BIA decisions were summary affirmances. By March 2002, more than half of the BIA’s decisions were summary affirmances.\textsuperscript{236}

**Shifting the Backlog to the Federal Courts**

The increased quantity of BIA decisions, and the dissatisfaction of aliens and their counsel with unexplained affirmances, have created a surge of appeals from the BIA to the federal circuit courts of appeals.

During late 2001, before the “Procedural Reforms” were proposed or effective, BIA decisions were being appealed to the federal circuit courts at a rate of around 100 per month. By March 2002 (when Acting BIA Chairman Lori Scialabba added asylum to the “certain categories of cases” that could be decided by a single member without opinion), appeals to the federal circuit courts had climbed to almost 300 per month. By May 2002 (when Acting BIA Chairman Lori Scialabba designated “all cases” as being in those “certain categories”), appeals to the federal circuit courts had climbed to more than 700 per month. By the beginning of 2003, BIA decisions were being appealed to the federal circuit courts at a rate of over 800-900 per month.\textsuperscript{237} Every federal circuit is experiencing a surge in appeals from the BIA.\textsuperscript{238}

This surge is continuing: the average number of requests per month for the immigration administrative record – the first step in an appeal to the federal circuit courts – has also quadrupled.\textsuperscript{239}

Now, the federal circuit courts are developing a backlog. The rate at which appeals from the BIA are being terminated by the federal circuit courts is far lower than the rate at which appeals from the BIA are being filed, and a backlog of over 5,000 appeals has developed and is growing.\textsuperscript{240}

As one federal circuit court observed recently:

\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} See Appendix 25.
\textsuperscript{237} See Appendix 26.
\textsuperscript{238} See Appendix 27.
\textsuperscript{239} See Appendix 28.
\textsuperscript{240} See Appendix 29, 30, 31.
Although a stated goal of the new regulations is to eliminate the BIA’s backlog, we observe that the practical result may be to shift the backlog to the courts of appeal.241

“PROCEDURAL REFORMS”: CAUSING ERROR, INJURY

The “Streamlining Rules,” even when limited to “certain categories” of straightforward cases amenable to rapid resolution, were reducing the BIA backlog and were an “unqualified success.”242 Nonetheless, during 2002, the Acting Chairman of the BIA stretched the “Streamlining Rules” to include asylum cases and then, potentially, all cases. Finally, in September 2002, the “Procedural Reforms,” with sweeping mandates for single member review and more “affirmances without opinion” became officially effective.243

Throughout 2002, as the “Streamlining Rules” were stretched and the “Procedural Reforms” were promulgated, the percentage of appeals upheld (usually favoring the alien) plummeted, and the number of “affirmances without opinion” (usually favoring the government) soared.244

A surge of appeals to the federal circuit courts is underway, creating a backlog there. Several opinions from the federal circuit courts have already been issued. The federal courts are describing obvious errors committed by the BIA: errors that would be comic, if they were not so tragic.

Tang v. Ashcroft 245

Yong Tang, a pro-democracy Chinese dissident, testified before the Immigration Judge to persecution while in the PRC.246 He testified of his placement in a “re-education” labor camp as a child, his arrest and detention by the government of the PRC in response to his pro-democracy activities, activities which included a leadership role at various demonstrations, such as the Tiananmen Square protests in the days leading up to the massacre of student demonstrators by the government.247 Mr. Tang also described having been brutally beaten until he lost consciousness in an attempt to compel him to reveal the names of fellow activists.248 Mr. Tang recounted persistent police visits, frequent interrogation, and constant surveillance.249 In asserting a well-founded fear of future persecution, Mr. Tang testified to his numerous pro-

242 Andersen Report, at supra 62.
243 Supra at IV.A.
244 Supra at VI.A. - B.
246 Id.
247 Id.
248 Id.
249 Id.
democracy activities in the United States, including his affiliation with the Chinese Alliance for Democracy, his participation in protests in front of the Chinese embassy in New York to rally for democratic reform in China, and his publication of articles critical of the government of the PRC in prominent international Chinese-language journals.  

While the Immigration Judge did not take any issue with Mr. Tang’s testimony that he had been politically active against the PRC government, that he had suffered persecution, or that he fears persecution in the future, the Immigration Judge denied Mr. Tang’s application for asylum “on the basis that his evidence was not plausible in a few respects.” The Immigration Judge also concluded that, because Mr. Tang was working in the United States for a company run by persons of Chinese extraction, he would not reasonably fear persecution upon his return to China. The basis for this remarkable conclusion, the Immigration Judge admitted, was “a feeling.”

The Third Circuit concluded that the Immigration Judge’s opinions “were premised on inferences, assumptions, and feelings that range from overreaching to sheer speculation.” The court went on to note that “[t]he record is bereft of evidence, much less ‘substantial evidence,’ to support an adverse credibility determination” as found by the Immigration Judge and summarily affirmed by the BIA.

Based on this review of the record, the Third Circuit held that the “adverse credibility determination made in this case was not supported by substantial evidence of record and may not stand.” The court vacated the BIA’s order and remanded the case to the BIA with further instruction to remand to the Immigration Judge for a determination of whether, given the testimony that Mr. Tang suffered past and fears future persecution, testimony the court found to be credible, he and his wife should be granted asylum and/or withholding of deportation.

Tuhin v. Ashcroft

Azim Tuhin, a native and citizen of Bangladesh, fled to the United States after having been arrested and beaten by the police in connection with a political protest. Mr. Tuhin was arrested at the protest: “A group of five or six officers kicked Tuhin and hit him with their batons; Tuhin was beaten again at the police station. During the beatings the police warned him to cease his political activism. . . .” Mr. Tuhin spent a month in jail, where he was beaten on
seven to ten more occasions. Mr. Tuhin was ultimately released on bond, and shortly thereafter fled Bangladesh.

Mr. Tuhin stated that he believes that if returned to Bangladesh he will surely face renewed arrest, incarceration, torture, and possible execution for his alleged crimes. In addition to his own testimony, Mr. Tuhin submitted affidavits, medical reports documenting injuries caused by police beatings, and copies of his charging papers, as well as state department and international human rights reports and news clipping discussing Bangladesh’s political climate.

“\nIn an oral decision announced immediately following the hearing, the IJ ‘fully credited’ petitioner’s testimony but went on to deny asylum based on a ‘legal conclusion that [petitioner] is not fleeing persecution but prosecution.’” The Immigration Judge reasoned that petitioner was “liable as an accomplice for the acts taken by his organization [the Jatiya political party],” thus, “the country of Bangladesh would have the right to prosecute [him] for having engaged in criminal activity.”

The BIA affirmed, without opinion, the Immigration Judge’s decision. The Seventh Circuit found that “the IJ’s decision reveals no analysis of whether the beatings that Tuhin endured rose to the level of political persecution.” Remarkably, though the Immigration Judge found the petitioner credible, the Immigration Judge did not mention Mr. Tuhin’s beatings. The court noted:

It is unclear whether the judge determined that the beatings were not sufficiently serious to constitute persecution, whether they were not imposed on account of Tuhin’s political opinion, or whether the IJ just disregarded the evidence altogether. In any case, without some reasoned explanation by the IJ for rejecting Tuhin’s past persecution claim, we cannot uphold the decision.

The court also found that the Immigration Judge’s conclusion that Mr. Tuhin fled prosecution and not persecution “seems to be based on a fundamental misunderstanding of the law.” The court noted that under federal court precedent, “[a] facially legitimate prosecution may amount to persecution if the prosecution was motivated by a ‘nefarious purpose,’ i.e., to punish political opinion, …and the punishment under the law is sufficiently severe.”

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260 Id.
261 Id.
262 Id.
263 Id.
264 Id.
265 Id. (quoting Immigration Judge’s decision).
266 Id.
267 Id.
268 Id.
269 Id.
270 Id. (citing Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001) (Chinese student who demonstrated during Tiananmen Square era and was sought by Chinese police under lawful subpoena for trespass had well-founded fear of persecution, not just prosecution); Chang v. INS, 119 F.3d...
court noted that the Immigration Judge’s failure to address whether or not the Bangladesh authorities had prosecuted Mr. Tuhin for his political beliefs “was not insignificant.” The Seventh Circuit noted that a finding of past persecution would give rise to the presumption that Mr. Tuhin’s fear of future persecution was well-founded. The burden would then shift to the Service to rebut that presumption with evidence that conditions in Bangladesh have changed to such an extent that future persecution is unlikely. The court noted that the Service had not come forward with any evidence of changed conditions. Thus, because it “cannot be sure whether, or how, the BIA might exercise its discretion if Tuhin’s claim of past persecution were fully considered and irrelevant considerations discarded” the Seventh Circuit remanded the case to the BIA for further proceedings.

Herbert v. Ashcroft

The Service charged Diland Herbert, a native and citizen of Trinidad and Tobago and a lawful permanent resident of the United State for almost twenty-five years, with being subject to removal from the United States under 8 U.S.C. § 1227(a)(2)(A)(ii) on the grounds that he had been committed a felony.

Approximately two hours prior to the scheduled time for a hearing, Mr. Herbert’s attorney filed an emergency motion for continuance with the Immigration Judge. The motion explained that the attorney had been ordered to appear before a magistrate judge in federal district court for a hearing in another matter, continued from the preceding day. The attorney never told Mr. Herbert or his family that he would be unable to be at the hearing. While Mr. Herbert arrived thirty minutes late to the hearing due to traffic and heavy rain, some of his family members were present. When Mr. Herbert did not arrive promptly, his mother informed court personnel that she had spoken to her son that morning and that he would be arriving shortly. Despite this knowledge and the attorney’s motion for a continuance, the Immigration Judge proceeded in absentia and ordered Mr. Herbert expelled.

1055, 1061-62 (3d Cir. 1997) (fact that petitioner violated Chinese security laws of general applicability did not preclude finding that prosecution under laws would constitute persecution); Rodríguez-Roman v. INS, 98 F.3d 416, 429 (9th Cir. 1996) (Cuban who would face severe punishment under Cuban law for having illegally departed had well-founded fear of persecution on account of his political opinion)).
Mr. Herbert appealed to the BIA. The BIA affirmed, without opinion, the decision of the Immigration Judge.\textsuperscript{284} Mr. Herbert then petitioned the First Circuit for review of the denial of the motion to reopen the decision in absentia to expel him. The First Circuit granted the petition for review, reversed the denial of the motion, and remanded the case back to the agency.\textsuperscript{285} The First Circuit held that exceptional circumstances existed and the agency acted arbitrarily and capriciously in denying the motion to reopen.\textsuperscript{286} Its opinion specifically cited to federal court precedent that an alien’s good faith reliance on counsel and the availability of relatives to testify on his behalf are factors that could contribute to a finding that extraordinary circumstances exist.\textsuperscript{287} The First Circuit directed that on remand Mr. Herbert be permitted to present his claims for cancellation of removal.\textsuperscript{288}

\textit{Georgis v. Ashcroft} \textsuperscript{289}

Zebenework Haile Georgis, a citizen of Ethiopia, along with her husband, her uncle, and three of her children, were members of All-Amhara People’s Organization (“AAPO”), a political group opposing the Ethiopian government. Before she left Ethiopia for the United States in 1995, Ms. Georgis had been arrested for an AAPO protest, taken to prison, beaten, and tortured. Her husband was also arrested, imprisoned, beaten, and tortured; her uncle was killed. Since her flight to the United States in 1995, her husband and children had been arrested and imprisoned; her daughter had been raped by a prison guard; and “government soldiers had interrogated her family and inquired as to her whereabouts.”\textsuperscript{290}

Ms. Georgis overstayed her visa and applied for political asylum. The Immigration Judge denied her application, because of “numerous discrepancies” in the dates Ms. Georgis gave for the killings, arrests, beatings, imprisonment, rape, and torture of herself or her family members. The Immigration Judge also deemed some of her testimony “uncorroborated,” and questioned why she had not mentioned the early killings and arrests in her asylum application. The BIA “issued a ‘streamlined’ order summarily affirming the [Immigration Judge’s] decision.”\textsuperscript{291}

Ms. Georgis appealed to the United States Court of Appeals for the Seventh Circuit. On appeal, the Seventh Circuit had nothing but a summary affirmance from the BIA, so it reviewed the Immigration Judge’s decision directly, reversed and remanded.\textsuperscript{292} As to the date discrepancies, the Seventh Circuit pointed out that the Ethiopian calendar is Julian, while the

\begin{itemize}
  \item \textsuperscript{284} Herbert, 325 F.3d at 70.
  \item \textsuperscript{285} Id. at *73.
  \item \textsuperscript{286} Id. at *72.
  \item \textsuperscript{287} See Romero-Morakes v. INS, 25 F.3d 125, 130-31 (2d Cir. 1994) (identifying the alien’s good faith reliance on counsel and the availability of relatives to testify on his behalf as factors that could contribute to a finding that extraordinary circumstances exist).
  \item \textsuperscript{288} Interestingly, one judge dissented noting that “the record on appeal is insufficiently developed to enable a reliable appellate determination as to whether the denial of the motion to reopen constitutes an abuse of discretion, let alone an arbitrary and capricious agency action.” Herbert, 325 F.3d at 73.
  \item \textsuperscript{289} Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003).
  \item \textsuperscript{290} Id. at 964.
  \item \textsuperscript{291} Id. at 966.
  \item \textsuperscript{292} Id. at 967-69. The Seventh Circuit noted that “it makes no practical difference whether the BIA properly or improperly streamlined review of Georgis’s case because the Immigration Judge’s opinion can be reviewed directly, allowing a “fair appraisal of the petitioner’s case and preserving “petitioner’s due process rights.” Id. at 967.
\end{itemize}
American calendar is Gregorian, so “everyone [at the hearing], and not just Georgis, seemed unclear about converting the dates from Ethiopian to Gregorian.” As to the lack of corroboration, the Seventh Circuit pointed out that, as a matter of law, corroboration is not necessary, and, in any event, much of her testimony was corroborated — by a document from the Ethiopian police, which the Immigration Judge had erroneously excluded on grounds that it had not been obtained or produced far enough in advance of the hearing. As to the remaining grounds cited by the Immigration Judge – the failure to list all of the killings and arrests on her asylum application – the Seventh Circuit noted that, normally, it would defer to the Immigration Judge’s credibility determinations. However, this time, “having found that the other five grounds given by the IJ for discrediting Georgis are either unsupported by the evidence in the record or based on incomplete or improperly excluded evidence, we are not inclined to defer to his credibility determination on this remaining sixth ground alone.” The Seventh Circuit vacated the expulsion order and remanded to the BIA, saying “we strongly urge the BIA to assign a different judge to Georgis’s case on remand.”

*El Moraghy v. Ashcroft*

Adel Nagi El Moraghy, a Coptic Christian Egyptian national, sought asylum in the United States because of fears of persecution by Islamic fundamentalists if he were returned to Egypt. Mr. El Moraghy described a series of beatings he had suffered in Egypt and testified that he would be a “marked man” if he returned because, while in Egypt, he had been a friend of a Muslim woman. After he accompanied the Muslim woman on several visits to a Christian monastery, a group of Muslim fundamentalists kidnapped them, insisted that Mr. El Moraghy convert to Islam, and insisted the Mr. El Moraghy marry the woman. Mr. El Moraghy fled to Cairo, then to the United States. According to Mr. El Moraghy, if he were forced to return to Egypt, he would “be tortured or most likely killed by Muslim Fundamentalists.”

The Immigration Judge did not make any finding as to Mr. El Moraghy’s credibility and did not address his past persecution at all. However, the Immigration Judge ordered Mr. El Moraghy deported. The basis for the Immigration Judge’s decision, to the extent it could be discerned, was that the United States Department of State “country reports,” which described a history of violent assaults against Coptic Christians in Egypt, did not mention Mr. El Moraghy by name. The BIA summarily affirmed.

The United States Court of Appeals for the First Circuit reviewed the Immigration Judge’s opinion directly, found an “absence of reasoned discussion,” and remanded to the BIA.

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293 *Id.* at 968.
294 *Georgis*, 328 F.3d at 968-69.
295 *Id.* at 970.
296 *Id.*
298 *Id.*
299 *Id.*
In remanding, the First Circuit held that “a more searching review of the application of the [affirmance without opinion] regulations” should be addressed only after evidence of “systemic violation” by the BIA.\textsuperscript{300} However, the First Circuit did address the systemic waste”

Here, streamlining a case “in which the reasoning proffered by the [Immigration Judge] is faulty” has resulted only in additional lost time and judicial resources…If, in the end, El Moraghy is granted the discretionary relief he seeks, the cost will have been borne mostly by the courts, which have done what the BIA should have done. And, if El Moraghy is properly denied relief, then the cost of the summary affirmance procedure will be, in addition, that an alien who should have been removed has stayed here even longer.\textsuperscript{301}

For Mr. El Moraghy, the process will now loop back through the BIA, to an Immigration Judge, perhaps back to the BIA, and perhaps back to the federal circuit court. Mr. El Moraghy, and the United States, could have been spared all of this waste if the BIA did “what the BIA should have done” in the first place: provide meaningful review and correct an obvious error.

\footnotesize{\textsuperscript{300} \textit{Id.}}
\footnotesize{\textsuperscript{301} \textit{Id.}}
Monday,
August 26, 2002

Part III

Department of Justice

Immigration and Naturalization Service

8 CFR Part 3
Board of Immigration Appeals; Procedural Reforms To Improve Case Management; Final Rule
DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
8 CFR Part 3
[EOIR No. 131; AG Order No. 2509–2002]
RIN 1125–AA36
Board of Immigration Appeals: Procedural Reforms To Improve Case Management
AGENCY: Executive Office for Immigration Review, Immigration and Naturalization Service, Department of Justice.
ACTION: Final rule.
SUMMARY: This final rule revises the structure and procedures of the Board of Immigration Appeals (Board), provides for an enhanced case management procedure, and expands the number of cases referred to a single Board member for disposition. These procedures are intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those cases presenting significant issues for resolution by a three-member panel. After a transition period to implement the new procedures in order to reduce the Board's backlog of pending cases, the size of the Board will be reduced to eleven.
DATES: This final rule is effective September 25, 2002.
FOR FURTHER INFORMATION CONTACT: Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.
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I. Introduction
The Attorney General has delegated to the Board of Immigration Appeals (Board) broad jurisdiction over appeals from decisions of the immigration judges in exclusion, deportation, and removal proceedings, bond appeals, asylum-only cases, and other specific matters, and also the authority to review certain final decisions by district directors and other officials of the Immigration and Naturalization Service (Service). See 8 CFR part 3, subpart A. Decisions of the Board are subject to review by the Attorney General as provided in 8 CFR 3.1(h).

The Executive Office for Immigration Review (EOIR) was created by the Attorney General in 1983 to consolidate the adjudicatory process by placing the immigration judges and the Board in a single administrative unit separate and apart from the Service. 52 FR 2931 [Jan. 29, 1987]. In 1987, the Attorney General also established the Office of the Chief Administrative Hearing Officer (OCAHO) within EOIR to adjudicate certain civil penalty issues. EOIR is an administrative component under the direction of the Attorney General, not a separate agency of the United States. It is, however, wholly separate from, and independent of, the Service.

A. The Problem Presented
The Attorney General is promulgating this rule to improve the adjudicatory process for the Board because, under the current process, the Board has been unable to adjudicate immigration appeals in removal proceedings effectively and efficiently. In 1992, the Board received 12,623 cases and decided 11,720 cases, including appeals from the immigration judges or the Service, and motions to reopen proceedings. At the end of FY1992, the Board had 18,054 pending cases. By 1997, the number of new cases rose to 29,913, disposions rose to 23,099, and the pending caseload had grown to 47,295 cases. Most recently, in FY2001, the Board received 27,605 cases and decided 31,780 cases. The pending caseload on September 30, 2001, totaled 57,597 cases.

To meet this demand, the number of Board members was increased from 5 positions to 12 positions in 1995, with further incremental increases in subsequent years to a total of 23 authorized Board member positions (with 19 members and four vacancies at
present). It is now apparent that this substantial enlargement—more than quadrupling the size of the Board in less than seven years—has not succeeded in addressing the problem of effective and efficient administrative adjudication, and the Department declines to continue committing more resources to support the existing process. Rather, the Department believes that amendment of the adjudicatory process is a more effective approach to facilitate the ability of the Board to adjudicate the case backlog, as well as to provide meaningful guidance for immigration judges, the Service, attorneys and accredited representatives, and respondents.

Until recently, three-member panels reviewed all cases, even cases that presented no colorable basis for appeal. However, beginning in 1999, the Attorney General instituted a mechanism for streamlining cases. See 64 FR 56135 (Oct. 16, 1999). The streamlining process permits a single Board member to summarily affirm the immigration judge’s decision without opinion; the Chairman is authorized to designate the type of cases that could be "streamlined." The streamlining process undertaken by the Board has provided the best opportunity to manage the Board’s backlog. Over 58% of all new cases in 2001 were sent to be summarily decided by single Board member review through streamlining. Testimony of Kevin Rooney, Director, EOIR; Hearing before the Committee on the Judiciary, Subcommittee on Immigration and Claims, United States House of Representatives, Operations of the Executive Office for Immigration Review (EOIR), 107th Cong., 2nd Sess. 23 (Feb. 6, 2002) (hereinafter "House Judiciary Subcommittee Hearing"). That initiative, allowing certain categories of appeals to be adjudicated by a single member, was recently assessed favorably by an external auditor. Arthur Andersen & Company, Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report (Dec. 13, 2001) (hereinafter “Streamlining Study”). Streamlining was the first disengagement from a "one size fits all" philosophy of using three member panels for all cases. The final rule continues that process.

The Department agrees with the fundamental assessment that the Board’s use of the streamlining process has been successful, and, in this rule, expands the single-member process to be the dominant method of adjudication for the large majority of cases before the Board. In particular, this rule removes the restriction that a single Board member is limited to affirming an immigration judge’s decision "without opinion" in those cases where an affirmation is appropriate. While such dispositions are proper in a substantial number of cases, as the Board’s experience to date with the streamlining process has demonstrated, there are many other cases that may require some explanation of the Board’s rationale, for example, as to why the immigration judge’s decision was the proper result, or why any asserted errors were harmless or immaterial.

Under the existing streamlining procedures, any case that is not appropriate for summary affirmation without opinion must be referred to a three-member panel for disposition, even if the issues are not novel or complex. That process can be, and has been, cumbersome and time-consuming, and expends an excessive amount of resources. Where single Board members can resolve such appeals through issuance of a brief written opinion, the Board will be able to concentrate greater resources on the more complex cases that are appropriate for review by a three-member panel, and will also be able to focus greater attention on the issuance of precedent decisions that provide guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.

Finally, under the Board’s existing processes, decisions have all too often been issued long after the Notice of Appeal. Cases have routinely remained pending before the Board for more than two years, and some cases have taken more than five years to resolve. There is reason for concern that many appeals have been filed precisely to take advantage of this delay. Moreover, the quality of precedent decisions has not improved and the number of precedent decisions has remained relatively constant despite substantial changes in the law.

B. History of the Rulemaking

The Department published a proposed rule in the Federal Register on February 19, 2002, 67 FR 7309, proposing procedural reforms to improve case management at the Board. A 30-day public comment period ended on March 21, 2002.

In response to the proposed rulemaking, the Department received numerous comments from various nongovernmental organizations (NGOs), members of Congress, private attorneys, and other interested individuals. The Department received a total of 66 separate, timely submissions (with several NGOs submitting separate comments with attachments that were identical, and one set of NGO comments that attached lists of signatures totaling in excess of 900 individuals). Since many of the comments are similar and endorse the submissions of other commenters, the Department addresses the responses by topic rather than by referencing each specific commenter and comment. In addition, five comments were either postmarked and/or received by EOIR after the closing date for the comment period. None of the untimely submissions presented any comment that was not already addressed by an earlier commenter.

In addition, the Department has considered the record of the House Judiciary Subcommittee Hearing, supra, because that hearing dealt with the same subject as the rule and because of the perceptive discussion before the Subcommittee. The Department also considered the evaluation of the streamlining project in the Streamlining Study.

C. 30-Day Notice and Comment Period

Several commenters objected to the 30-day comment period for the proposed rule and requested an extension. Some of the NGOs also requested a meeting with the Department.

Notwithstanding the length of the comment period, 66 commenters submitted a variety of comments, many of which were thoughtful and extensive. The Department has reviewed and carefully considered all of the comments submitted and believes that the 30-day comment period has been sufficient. Additionally, the Department has decided against engaging in meetings with particular commenters since the written comments of all commenters as submitted are sufficient. The Department also notes that the Administrative Procedure Act (APA) provides that procedural rules may be issued without notice and opportunity for prior comment and may be effective upon publication. Rules which are arguably "substantive" require at least 30 days prior notice subject to certain exceptions. See 5 U.S.C. 553(b)(A), (d). Accordingly, the Department has fully complied with the APA, and no additional opportunity for comment is required or necessary considering the written comments already submitted.

Furthermore, the 30-day comment period is in keeping with the Department’s objectives, including eliminating unwarranted delay.
II. Summary of the Revised Review System

A. Description of the Department's Goals

At the time this rule was proposed, the Attorney General laid out four important objectives in the disposition of administrative immigration appeals: (1) Eliminating the current backlog of cases pending before the Board; (2) eliminating unwarranted delays in the adjudication of administrative appeals; (3) utilizing the resources of the Board more efficiently; and (4) allowing more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions—cases that are most appropriate for searching appellate review and that may be appropriate for the issuance of precedent decisions.

This rule reflects a variety of necessary reforms to achieve these various objectives, in order to strengthen the review system. It enhances the function of the Board in resolving issues, provide effective guidance regarding the implementation of the immigration laws, and improve the timeliness of the Board's review.

The Board's decisions focus, for the most part, on the issue of whether a respondent has established eligibility for relief from removal from the United States and whether the Attorney General should affirmatively exercise discretion in the respondent's favor. Although the nature of the Board's caseload appears to be changing somewhat in light of changes in the law, the Board's caseload continues to focus heavily on relief from removal. Most respondents either concede removability before the immigration judge, or do not appeal the immigration judge's determinations that the respondent is removable. Therefore, the dominant number of the Board's cases relate to the application of specific portions of the Act relating to relief from removal.

Moreover, the Department agrees with the assessment of former Board member Michael Heiman, based on his review of over 100,000 appeals over some 15 years of service on the Board, that the "overwhelming percentage of immigration judge decisions * * * [are] legally and factually correct." House Judiciary Subcommittee Hearing, supra, at 15. The Department disagrees with a view that suggests that "the factual records made in the majority of hearings * * * [are not] fully considered and assessed by either the Immigration Judge or the Board." See Matter of A-S-, 21 I&N Dec. 1106, 1122 (BIA 1998) (Rosenberg, dissenting). Accordingly, the final rule continues to focus on the

guidance regarding the standards for the exercise of discretion, rather than reviewing appeals that involve routine questions of law or fact or that present no substantial basis for reversing the decision under appeal. In this regard, the Board is delegated authority to review questions of fact to determine whether they are clearly erroneous; all other questions, whether of law or discretion, may be reviewed by the Board de novo. A key element of this reform is that the Chairman will establish, and be responsible for, a case management screening system to review all incoming appeals and to provide for prompt and appropriate disposition—by a three-member panel in those instances where the merits of the case presented to the Board call for review by a three-member panel under § 3.1(e)(6) of the rule, and by a single Board member in every other case that does not meet those standards.

The final rule establishes the primacy of the streamlining system for the majority of cases. These do not present novel or complex issues. A single Board member may issue a brief order where appropriate to affirm the decision of the immigration judge or dismiss the appeal on procedural grounds. A single Board member may issue a short order that explicates the reasons, for example, why an immigration judge’s findings of fact are not clearly erroneous, or why the immigration judge’s exercise of discretion was inappropriate, or why the record should be remanded to the immigration judge for further proceedings.

Under specific circumstances, the single Board member may refer the record for decision by a three-member panel. These more complex cases deserve closer attention. The Board’s en banc process remains as currently devised to provide interpretation of the Act through precedent decisions. Under those circumstances, the Board of Appeals, and the Board of Immigration Appeals, will be able to provide more precedential guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.

This process will resolve simple cases efficiently while reserving the Board’s limited resources for more complex cases and the development of precedent to guide the immigration judges and the Service. The Department believes that this allocation of resources will better serve the respondents, the Service, the
public, and the administration of justice.

The final rule establishes the primacy of the immigration judges as factfinders by utilizing a clearly erroneous standard of review for all determinations of fact. The Board’s historic rule, explained below, of not considering new evidence on appeal, is codified in this rule. Factfinding that may be required will be conducted by the immigration judge on demand.

However, the rule retains de novo review both for questions of law and for questions of judgment (concerning whether to favorably exercise discretion in light of the facts and the applicable standards governing the exercise of such discretion). The rule contains a number of the time limits of the proposed rule. However, recognizing the concern of a number of commenters, the Department has decided to retain the current sequential briefing schedule for non-detained cases, but with shorter time limits. Under the final rule, detained cases will be briefed concurrently on a 21-day calendar and non-detained cases will be briefed consecutively on a 21-day calendar. Moreover, the Chairman is directed to undertake improvements in the transcription process to assist in the briefing process.

Finally, the rule retains the reduction to 11 Board members after a transition period. The Department is unsuasioned by the arguments received, particularly in light of the objective evidence, that the reduction to 11 Board members should be changed. The Board should, under this rule, be able to reduce its backlog and keep current, as well as conduct the en banc proceedings necessary to provide precedent guidelines to the immigration community. Given the scope of these changes to the Board’s structure and revisions to current procedures, the Department will continuously review the effectiveness of the rule in achieving the aforementioned Departmental goals.

III. Comments on the Proposed Rule

The comments received on the proposed rule can generally be grouped into broad categories. In this analysis, we divide the comments and further discussion of the rule into specific subparts in order to provide a cohesive overview of the comments, the changes made in light of the comments, and the final rule. Many of the issues overlap and commenters treated the same issues in different ways. Accordingly, while all comments have been carefully reviewed, it may not be apparent from this discussion that a particular version of a comment has been directly addressed. To the extent practical, the Department has attempted to address the comments received as specifically as possible, but the duplication of comments, either by filing the same comment multiple times, or making minor adjustments in different submissions, makes it impossible to address each specific comment in a structured response.

The Department received widely divergent comments that both supported and opposed the proposed rule. The Department appreciates the contributions of all the individuals and groups who submitted comments. The Department has given careful consideration to all of the comments received on the proposed rule, as indicated in the following discussion. The thoughtfulness of the public comments has contributed greatly to improvement in the final rule. As discussed below, the comments also included ideas and specific proposals that were beyond the scope of the proposed rule.

Overall, most of the commenters supported at least some of the Department’s objectives, especially the elimination of unwarranted delays and the current backlog of cases pending before the Board. As numerous commenters noted, languishing appeals do not serve the interests of justice. There are divergent views, though, regarding how these objectives should be accomplished. Some commenters generally supported the proposed rule, while many other commenters strongly opposed many or most of the specific provisions of the proposed rule.

A. General Due Process Issues

Some commenters argued in a general way that the proposed rule violates due process or that it is otherwise bad procedure. Initially, the Department notes that the due process clause of the Constitution does not confer a right to appeal, even in criminal prosecutions. See Ross v. Moffitt, 417 U.S. 600, 611 (1974) ("[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all.") Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (noting that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all") (citation omitted). Much as the Congress may dispense with the inferior form of the same legislative stroke that created them, the Attorney General could dispense with the appellate review process in immigration proceedings, i.e., the Board of Immigration Appeals.

Some of the commenters argued specifically that the proposed rule violates a respondent’s right to due process under the Supreme Court’s balancing in Mathews v. Eldridge, 424 U.S. 319 (1976). The Department agrees that some form of hearing is appropriate and beneficial under the circumstances. See Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974). However, due process is not “a technical conception with a fixed content unrelated to time, place and circumstances.” Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961), but is “flexible and calls for such procedural protections as the particular situation demands.” Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Assuming that Mathews is the appropriate touchstone, the process that is due is determined by balancing the nature of the individual’s interest, the fairness and reliability of the procedures, and the nature of the governmental interest. Many of the commenters focused on the nature of the interest of the individual, particularly in asylum and related cases where the respondents assert that the respondent will be persecuted, his or her life or freedom will be threatened, or that he or she will be tortured, if returned to his or her country of origin.

1. The Respondent’s Interest in the Individual Proceeding

First, and foremost, the vast majority of issues presented on appeal to the Board involve applications for relief from removal, not removal itself. Accordingly, the process that is due is not a process related to the government’s efforts to remove the respondent from the United States. The process that is due is process relating to the respondent’s request for amelioration of removal.

Those cases where the respondent has a basis to contest a finding of removability would appear to be more amenable to review by a three-member panel under § 3.1(e)(6). Removability, and whether the Service has established clear and convincing evidence to support the charge, when disputed, may be more likely to involve novel or complex factual or legal issues because of the multitude of governing statutory provisions, such as divisible State criminal laws. Whether a single-member or three-member review is more efficacious is a question best decided by the Board under the standards of this rule.

In most cases, the issues before the Board relate to whether the respondent
has established eligibility for an application for relief from removal, or whether the Attorney General should exercise discretion in the respondent's favor. In these cases, the Service has established the government's interest in removal of the respondent. The burden of proof has been cast on shifts to the respondent to establish eligibility for relief from removal and, in most cases, that the respondent deserves a favorable exercise of the Attorney General's discretion. The process due under the Constitution in determining removability is substantially higher than the process required by the Constitution in determining whether to grant relief from such an order of removal.

2. The Government's Interest in the Immigration Adjudication Process

The interest of the government in effective and efficient adjudication of immigration matters, moreover, is substantially higher than an individual respondent's interest in his or her own proceeding. Congress is granted plenary authority under the Constitution in immigration matters and Congress has delegated broad authority to the Attorney General to administer the immigration laws. The authority is not merely one involving a discrete set of benefits and penalties, but implicates, in conjunction with the Secretary of State, the vast external realm of foreign relations. Not only does the removal process utilize reports and profiles of country conditions provided by the Department of State, the actual removal process implicates the relationships of the United States with other countries. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); INS v. Abudu, 485 U.S. 94, 110 (1988). In this context, the Attorney General is granted substantially more authority to structure the administrative adjudicatory process than most administrative processes. Indeed, the Department questions whether Matthews is the appropriate touchstone in light of the unique nature of the Act as the tool for managing the intersection of foreign and domestic interests regarding aliens. Congress has provided almost no parameters for the exercise of the Attorney General's broad authority to manage immigration adjudications, and to the extent it has done so, has limited discretionary procedures available to respondents. See, e.g., INS v. Rios-Pineda, 471 U.S. 444, 466 (1985) (Attorney General's creation of motion to reopen, and decision to the Board, by regulation, 8 C.F.R. § 1229.6(c)(6) (motions to reopen in statutory removal proceedings specified by statute in 1996). Accordingly, more deference to the Attorney General is appropriate. Cf. Weiss v. United States, 510 U.S. 163, 176-79 (1994).

3. Balancing of Interests in the Adjudicatory Process

Some commenters expressed concern that the expansion of the streamlining initiative, with its emphasis on single-member review of cases, will result in violations of the due process rights of respondents-appellants. Some commenters contended that three-member reviews of appeals provide more protection for due process rights than single-member reviews. The primary concern of the comments is a perceived inadequacy in the ability of a single Board member to decide an appeal in a way that protects the due process rights of appellants while maintaining administrative efficiency. The Department finds that single-member review under the final rule is both fair and reliable as a means of resolving the vast majority of non-controversial cases, while reserving three-member review for the much smaller number of cases in which there is a substantial factual or legal basis for contesting removability or in which an application for relief presents complex issues of law or fact. In this context, the Attorney General is free to tailor the scope and procedures of administrative review of immigration matters as a matter of discretion. Maka v. INS, 904 F.2d 1351 (9th Cir. 1990); see also Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519, 524-25 (1978), quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"). See generally L. Morrison, J. Cooper & M. Clark, Federal Judicial Center, Case Management Procedures in the Federal Courts (2000) (comparative compendium of innovations in circuit court case management systems).

Each case varies according to the needs presented by the respondent and the issues. In the typical case that reaches the appeal stage, the respondent makes an initial appearance and is advised of his or her rights, including the right to be represented by counsel or an accredited representative at no cost to the government, the right to inspect all evidence presented, and the right to present evidence and testimony, by the respondent and other witnesses, in the language the respondent understands. Pleadings are usually taken after a continuance, with a further hearing being held to determine whether the alien is deportable or inadmissible, if the respondent contests removability. If the immigration judge finds that the respondent is removable, the immigration judge informs the respondent of possible forms of relief, and further continuances may be granted to allow time for the respondent to prepare applications for relief and acquire additional evidence. A call-up date is established for filing the application and a deadline is set for filing additional evidence. Only then is the respondent expected to present his case for relief from removal. All of these proceedings are on the record and recorded verbatim. A transcript of proceedings has been prepared in all appeals, including any oral decision by the immigration judge. See, e.g., 8 C.F.R. 240.3-240.13 (procedure in removal cases). Accordingly, by the time a case reaches the Board on appeal, many, if not most, respondents have already had several hearings on the record before the immigration judge, have explained their rights, and have been given more than one opportunity to ask questions and raise issues.

On appeal, the respondent is required under existing regulations to file a statement indicating the grounds for appeal, and has the right to file a more detailed brief. On this record, single Board members are well-equipped both to determine the legal quality and the efficient and effective utilization of an immigration judge's decision and to determine if the appeal qualifies under 8 C.F.R. 3.1(e)(6) for referral to a three-member panel. Each appeal will be fully reviewed and decided by the Board member within the law and regulations, precedent decisions, and federal court decisions. The Department is not persuaded that a single Board member review gives any less due process to an respondent's appeal that involves routine legal and factual bases than would a three-member panel considering the same appeal.

B. General Comments Relating to the Role and Independence of the Board

Some commenters argued that the provisions of this rule, either individually or in combination, would adversely affect the fairness or effectiveness of the Board's adjudications by limiting the independence and perceived impartiality of the Board. Some commenters criticized the provision in § 3.1(a)(1) of the proposed rule that the
Board members act as the “delegates” of the Attorney General in adjudicating appeals, as well as the language in § 3.1(d)(1) of the proposed rule making clear that, in exercising their independent judgment and discretion in cases coming before them, the Board members are subject to the Act and the implementing regulations, and the direction of the Attorney General.

1. The Attorney General’s Authority

These arguments misapprehend the nature of the Board and the rule. The Board is an administrative body within the Department, and it is well within the Attorney General’s discretion to develop the management and procedural reforms provided in this rule. As one court has noted, the Attorney General could dispense with Board review entirely and delegate his power to the immigration judges, or could give the Board discretion to choose which cases to review. See Guenther v. INS, 77 F.3d 1036, 1037 (7th Cir. 1996).

In Nash v. Bowen, 869 F.2d 675 (2nd Cir. 1989), the court of appeals addressed similar concerns by an administrative law judge (ALJ) challenging efforts by the Social Security Administration (SSA) to improve the ALJ’s quality and efficiency. In an effort to reduce a backlog of 100,000 cases, the SSA instituted a series of reforms that included a monthly production quota, an appellate system or peer review program, and a reversal rate policy. The court rejected challenges to each of these reforms, explaining that “those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. The bottom line in this case is that it was entrusted to the Secretary’s discretion to adopt reasonable administrative measures in order to improve the decision making process.” Id. at 681 (citations omitted). Similarly, the Attorney General has promulgated a final rule within his discretion intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those cases presenting significant issues for resolution by a three-member panel. The Department, in this final rule, does not go so far as did the SSA, nor does it intend to intrude on the intellectual independence of its adjudicators.

2. Independence of Administrative Adjudicators

Several commenters argued that the independence and impartiality of immigration judges and immigration adjudicators must be affirmed. They asserted that the proposed rule would adversely affect the independence of the Board. Some of these same commenters expressed the view that immigration courts should be independent from the Department.

These comments misapprehend the distinction between “independence” and “fundamental fairness.” The Constitution and fundamental fairness, not that the adjudicator be “independent” of policy direction or management by the Executive. The Department agrees with the principle of independence of adjudicators within the individual adjudications, but notes that freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review. The case management process that is established and delegated by the Attorney General to the Director of EOIR and the Chairman deals with management of the workload, not professional judgment in adjudicating any individual case. Similarly, establishing standards for review by rule is well within the Attorney General’s authority to oversee and manage the Board; again, it is not related to the Board’s professional judgment in adjudicating any individual case. The key to understanding here is that the Department employs Board members to make professional adjudicatory judgments in individual cases and to establish precedent subject to further review, but it is within the Attorney General’s authority to manage the caseload and set policy.

The authority of the Attorney General to establish standards for the Board’s adjudications, and to review the decisions of the Board, is well established. “[T]he Board acts on the Attorney General’s behalf rather than as an independent body. The relationship between the Board and the Attorney General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.” Matter of Hernandez-Casillas, 20 I&N Dec. 262, 289 n.9 (BIA 1990, A.G. 1991).

The final rule does not obstruct the Board’s judgment. As the Supreme Court has noted, “The Board is appointed by the Attorney General, serves at his pleasure, and has certain regulations (that provided) that ‘in considering and determining * * * appeals, the Board * * * shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the cases.’ The decision of the Board * * * shall be final except in those cases reviewed by the Attorney General.” United States ex rel. Accardi v. Shaughnessy, 347 U.S. 280, 286 (1954). In that case, the Court initially found sufficient cause for a further hearing on whether the Attorney General had interfered with the authority that he had delegated to the Board, and concluded: “[A]s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.” Id. at 267. However, after a formal hearing on the petition for habeas corpus and further review by the court of appeals, the Court ultimately concluded that no such violation of the regulation, adversely affecting the respondent, had occurred. Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280 (1955).

This case is important to understanding the final rule for two distinct reasons. First, the final rule amends the very rule under consideration by the Supreme Court in Accardi to structure the Board’s procedures and scope of review in all cases. This is precisely the manner by which the law requires such changes to be made: amendment of the Board’s regulations. Second, no portion of the final rule relates to any specific case or alien, or decides any such case, or implicates any alien. The actions here taken are those prescribed by the Court in Accardi.

3. Attorney General Opinions and Written Orders

Several commenters objected to the new language in § 3.1(d)(3)(i) of the proposed rule that the Board is subject to legal opinions and written orders issued by the Attorney General, in addition to the Attorney General’s review of individual Board decisions. The Department notes that the proposed rule, in this respect, is virtually identical to the proposed rule published by former Attorney General Janet Reno, and retains this provision without change. 65 FR 81435, 81437 (Dec. 26, 2000).

The Attorney General is the principal legal advisor to the President and the Executive Branch. In particular, section 103(a) of the Immigration and Nationality Act (“Act”), 8 U.S.C.
1103(a), provides that the opinion of the Attorney General on legal issues is controlling. In addition, the role of the Department's Office of Legal Counsel in issuing legal opinions, on behalf of the Attorney General, that are binding on the Executive Branch, is well established. See, e.g., Secretary of the Interior v. California, 464 U.S. 132, 320-21 n.6 (1984); Sea-Land Service, Inc. v. Department of Transportation, 137 F.3d 640, 643 (D.C. Cir. 1998).

This rule makes clear that the Attorney General need not be strictly limited to the issuance of legal opinions and the direct review of individual Board opinions, and that the Attorney General may provide direction to the Board through written orders. It may be appropriate for the Board to take account of the policy goals or priorities established by the Attorney General. Such actions by the Attorney General do not encroach on the decisional independence of Board members in particular cases before them.

4. The Effect of Regulations

Although not specifically raised in the public comments, the Department also notes that the language of § 3.1(d)(1) of the proposed rule states that the Board will resolve the issues before it in a manner that is "consistent with the Act and the regulations." This language clarifies the role of regulations in administrative adjudications under the Act.

The Board has long recognized that it is bound by the provisions of the Act, as well as by regulations adopted by the Attorney General. See Matter of Ponce de Leon-Ruiz, 21 I. & N. Dec. 154, 158 (BIA 1996) ("The Board is bound to uphold agency regulations ... A regulation promulgated by the Attorney General has the force and effect of law as to this Board and Immigration Judges.

The Board has expressly acknowledged, for example, that the Attorney General's determination of a legal issue in interpreting the Act is binding on the Board and the immigration judges, even if that determination is reflected in the SUPPLEMENTARY INFORMATION to a rule rather than in the text of a rule or in an Attorney General or OLC Opinion. See Matter of A-A. 20 I. & N. Dec. 492, 502 (BIA 1992): "In the supplementary information published with the regulations, the Attorney General made clear that "under the prevailing interpretation, the phrase "shall apply to admissions" as used in section 511(b) of the 1990 Act refers to all applications for relief pursuant to section 212(c) of the Act submitted after November 29, 1990, whether at a port of entry or in subsequent proceedings before a district director or Immigration judge." 55 FR 50333-34 (1991) (Supplemental Regulation). The Attorney General has thereby determined that the statutory bar to section 212(c) relief shall apply only to those applications submitted after November 29, 1990. We are therefore bound by his determination in this regard.

Regulations in effect have the force and effect of law." (citations omitted).

The immigration regulations, however, include not only those rules adopted personally by the Attorney General, but also substantive and procedural rules duly promulgated by the Commissioner of the Service, under an express delegation of rulemaking authority from Congress to the Attorney General and, in turn, from the Attorney General to the Commissioner. See 8 U.S.C. 1103; 8 CFR 2.1. The Department fully recognizes and reiterates, of course, that the Board and the immigration judges are independent of the Service (although some court opinions contain language that appears to blur this key distinction). For this reason, the Attorney General, and not the Commissioner, has consistently promulgated the regulations that govern the organization, procedures, or powers of the Board and the immigration judges and the conduct of immigration proceedings. See, e.g., 8 CFR parts 3, 236, 240. Thus, for example, standards governing the availability of discretionary relief in immigration proceedings are properly adopted by the Attorney General, either by rule, e.g., 8 CFR 240.58, or by written decision, e.g., Matter of Jean, 23 I. & N. Dec. 373, 383-85 (A.G. 2002). See generally, Lopez v. Davis, 531 U.S. 230, 238-42 (2001).

The authority delegated to the Commissioner to promulgate substantive or "legislative" rules does properly extend, however, to the interpretation of the general provisions of the Act. A regulation adopted pursuant to delegated statutory authority and pursuant to applicable rulemaking requirements under the Administrative Procedure Act has the "force and effect of law" as a substantive or legislative rule. The existing language in section 3.1(d)(1), which defines the broad general powers of the Board, specifies that the Board's authority in cases before it is "subject to any specific limitation prescribed by this chapter (constituting 8 CFR parts 1-490)." Necessarily, such limitations would include a regulatory provision that has given a specific legal interpretation to a provision of the Act. The language of this rule makes explicit what was implicit in the current version of § 3.1.

A fundamental premise of the immigration enforcement process must be that the substantive regulations codified in title 8 of the Code of Federal Regulations are binding in all administrative forums, and this specifically includes substantive regulations interpreting and applying the provisions of the Act. Of course, the Service and the Board are bound by the decisions of the federal courts, see, e.g., Matter of Anselmo, 20 I. & N. Dec. 25 (BIA 1989), but even the federal courts owe deference to authoritative agency interpretations of the substantive provisions of the Act, within the limits recognized by the Supreme Court. Chevron v. NRDC, supra (deference due agency's interpretation of statutes delegated for administration); INS v. Aguirre-Aguirre, supra (deference due administrative interpretations of the Act); cf., Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (same; different standard). In the absence of such controlling judicial interpretations, the respondents, the immigration judges, the Service, and the public at large should not be left to wonder whether the regulations interpreting and applying the substantive provisions of the Act will be binding in administrative proceedings under the Act. Cf. Matter of Rodriguez-Tejedor, 23 I. & N. Dec. 153, 156 (BIA 2001).

Such regulations themselves, of course, are susceptible of interpretation and application of their regulatory language by the immigration judges and the Board. However, if a substantive rule clearly defines a statutory term, or reflects a legal interpretation of the statutory provisions, then the position set forth in the rule will govern both the actions of the Service and the adjudication of immigration proceedings before the immigration judges and the Board. The Department recognizes that the Board members, under § 3.1(a)(1) in the current regulations, and under § 3.1(d)(1)(ii) as revised, "shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board." But such judgment and discretion must necessarily be exercised subject to the applicable standards. In turn, legislative rules that interpret and apply the provisions of the Act, and that are promulgated under rulemaking authority expressly delegated by the Attorney General have the "force and effect of law" and accordingly are part of the governing law. Accordingly, the Board members properly have decisional independence and discretion in interpreting and applying the law to the facts of particular cases and in exercising judgment in matters of discretionary action, but they are not independent from the governing regulatory standards that are otherwise binding and effective.
C. Expanded Single-Member Review

Many of the key features of the final rule are codified in the new provisions of 8 CFR 3.1(e), which directs the Chairman to establish a case management system with specific new standards for the efficient and expeditious resolution of all appeals coming before the Board. One of the primary components of the case management system is expanded single-member review. The currentstreamlining process permits a single Board member to affirm the decision of the immigration judge without opinion. 8 CFR 3.1(a)(7). The final rule retains this current practice intact, but expands upon this authority to permit a single Board member to affirm, modify, or remand the immigration judge’s decision with a short explanation. The final rule also provides that the reviewing Board member may refer a case for disposition by a three-member panel only if the Board member determines, after a review of the case on the merits, that it satisfies one of the standards prescribed in § 3.1(e)(6).

1. General Comments on the Adequacy of Single-Member Review

Many of the comments expressed the concern that single-member review of decisions by the immigration judges will mean that procedural failures in the record will be overlooked—that a single Board member’s review will somehow be “cursory” or will give a “boilerplate stamp of approval” to the decision on appeal. Some commenters asserted that the single-member decisions that will be issued under this rule will be poorly considered and will not provide a sufficient basis for further review by district and circuit courts.

The Department believes that the Board’s experience with the streamlining initiative has proven that fears of procedural failures or substantive errors being overlooked are not well founded. Even single-member review is a multi-stage process involving review by Board staff and by a Board member assigned to the screening panel. Individual Board members are well-equipped to determine both the legal quality and sufficiency of an immigration judge’s decision, and to determine if the appeal qualifies for referral to a three-member panel under § 3.1(e)(6). Each appeal will be fully reviewed and decided by the Board member, within the guidelines of current Board practice and legal precedent. Under the standards of § 3.1(e)(4) and (5) of this rule, it is only if the Board member finds that the record is complete and legally adequate, and the Board member agrees that the decision is legally correct, that the Board member may affirm the decision of the immigration judge, either as a summary affirmance without opinion or in a short opinion.

2. Summary Dismissals

The proposed rule included a provision that the screening panel, in those cases not summarily dismissed, would order the preparation of a transcript and set a briefing schedule. This provision presumed a review by the screening panel at the outset of the process based solely on the immigration judge’s order and the Notice of Appeal to determine such fundamental matters as whether the appeal was timely filed, whether the Board had jurisdiction, or whether the Notice of Appeal facially provided sufficient reasons for an appeal to be lodged. Some commenters did not seem to grasp the distinction between these core “adjudicability” issues that could be dismissed without the preparation of the transcript and briefs, and those issues, such as whether a brief was filed, that inextricably must be decided only upon the completed record. Although this lack of understanding appears to the Department to require this further explanation, it does not appear to warrant any change in the rule.

3. Summary Affirmances Under Streamlining

Many commenters expressed concerns about the proposal to authorize a single Board member to issue a summary affirmation of an immigration judge’s decision. A few commenters argued that decisions affirming an immigration judge’s decision without further elaboration would not be considered by the public to be as legitimate as a more fully developed written decision. Other commenters suggested that such an affirmation would hinder a respondent’s understanding of the rationale behind the decision. Some commenters also suggested that courts of appeals will return many of the single-member and summary affirmation decisions for a fuller written decision, thus negating any advances made in diminishing the Board’s backlog and arriving at decisions more quickly.

These concerns led the Department to consider the Board’s experience under the existing streamlining process, which, since 1999, has authorized single Board members to summarily affirm a decision without opinion, in appropriate cases. Similar objections were raised regarding summary affirmance when the Department first proposed the “streamlining” initiative in 1996, see 64 FR 56135, 56137 (Oct. 16, 1999), but have not been borne out by the Board’s experience since then.

The streamlining initiative allowed for summary decisions by a single Board member in certain limited situations. In FY2001, the Board issued 13,372 decisions under the streamlining initiative, or approximately one-half of all decisions. The Streamlining Study has not noted an appreciable difference in the quality of the decisionmaking based on the experience of the participants. Although a complex study of the results of streamlining, by following a specific set of streamlined cases through judicial review, has been proposed, such a theoretically “objective” evaluation could take years.

The Department may or may not undertake such a study, but the demands for fair, effective, and efficient adjudication of present cases do not permit the luxury of waiting for the results of such a study. Streamlining Study, 10–11 and Appendix C. Summary affirmances have not yet resulted in an overwhelming number of remands from Federal district and appeals courts. See 64 FR at 56138 (Oct. 18, 1999). Of the 23,224 streamlined decisions between 1999 and 2001, only 0.7% have resulted in judicial remands or reversals. Although this is not the full study envisioned by the Streamlining Report, cited above, it is, together with anecdotal evidence, sufficient evidence for the Department to proceed with an expansion of the single-member review process. The Department has concluded that streamlining has proven to be an effective procedure for managing an ever-increasing caseload and will significantly assist and promote fair and expeditious review of all pending and incoming appeals while maintaining a respondent’s rights to a reasoned administrative decision.

Furthermore, the Department has determined that, because a summary affirmation without opinion concludes that any error in the immigration judge’s decision was harmless or immaterial, there is no basis for the contention that a respondent will be unable to discern the rationale behind a decision. The immigration judge’s order provides the rationale, and thus the legitimacy, for the Board’s summary affirmation. The Department, in this regard, agrees with the succinct summary of one court of appeals that, “If the Board’s view is that
the immigration judge 'got it right,' the law does not demand that the Board go through the idle motions of dressing the immigration judge's findings in its own prose." Chen v. INS, 87 F.3d 5, 7 (1st Cir. 1996). The Department does not believe that there is any basis for believing that providing a recitation of the same facts and legal reasoning, albeit with citation to more legal precedent, will be beneficial to the respondent or the reviewing courts in most cases. Section 3.1(e)(4) of the final rule therefore continues to authorize a single Board member to issue an order with the same effect, an order affirming the immigration judge without opinion.

Moreover, Service appeals are equally subject to summary affirmance. Although the Service appeals few immigration judge decisions terminating proceedings or granting relief from removal, there is no distinction between those appeals and appeals filed by respondents.

4. Other Dispositions by a Single Board Member—Affirmations, Modifications, and Remands

Some commenters took the position that single Board members should not be permitted to affirm, modify, or remand the decision of an immigration judge in a short opinion. They argue that, if there are factual errors, a three-member panel should consider the entire record. This rule retains the existing "summary affirmance without opinion" process intact, but also authorizes single Board members to resolve other cases by issuance of a short order explaining the relevant issues in the case.

At the outset, it should be noted that the Board has been allowed to summarily affirm decisions of the immigration judge "for the reasons stated therein" for many years before the streamlining initiative was begun. The Board was never prohibited from doing so. In reality, some panels of the Board have done so in the past with great success.

However, there may be a number of instances where the reviewing Board member believes that the result of the case under review is essentially correct, but requires some further explanation or discussion in the disposition of the appeal. For example, an immigration judge may not have explained his or her evaluation of the facts or the law in the manner in which the respondent believes was appropriate. However, in those instances where there is no error that affects the outcome of the proceedings, there is also no point in expending substantial time and effort to "correct" such a record. Rather, a single Board member is authorized to issue a short order affirming the immigration judge's decision, but adding an additional explanation of discussion of the case in that Board member's view.

As discussed below, § 3.1(e)(5) also authorizes a single Board member to enter a decision that modifies the immigration judge's decision or remands the case to the immigration judge in any case that does not meet the standards for three-member panel review under § 3.1(e)(6). Such an opinion may properly begin with the opinion of the immigration judge and make specific modifications to that opinion. For example, a single-member opinion may state that the Board member "adopts the opinion of the immigration judge, except to note that" a particular issue is governed by intervening precedent, and to explain that the immigration judge's opinion would still be correct in light of the intervening precedent. Accordingly, such an opinion would conclude that the "immigration judge's opinion is affirmed for the reasons set forth therein and as set forth in this opinion." In this instance, the parties or any reviewing court would be able to look to the combination of the immigration judge's opinion and the single-member decision to understand the conclusions reached in the adjudication.

Similarly, the single-member review may result in a determination that the immigration judge clearly erred over a specific fact, but that the error did not prejudice the appealing party and was harmless. For example, an immigration judge might determine that the respondent had entered on a specific date based on conflicting evidence, but fail to note in the oral decision that a specific official government document indicated a slightly different date, such as a traffic violation in the United States some days prior to the date determined by the immigration judge. In this case, if neither date would satisfy a requirement for a period of continuous physical presence in the United States, the finding of fact might be both clearly erroneous and harmless. However, if the existence of the documented infraction, presented by the respondent, convinced the Board member that the respondent was being candid and warranted a favorable exercise of discretion in voluntary departure, which the immigration judge had also denied as a matter of discretion, the single Board member would have the option of modifying the order to grant voluntary departure.

Finally, a single Board member would be authorized to grant a motion to remand the record for specific factfinding if the respondent provided new evidence that was not previously available under the standards of the regulations. Whether agreed upon by all of the parties or contested, this single member review process permits the more expeditious disposition of cases than a full three-member panel review. In each of these cases, the Department has no reason to believe that such decisions would be any less efficacious than the current decisions of the Board resulting from three-member panel review.

The Department has noted that some language in this section and § 3.1(d)(2)(iii) could cause confusion over the finality of a decision by a single member. Accordingly, the language in these two provisions has been revised for clarity, and the provisions relating to finality of the Board's decisions have been consolidated in § 3.1(d)(6), as discussed in part 1 below.

However, the provision authorizing a single Board member to affirm, modify, or remand a decision must be understood in light of the standards for three-member panel review. That is, this authority will apply only if the Board member has already been issued a review on a appeal on the merits, that the case should not be referred to
a three-member panel—for example, because of factual determinations by the immigration judge that appear to be clearly erroneous, because the decision is not in conformity with applicable precedents, or because of the need to review the dispositions of similar issues by various immigration judges or to establish precedential guidance on matters of law or procedure.

5. Reversals and Terminations of Proceedings

Several commenters raised issues regarding the propriety of a summary decision by a single Board member that reverses the decision of the immigration judge, with some suggesting that a single Board member should not be able to reverse a decision granting relief or terminating proceedings, while others suggested that a single Board member should not be able to reverse a decision denying relief.

In general, if the single Board member believes that the decision of the immigration judge should be reversed because of a clearly erroneous factual determination or an error in law, or one of the other reasons specified in § 3.1(e)(6), the Board member should refer the case to a three-member panel. Under the terms of the proposed rule, it is reasonable to expect that most reversals would likely have been handled by a three-member panel rather than by single Board members. However, in order to avoid uncertainties as to how to proceed, this final rule adds an additional provision under the standards of § 3.1(e)(6) providing for referral of a case to a three-member panel where there is a need to reverse the decision of an immigration judge or the Service.

However, the Department also recognizes that there may be cases where reversals may be required as a nondiscretionary matter. This would be particularly true where there has been an intervening change in the law, such as the publication of a Board precedent decision interpreting a statutory provision relating to eligibility or ineligibility for a form of relief, that mandates the reversal of immigration judge decisions in pending cases that were inconsistent. If the Board determines that relief should be granted in particular circumstances, and an immigration judge had denied relief in a case where the facts are indistinguishable, there is no reason why a single Board member cannot summarily vacate the immigration judge's order denying relief. On the other hand, if the factual record does not compel reversal under the precedent as applied to that case, the single Board member may then refer the case to a three-member panel or demand the record for further proceedings. This is typical of the implementation of precedent.

6. Quality Assurance of Decisions

Other commenters questioned whether the Board would be able to assure that single Board members did not act arbitrarily or institute a mechanical, rather than thoughtful, approach to disposing of cases themselves or forwarding cases to three-member panels. In essence, these comments focus on both the individual thoroughness of review and the integrity of the review process among decisionmakers.

The Department has carefully considered the argument that there are inadequate safeguards to protect the system and its participants from divergent decisions by single Board members, but has concluded that the provisions of this rule as written are adequate. As mentioned previously, concerns regarding the adequacy of summary affirmances were addressed in the streamlined regulations. This rule builds upon the streamlining process by providing for a case management screening process to review all cases coming before the Board initially, thus allowing the members of the screening panel to become familiar with the broad range of issues coming before the Board, and the processes for both single-member and panel dispositions of cases decided by the Board. The existing checks of three-member review of complex issues and other cases under the standards of § 3.1(d)(6), and of en banc Board review, remain in effect. Accordingly, the Department believes that a shift to predominantly single-member adjudication in the substantial majority of cases is a legitimate exercise of agency discretion and will not significantly increase judicial demands.

However, the Department recognizes that any tribunal must be concerned with whether its members are adjudicating factually and legally similar claims in a similar fashion, a concern that is particularly apt given the large volume of cases being decided by the Board. See generally House Judiciary Subcommittee Hearing, at 10. These general concerns relating to this aspect of the Board's operation are important to the Department, to the immigration judges, to aliens in proceedings, and to the general public. These concerns are relevant whether applied to several different individual members' decisions in single-member cases, or to the results of the various three-member panel reviews that have been used in the past and will continue to be used in the future.

The Board recently has taken further steps to review the disposition of Board decisions in light of the need to resolve issues and provide guidance through the issuance of precedent decisions. Exercising its authority under the existing rules and the provisions made by this rule, the Department expects the Board will be able to determine whether issues are developing appropriately and whether referral of similar cases to a three-member panel, or further adjudication of those issues by issuance of a precedent decision, may be appropriate. See generally J. McKenna, L. Hooper & M. Clark, Federal Judicial Center, Case Management Procedures in the Federal Courts of Appeals 163 (2000) (case weighting and issue tracking in the Ninth Circuit); see generally B. White, et al., Commission on Structural Alternatives for the Federal Courts of Appeals: Final Report, at 39–40 (1998).

7. Single Board Member Participation in Reopening and Reconsideration of Own Decision

One commenter suggested that a single Board member who made an initial decision should be recused from adjudication of the motion to reopen or reconsider. The Department disagrees that the single Board member who made the initial decision should be recused from adjudicating these types of motions. The long-standing practice of the Board has been to assign motions to reopen and reconsider to the original Board Members who considered the appeal if they are available. This permits some familiarity with the record and obviates the use of such a motion to merely seek a second panel review of a decision. Moreover, as with the initial notice of appeal, a party filing a motion to reopen or to reconsider can state in the motion any reasons why the motion should be referred to a three-member panel for adjudication, as provided in § 3.1(e)(6).

D. Standards for Referral of Cases to Three-Member Panels

1. In General

Some commenters suggested a modification to the rule to specify additional types of cases that would be referred to a three-member panel. This rule retains the basic provisions of the proposed rule, which provide for an initial review of each case by a single Board member, and allows for referral of cases to a three-member panel based upon the specific criteria of 8 C.F.R. § 3.1(e)(6). This review process for
adjudicating the cases is both fair and efficient in meeting the Department’s goals. However, as discussed below, the Department has made certain clarifications to these provisions based on the public comments.

As noted above, an agency must have discretion to innovate and establish new procedures for administrative appeals. See Vermont Yankee, 435 U.S. at 525 ("[A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts, * * * to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."). (internal quotes omitted); cf. D. Meador & J. Bernstein, Appellate Courts in the United States 78-91 (1994) (differentiated internal decision tracks in federal courts of appeals, and other innovations).

The criteria used in the final rule are similar to those used by the federal courts of appeals in deciding whether to hold oral argument or to publish an opinion. The Department believes that these criteria strike the proper balance between cases that do not present novel or complicated issues that may be decided by a single Board member, and those issues that are appropriate for review by a three-member panel.

2. Particular Classes of Cases

Some commentators recommended that a full written decision by a three-member panel be required in cases denying asylum, withholding of removal, or Convention Against Torture relief.

The Department does not agree that certain classes of cases, such as those facially raising an asylum issue, should routinely be referred to a three-member panel. While asylum cases can include complex issues of law and fact, an objective review of those cases indicates that many do not. Moreover, cases involving asylum and asylum-related relief appear to make up a substantial portion of cases pending before the Board, although there are currently no statistics captured on forms of relief sought. The Department has not found evidence to support a view that every such case is profoundly complicated. Of course, in those appeals that do raise novel or complex factual or legal issues in asylum or asylum-related cases, a respondent is permitted, even encouraged, under the provisions of this rule to state in the Notice of Appeal and elaborate in a brief the reasons why the appeal merits review by a three-member panel under §3.1(e)(6) of the rule. Such contentions will be reviewed in each case as part of the case management screening process.

3. Clarification of Standards for Panel Review

In the proposed rule, the Department stipulated in §3.1(e)(6) that a Board member "shall" refer specific classes of cases for three-member panel review. It was not the Department’s intent, however, that this language might lead to judicial enforcement of three-member panel review. Rather, the Department believes that it is appropriate for the decision to refer a case for panel review to be made on a case-by-case basis according to the judgment of the reviewing Board member under the standards of this rule. Accordingly, the mandatory "shall" has been changed to "may" to avoid this possibility. This change does not broaden the authority of a single Board member to decide these cases, but rather provides discretion to refer the cases to a three-member panel if appropriate.

Section §3.1(e)(6)(ii) of the proposed rule states that three-member panels have authority to review records if there is 

"[t]he need to establish a precedent to clarify ambiguous laws, regulations, or procedures." The Department did not intend, by this language, to narrow the scope of panel review and decisionmaking to "Chevron step II" issues—i.e., "ambiguous" questions of statutory or regulatory construction. Chevron v. NRDC, supra. On further review, the Department has revised this language to make clear that three-member panels should be able to decide all preential questions of first impression as to the interpretation of the provisions of the Act and its implementing regulations, regardless of whether the parties or the immigration judge believe that the meaning is "plain" or "ambiguous." Accordingly, the Department has altered this language to permit three-member panels to adjudicate cases where there is a "need to establish precedent construing the meaning of laws, regulations, or procedures" encompassing both the Chevron step II interpretive issues as well as the initial Chevron step I interpretation of the statute or regulation to determine the scope and implementation of clear and plain statutory language.

The Department has noted that §3.1(e)(6)(iii) suggests that three-member review is appropriate if the error of law is "plain."). This might give the impression that the Department is adopting the "plain error" standard of F.R. Crim. P. Rule 52(b), by which an appellate court may review errors of law that are "plain" even if not raised by a party. Under the context of this rule, such an interpretation would tend to limit the authority to refer cases to a three-member panel by suggesting that only "plain error" was referable. This was not the Department’s intent and the word "plainly" has been deleted. If the single Board member believes that an error of law warrants three-member review, the single Board member may refer the case.

E. De novo Review and the Clearly Erroneous Standard

Many commentators expressed opposition to the provision in proposed §3.1(d)(3), which provided that the Board would not engage in de novo review but would accept the factual findings of the immigration judges in decisions under review, excluding findings as to the credibility of testimony, unless the determinations are clearly erroneous. These commentators noted that the Board had asserted its authority to conduct de novo review of cases on appeal from the immigration judges in cases dating back to Matter of B., 87 I.N. Dec. 1 (BIA 1955: A.C. 1956), and as applied in many decisions since then. Several NGOs attached lists of case examples describing instances where the Board on appeal had rejected the factual determinations or the denial of relief from removal by an immigration judge.

The Department has considered these comments very carefully. The final rule adopts the approach of proposed §3.1(d)(3) by eliminating the Board’s de novo appellate review of factual issues before an immigration judge, but with certain modifications. Guidance has been added to the rule to clarify the standard of review in light of comments received indicating confusion over the application of the clearly erroneous standard with respect to factual determinations.

The Department is also concerned that some commentators did not have a clear understanding of the relationship between this change and the standard of review with respect to matters of law and discretionary determinations, and, accordingly, the final rule contains new language to clarify these important issues as well. Where the Board reviews what was previously called a mixed question of law and fact in the proposed rule, and is now referred to as a discretionary decision, the Board will defer to the factual findings of the immigration judge unless clearly erroneous, but the Board members will retain their "independent judgment and discretion," subject to the applicable governing standards, regarding the review of pure questions of law and the
application of the standard of law to those facts (however, when an appeal is taken from a decision of a Service officer, the standard of review will remain de novo.)

1. De novo and Clearly Erroneous Standards of Review of Factual Determinations by the Immigration Judges

The Department received a number of comments opposed to elimination of de novo appellate review of determinations of facts by the immigration judges and the substitution of a "clearly erroneous" standard of review. The commentators generally asserted that eliminating the Board's de novo appellate review of factual issues will result in an overall denial of due process. Commentators also expressed their opinions that, because immigration judges occasionally misstate or omit important facts, and country conditions change, substituting "clearly erroneous" review for de novo review of facts will compel the Board to perform a brief, cursory review of the record, resulting in decisions that do not accurately reflect the facts.

The Department has determined that the proposed rule eliminating de novo review of facts by the Board and replacing it with "clearly erroneous" review should remain intact, with appropriate clarifications. The Department does not accept the suggestions that a clearly erroneous standard of review, as provided in this rule, will lead to decisions by the Board that "rubber stamp" the decisions of the immigration judges without thoughtful review or analysis, or that retaining de novo review by the Board is necessary in order to deal with erroneous decisions by immigration judges who are "antagonistic, biased and ignorant," in the terms of one commenter.

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing Board member or panel is left with the definite and firm conviction that a mistake has been committed. A factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

The "clearly erroneous" standard reflects the major role of immigration judges under the Act and implementing regulations as determiners of facts. In removal proceedings, it is the immigration judges, not the Board, who have been given authority to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." 8 U.S.C. 1229a(b)(1). Moreover, immigration judges are in the best position to make determinations as to the credibility of witnesses. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994). Immigration judges conducting the hearings are aware of variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 466 U.S. 412 (1985).

Accordingly, even under its present authority to conduct de novo review of the facts, the Board gives "significant weight to the determinations of the immigration judge regarding the credibility of witnesses" as well as to "other findings of an immigration judge that are based on her observance of witnesses." Matter of Burbano, 20 I&N Dec. at 874 (citations omitted); see Matter of A-S-, 21 I&N Dec. at 1108-1112. The Department believes that this deference is appropriate. Indeed, as we have discussed above, the Board has long engaged in the practice of adopting and affirming the immigration judges' factual determinations and decisions, for the reasons stated in the immigration judges' decisions, and this is "not only common practice, but universally accepted." Giday v. INS, 113 F.3d 230, 234 (D.C. Cir. 1997); see, e.g., Chen v. INS, supra; Prado-Gonzalez v. INS, 75 F.3d 631, 632 (11th Cir. 1996); Aflaloe v. INS, 45 F.3d 1379, 1382 (9th Cir. 1995).

Thus, for example, it is well established that, because the immigration judge has the advantage of observing the respondent as the respondent testifies, the Board already accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues. See Matter of A-S-, 21 I&N Dec. at 1109-1112; Matter of Burbano, 20 I&N Dec. at 874; Matter of Pula, 19 I&N Dec. 467, 471-72 (BIA 1987); Matter of Kulle, 19 I&N Dec. 318, 331-32 (BIA 1985), aff'd, 825 F.2d 1188 (7th Cir. 1987), cert. denied, 489 U.S. 1042 (1988). Under certain circumstances, the Board may not accord deference to an immigration judge's credibility finding where that finding is not supported by the record. See, e.g., Matter of B-, 21 I&N Dec. 66, 70-71 (BIA 1995); Matter of B-., 7 I&N Dec. 1, 32 (BIA 1955); A.G. (1956).

However, because an immigration judge has the ability to see and hear the respondent, which the Board and the courts of appeals do not, if the immigration judge bases an adverse credibility finding on the facts should be the "main event" rather than a "tryout on the road." Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

Just as the Supreme Court has concluded that the "clearly erroneous" standard is an effective, reasonable, and efficient standard of
appellate review of factual determinations by federal district courts, see Anderson, 470 U.S. at 574–
75, and Fed. R. Civ. P. 52(a), the Department has concluded that the “clearly erroneous” standard is an effective, reasonable, and efficient standard for appellate administrative review of factual determinations by immigration judges. The “clearly erroneous” standard is duly protective of the Department’s legitimate institutional interests in the effective adjudication of administrative appeals and eliminating the duplication of resources involved in successive de
novo factual determinations, first by immigration judges and then by the Board. At the same time, it allows for the correction of fact findings in the rare cases where the Board is left with the definite and firm conviction that a mistake has been committed. See generally United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Therefore, in the administrative immigration system, the Department has determined that the “clearly erroneous” standard of review—with its deference to the initial factfinder—should be “the rule, not the exception.” See generally Streamlining Study, supra.

This is not a novel standard in the administrative process; rather, similar standards have been applied within agency review proceedings for many years. See, e.g., 10 CFR 2.766 (Nuclear Regulatory Commission: domestic licensing proceedings; review of decisions of a presiding officer); 17 CFR
201.411 (Securities and Exchange Commission: consideration of initial decisions by hearing officers); 20 CFR 422.114 (Social Security Administration: annual wage reporting process); 26 CFR 614.405 (EEOC, decisions on appeals); 40 CFR 124.19 (EPA: appeal of certain permits). The Department believes there is ample authority and experience to apply this standard to the agency review process in immigration proceedings.

2. “Correction” of Clearly Erroneous Factual Determinations

The Department’s adoption of the “clearly erroneous” standard enunciated by the standards now commonly used by the federal courts with respect to appellate court review of findings of fact made by a trial court. See Dickinson v. Zurko, 527 U.S. 150, 153 (1999). Under this standard, an appellate tribunal merely has authority to reverse erroneous fact findings and not authority to correct them. See id. However, it has been pointed out that the word “correct” in proposed § 3.1(e)(6) might appear to give three-

member panels authority to go beyond the traditional “clearly erroneous” standard used in such review and to engage in de novo factfinding to “correct” clearly erroneous facts. This was not the Department’s intent and § 3.1(e)(6) has been revised.

3. Clearly Erroneous Standard Applied

One of the more complicated contexts in which the clearly erroneous standard will be applied is in the area of asylum. For example, the Board has established standards for immigration judges to make credibility determinations. Matter of A-S-, supra. These standards involve several different types of findings: whether inconsistencies exist, whether omissions in an application indicate exaggeration in testimony, or whether a respondent has indicated through his or her demeanor that he or she is being less than truthful.

The “clearly erroneous” standard will apply only to the factual findings by an immigration judge, including determinations as to the credibility of testimony, that form the factual basis for the decision under review. The “clearly erroneous” standard does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to “past persecution” or a “well-founded fear of future persecution.”

The distinction requires a more refined analytical approach to deciding cases, but focuses on the qualities of the decisionmaking that best suit the different decisionmakers. Immigration judges are better positioned to assess the facts with the witnesses before them; the Board is better positioned to review the decisions from the perspective of legal standards and the exercise of discretion.

For example, under section 208 of the Act, a respondent may establish eligibility for asylum by showing that he has been persecuted on account of a protected ground under section 101(a)(42) of the Act, e.g., religion. See generally Matter of Chen, 20 I&N Dec. 16 (BIA 1989). The immigration judge’s determination of what happened to the individual is a factual determination that will be reviewed under the clearly erroneous standard. The immigration judge’s determinations of whether these facts demonstrate harm that rises to the level of “persecution,” and whether the harm in question is “on account of” a protected ground, are questions that will not be limited by the “clearly erroneous” standard.

Similarly, in cancellation of removal, those facts that a respondent claims make up “exceptional and extremely unusual hardship” to a respondent’s putative qualifying relative under section 240A(b)(1)(D) of the Act, whether the putative qualifying relative is actually a qualifying relative, will be reviewed by the Board only to determine if the immigration judge’s determination was clearly erroneous. Whether those facts, as determined by the immigration judge and found not to be clearly erroneous, amount to “exceptional and extremely unusual hardship” under the Act may be reviewed by the Board de novo. See, e.g., Matter of Andaloza-Rosas, 23 I&N
Dec. 319 (BIA 2002) (evaluation of legal standards: de novo review leading to reversal of immigration judge’s grant of relief); id. at 330–331 n.1 (Oruña, dissenting, suggesting reliance on immigration judge’s factfinding leads to a different evaluation); Matter of Monreal-Aguinaga, 23 I&N Dec. 56 (BIA 2001) (evaluation of whether hardship to qualifying relatives is “substantially different from, or beyond, that which would normally be expected” from the removal of the respondent).

Third, in both of these two examples, the underlying statutes grant the Attorney General discretion to grant relief. This “discretionary” determination can likewise be considered under this dichotomy. What have historically been referred to as “equities” are facts that the respondent establishes in his or her case, and these factual determinations by an immigration judge may be reviewed by the Board only to determine if they are clearly erroneous. However, the “discretion,” or judgment, exercised based on those findings of fact, and the weight accorded to individual factors, may be reviewed by the Board de novo.

Thus, properly understood, the “clearly erroneous” standard will only apply to the specific findings of fact by the immigration judges, and will not limit the Board to reviewing discretionary determinations. Accordingly, in reviewing the various decisions of the immigration judges, the Board will still be able to consider and resolve instances where “differing decisions may be reached based on essentially identical facts.” Matter of Burbano, 20 I&N Dec. at 873. For these reasons, the Department does not agree with the comments suggesting that the “clearly erroneous” standard would “severely reduce” the Board’s ability to act as a check against the wide disparities in discretionary decisions by the immigration judges to grant or deny relief in factually similar cases.
4. Harmless Error

Several commentators expressed the view, in essence, that there exists a gap between review of all facts de novo and a “clearly erroneous” threshold. They argue that the immigration judges frequently misstate facts that require further review. The Department agrees that in some cases an immigration judge may misstate facts, but disagrees that in all such cases further adjudication of those facts is necessary. In many instances, such errors, or perceived errors, do not prejudice a respondent, and are, in effect, harmless errors. Section 3.1(e)(4) of the rule provides that summary affirmance is only appropriate if the single Board Member determines that “any errors in the decision under review were harmless or nonmaterial” and all other conditions apply. Thus, an affirmation without opinion signifies that any such error is considered to be harmless. Historically, many cases are appealed to the Board on the basis of perceived factual errors in an immigration judge’s decision that are, in fact, harmless or immaterial. For example, an immigration judge’s misstatement of a fact in evaluating whether a nonimmigrant respondent seeking cancellation of removal had established a particular element of “exceptional and extremely unusual hardship” under 8 U.S.C. 1229b(b)(1)(D) of the Act is not a harmful, prejudicial, or material error if the immigration judge also concluded that the respondent had not accrued the required 10 years of continuous physical presence under subsection (b)(1)(A). A single-member brief order may even explain why such an error is harmless and not prejudicial. By contrast, where a material finding of fact is clearly erroneous, the Board may review the record before a three-member panel under §3.1(e)(6)(v). This is precisely the function of a three-member panel.

5. Litigation Concerns

Some commenters were also of the opinion that if the Board reviews fact findings to determine if they are “clearly erroneous,” as opposed to deciding the facts de novo, courts will give less deference to the agency’s decisions and more cases will be remanded to the immigration judges for further factfinding; they allege this to be true particularly in cases where an asylum applicant is alleging changed country conditions. Consequently, the commenters were of the opinion that by implementing a “clearly erroneous” standard of review for facts, the Board’s appellate decisionmaking would become less, rather than more, timely and efficient.

The Department disagrees with this evaluation. Under the Act, courts of appeals must apply a highly deferential “substantial evidence” standard in reviewing administrative factfinding in removal orders, including the findings made regarding asylum and changed country conditions. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (substantial evidence standard required for asylum determinations); 8 U.S.C. 1252(b)(4)(B) (“administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary”). Where the Act precludes direct review in the courts of appeals, district courts have limited jurisdiction to review removal orders by means of habeas corpus, encompassing only purely legal challenges to removal orders. INS v. St. Cyr, 533 U.S. 289, 306, 314 n.38 (2001). Habeas review does not permit review of administrative factfinding, except perhaps to determine whether such facts are “unsupported by any evidence.” Id. at 306 n.27.

Accordingly, the commenters’ concerns that courts may choose to accord less deference to administrative factfinding and may reverse the Board more frequently if the Board reviews appeals under a “clearly erroneous” standard are not well founded. Such concerns overlook the courts’ inability to alter the standard of review, and their obligation of deference to the Attorney General’s factfinding (by whatever means such authority is exercised).

The Department recognizes that increasingly, and particularly in asylum cases, some courts have failed to defer to administrative factfinding. See, e.g., Abovian v. INS, 257 F.3d 971 (9th Cir. 2001) (Kozinski, O’Scannlain, T.G. Nelson, Kleinfield, Graber, Tallman, Rawlinson, J., dissenting from denial of rehearing en banc); Agbayu v. INS, 219 F.3d 962, 967 (9th Cir. 2000) (Hall, J., dissenting); Briones v. INS, 175 F.3d 727, 730 (9th Cir. 1999) (en banc) (O’Scannlain, J., dissenting); Borja v. INS, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (O’Scannlain and Kleinfield, J., dissenting); Megasian v. INS, 184 F.3d 1028, 1037 (9th Cir. 1999) (Rymer, J., dissenting). The Department disagrees with such an approach, and therefore does not consider it appropriate to alter the nature of the Board’s appellate review to conform to it.

6. De novo Review by the Attorney General

Some commentators suggested that it was inappropriate for the Attorney General to adopt a “clearly erroneous” standard for the Board, but use a de novo standard himself in reviewing the Board’s determination, such as in Matter of Y-L., 23 I&N Dec. 270 (A.G. 2002). This suggestion misapprehends the different roles of the Attorney General and the Board. As discussed above, the Attorney General is charged not merely with adjudicating immigration matters, but with establishing policy and managing the immigration process. The Board, on the other hand, is delegated authority by the Attorney General to adjudicate cases before it, not make policy or manage the immigration process. It is appropriate for the Attorney General to exercise broader authority than he delegates to the Board.

7. Review of Service Decisions

The comments on de novo review have raised an issue of the scope of review of factual determinations by officers of the Service in decisions by the Board. Review of decisions by the district director and other Service officers do not have the benefit of a full record of proceedings or, except in rare cases, a transcript of hearings before an independent adjudicating officer. Rather these decisions are made on applications and interviews, and other information available to the Service.

In light of these differences, the Department has clarified the language of the final rule to retain de novo review of Service officer decisions, either by a single Board member or by a three-member panel. Accordingly, §3.1(d)(3) has been revised to retain the Board’s authority to review decisions of the Service de novo. The process for initial single Board member review will be retained, but the scope of review is broadened. The same standards for referral to a three-member panel will be applied.

F. New Evidence and Taking Administrative Notice of Facts

Section 3.1(d)(3) of the proposed rule also generally prohibits the introduction and consideration of new evidence in proceedings before the Board, except for taking administrative notice of commonly known facts such as current events, or the contents of official documents such as country condition reports prepared by the Department of State.

Several commenters suggested that the rule would alter the Board’s authority to administratively notice facts. Some commenters believed that a broadening of the authority to administratively notice facts was appropriate, while others argued that
the Board should, in essence, not be able to take administrative notice of facts without providing a hearing. Where it is established that an appeal cannot be properly resolved without further findings of fact, other than those established by administrative notice, the Board will allow the proceeding to the immigration judge.


Contrary to the assertions of several commentators, this rule does not disturb the Board’s authority to take administrative notice of commonly known facts. The Board may, and does, take administrative notice of commonly known facts such as agency documents and current events. See e.g. Matter of S.-M.-F., 21 I&N Dec. 722, 733 n.2 (BIA 1997), disapproved on other grounds, Lira-Cabada v. INS, 215 F.3d 889 (9th Cir. 2000); Kaczmarczyk v. INS, 953 F.2d 588, 593 (7th Cir. 1991). The language of the regulation explicitly uses the phrase "commonly known facts" to describe the kinds of facts or matters of which the Board may take administrative notice, giving way by way of example "current events" or "the contents of official documents." The Department intends by use of this language to make clear that the Board may take administrative notice not only of current events but also of the contents of official documents such as the country reports prepared by the Department of State, including its foreign policy expertise, analysis, and opinion.

The Department does note, however, that there is an intercircuit conflict over the degree to which the Board may take administrative notice of facts without first providing notice and an opportunity to respond.7 After reviewing the comments, the Department agrees with those courts that have found post-decision motions to reconsider and reopen under 8 CFR 3.2, alleging a specific error of fact (the administratively noticed fact), to be sufficient to preserve the respondent's constitutional due process rights.

In immigration proceedings, the administrative notice of facts—usually relating to country conditions—revolves around issues that form the respondent's burden of proof for relief from removal. The most common facts about country conditions appropriate for administrative notice are those contained in country reports and profiles prepared by experienced foreign service officers in the Department of State who are experts on specific regions and whose courts have recognized, they, the immigration judges, and the Board owe deference to the Department of State on such matters of foreign intelligence as assessments of conditions. Some commentators relied upon the opinions expressed by NGOs in disputing the deference that should be given to Department of State reports and profiles, either directly or through administrative notice of facts and official documents. However, reports by NGOs are simply not as reliable as those of the Department of State because the mission of those organizations is to advocate specific views and which, their positions are often based on anecdotal experiences of individuals and unidentified persons, and their opinions tend to lack the disarmament and expertise of those provided by the Department of State.

The important, complicated, delicate, and manifold problems of assessing conditions in a foreign country warrant deference to those whose expertise the United States trusts with that duty. It is the respondent's responsibility to present facts on the record that refute those assessments. The Department believes that, given this required deference, post hoc rebuttal of administratively noticed facts is appropriate and sufficient for due process purposes. Accordingly, the Department has not altered the final rule in response to these comments. Nonetheless, the Board is mindful of the limitations on the use of administrative notice in those circuits that have contrary precedents.

In light of the intercircuit conflict and the deference that is due such Department of State reports and profiles, the Department believes that a compelling case is made for a liberal interpretation of the rule on reconsideration and reopening in cases in which the Board has administratively noticed facts such as a Department of State country report. Accordingly, the Department is of the view that in any case in which the Board takes administrative notice of a specific fact by reference to any documentary evidence, e.g., a Department of State country report or profile published after the immigration judge's decision, not

7 The First, Seventh, Ninth, and Tenth Circuits have held that it is a violation of due process for the Board to take administrative notice of new facts on appeal without affording notice and an opportunity to respond. In the Ninth and Tenth Circuits the board must provide notice and an opportunity to respond before taking administrative notice. Kowalczyk v. INS, 249 F.3d 1143 (10th Cir. 2001); de la Llana-Castillon v. INS, 16 F.3d 1093, 1099-1100 (9th Cir. 1994); Castillon-Villegas v. INS, 972 F.2d 1037 (9th Cir. 1992) motion to reopen does not provide adequate opportunity to rebut administrative notice of changed country conditions and due process requires BIA to give prior notice and opportunity to rebut. In other circuits a post-decision motion to reopen, or, more properly, a motion to reconsider, disputing the taking of administrative notice is a sufficient remedy. Gonzales v. INS, 77 F.3d 1015, 1024 (7th Cir. 1996); D.-F. v. INS, 30 F.3d 1090 and 10th circuits and holding that "mechanism of the motion to reopen [ ] allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts." (land) provides a sufficient opportunity to be heard to satisfy the requirements of due process. A. H. Gutierrez-Rogey v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992); Rivero-Cruz v. INS, 948 F.2d 962, 966-69 (5th Cir. 1991), reaffirming, 954 F.2d 713 (1992). The First Circuit initially adopted the position that a post-decision motion to reopen is sufficient to satisfy due process but may not continue to hold that view. Compare Cebremichal v. INS, 10 F.3d 28 (1st Cir. 1993) ("We agree with the majority of those courts which have addressed the question that a post-decision motion to reopen [ ] can ordinarily satisfy the demands of due process."") (emphasis added); citations omitted), with Ferguson v. INS, 138 F.3d 13 (7th Cir. 1998); and Gutierrez-Rogey v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992); Rivero-Cruz v. INS, 948 F.2d 962, 966-69 (5th Cir. 1991), reaffirming, 954 F.2d 713 (1992). The First Circuit initially adopted the position that a post-decision motion to reopen is sufficient to satisfy due process but may not continue to hold that view. Compare Cebremichal v. INS, 10 F.3d 28 (1st Cir. 1993) ("We agree with the majority of those courts which have addressed the question that a post-decision motion to reopen [ ] can ordinarily satisfy the demands of due process."") (emphasis added); citations omitted), with Ferguson v. INS, 138 F.3d 13 (7th Cir. 1998); and Gutierrez-Rogey v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992); Rivero-Cruz v. INS, 948 F.2d 962, 966-69 (5th Cir. 1991), reaffirming, 954 F.2d 713 (1992).
therefore in the record of proceedings, either party may file as part of a motion to reopen any contradictory documentary evidence (e.g., a contradictory report by a third party such as Amnesty International), which shall be considered, for the purpose of this section, to have been not available and which could not have been discovered and presented at the former hearing. If administrative notice is taken of a fact, then the parties should have the opportunity to challenge that fact. The Department’s interpretation is that the “not available” and “could not have been discovered” requirements of section 3.2(c) should not stand in the way of such a review and determination on the merits of the motion. If the motion has merit and additional factfinding is required, the Board may reconsider and vacate its decision, reopen proceedings, and remand the record to the immigration judge.

G. Reduction in Size of the Board

The proposed rule provided that, after the transition period of 180 days has elapsed, the final structural reform of the Board will occur. The number of Board members will be reduced to 11, with the Attorney General designating the membership of the Board. After reviewing the comments, the Department has determined to retain the reduction of the size of the Board to 11, as proposed.

We note at the outset that two individuals who understand the Board well from their previous experience as Board members, and who testified before the House Judiciary Subcommittee, both agreed that the size of the Board should be reduced but differed over the proper reduction—one around 9 members and one reduction to no more than 9 while the other suggested 16.


The Department has determined that 11 Board members is the “appropriate size for the Board based on judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload.” The Board is expected to function with two three-member panels and five Board members acting individually in deciding cases. The Department believes that this is a realistic evaluation of the resource needs, capacities and resources of the Board in adjudicating immigration issues. The Attorney General may reevaluate the staffing requirements of the Board in light of changing caseloads and legal requirements following implementation of the final rule.

1. Quality of Board Member Personnel

Several commentators questioned how this reduction would occur. Commenters objected to the reduction stating generally that it raises constitutional issues, but without significant elaboration. These commenters either supported maintaining the current number of Board members or supported an increase in the number of Board members, staff, and resources.

Comments concerned the transition period, in which the backlog of cases will be eliminated and the Board size reduced.

A few commenters stated that the reduction could be perceived as part of a design to eliminate Board members with whom the Attorney General disagrees and noted that diverse Board member opinions are important. Several commenters asserted that, during the 180-day transition period, Board members would be “auditioning” to keep their jobs and that it would affect the perceived impartiality of current Board members given that it was announced before the backlog was reduced.

The Department has already addressed, in part III.B above, the general comments asserting that reducing the number of Board members would adversely affect the due process of respondents by affecting the independence and perceived impartiality of the Board.

The Department expects that the reduction in the number of Board member positions will be effectuated by the Attorney General from among the current Board Members, after consultation with the Director of the Executive Office for Immigration Review (EOIR) and the Board Chairman, but that determination remains one that is within the discretion of the Attorney General. As EOIR Director Rooney pointed out in testimony before a subcommittee of the House Judiciary Committee, the Attorney General generally looks to traditional factors that guide the selection of adjudicators, such as experience, judicial temperament, and efficiency, particularly in an experienced adjudicator. Testimony of K. Rooney, House Judiciary Subcommittee Hearing, 37–38. The Department expects that the final determination will be made on factors including, but not limited to, integrity (including past adherence to professional standards), professional competence, and adjudicatory temperament. Cf. D. Meador, M. Rosenberg, & P. Carrington, eds., Appellate Courts: Structures, Functions, Processes and Personnel (1994), 671–681 (varying views on the qualifications of judges in the judicial setting rather than the administrative adjudication setting); D. Meador & J. Bernstein, Appellate Courts in the United States (1994), 94–99.

In the end, however, it is not possible to establish guidelines or specific factors that will be considered, nor should the Attorney General limit his decisionmaking process. The decision as to the relative values and the weights given to those values belongs to the Attorney General. Each Board member is a Department of justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department’s mission. Moreover, and of critical importance, the Department has not indicated that any of the existing Board members will be adversely affected by the reduction in the number of Board members. Until the Attorney General makes these personnel decisions, such comments are, at best, speculative.

A few commenters supported reduction based solely on seniority. While seniority is an experience indicator, the Department does not believe that it should be considered a presumptive factor.

Several commenters have suggested that the Attorney General must appoint individuals to the Board who are expert in immigration law. The Department believes that this argument rests on the faulty premise that immigration law is the only area of the law where Board members must have expertise. Although immigration law is a unique blend of foreign and domestic concerns, it is not so discrete and insular in nature.

In reality, immigration law is part of the larger body, and requires a more global view, of federal law. The Board is no longer, and perhaps never has been, a body whose decisions relate only to the interpretation of the Act and regulations. More frequently now than ever before, the Board decides cases based on the criminal law, and expertise in that area of the law is also required of the Board. Accordingly, it is not...
merely expertise in immigration law that must guide the Attorney General's decisions on immigration law and policy, or to whom to delegate authority to make immigration decisions, but also expertise in the inextricably interrelated criminal law. By the same token, the Board’s determinations under the Refugee Act of 1980, 8 U.S.C. 1158, and implementing regulations, 8 CFR part 208, necessarily include both facts and inferences from the expertise of the Department of State on matters of foreign conditions. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (deference due Attorney General’s, and hence Board’s, role in foreign policy); INS v. Abudu, 485 U.S. 94, 110 (1988) (foreign policy considerations in immigration proceedings).

2. Resource Requirement Concerns

A number of commenters expressed the view that the current case backlog reflects the need for more resources. In their view, increased attorney and paralegal staffing, as well as filling all existing Board member positions, would be a preferable method of reducing the backlog. As described above, beginning in 1995, the Department sought to aid the Board in reducing its burgeoning caseload by increasing its size from 5 to 23 Board members with increases in its


3. Advantages of a Smaller Board

The Department believes that the continued expansion of the Board has, indeed, had significant institutional costs including effects on the cohesion of the Board’s decision making process, and the Department’s perception of the uniformity of its decisions, and an administrative and supervisory strain on the Board’s staff. Cf. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 16–21 (1975). These costs have been magnified by substantial changes in the immigration laws and have resulted in unnecessary delays in issuing final agency decisions. This continued expansion has shifted the Board’s attention away from providing nationwide guidance on those cases presenting difficult and repetitive or controversial legal questions. Testimony of M. Heilman, House Judiciary Subcommittee Hearings 13, 16. The institutional cost of unlimited expansion is not a new phenomenon, but one that has been experienced in the federal court system. See generally Structural Alternatives, at 29–57. At the same time, the Board’s precedent decisions indicate an inability to reach consensus about even fundamental approaches to the law.

Accordingly, the Department agrees with certain comments that the reduction in the number of Board members should increase the coherence of Board decisions and facilitate the en banc process, thereby improving the

value of Board precedents. The Department believes that more and clearer precedent will be of greater assistance to the immigration judges, practitioners, and respondents.

Another commenter argued that reducing the number of Board members combined with increasing single-member review will save American taxpayers money. It is not clear to the Department that the cost of operating the Board will substantially be reduced, nor does the Department plan to propose a substantial reduction in budget outlays. However, by further expediting the disposition of cases for aliens currently held in detention, the Department expects to realize savings in the costs of detaining such aliens pending their removal from the United States. In addition, the Department believes that following implementation of the streamlining process and this rule, maintaining the current number of Board members will be unnecessary. With greater efficiency, fewer Board members will be needed to adjudicate the caseload. A reduction to 11 Board members will allow for the most efficient use of resources to adjudicate administrative appeals on a timely basis.

H. Case Processing Issues

Section 3.1(e)(8) of the proposed rule, as well as §§3.3 and 3.5, established new time limits for several elements of the appellate process while maintaining several aspects of current Board practice. Some commenters implied that these time limits could create justifiable rights. The Department disagrees. These internal management limitations are intended only to provide direction for the management of the Board, not establish any right or remedy in litigation. See United States v. Caceres, 440 U.S. 741 (1979).

In response to the public comments, the Department has changed the briefing process, establishing a distinction between detained and non-detained cases. For detained cases, the final rule establishes a simultaneous briefing process, with a time limit of 21 days for the filing of briefs by each party. For non-detained cases, the Department is retaining a sequential, but reduced, briefing schedule, allowing the appealing party 21 days in which to file a brief, and allowing the opposing party 21 days to respond. As in the proposed

10 The Board currently has 19 members and 4 vacancies, which the Department has declined to fill in light of the fact that the expansion has not achieved the desired results based upon historical staffing levels.

11 The Department notes that not all of the Board precedent decisions are issued en banc. Under 8 CFR 3.1(h), the Board designates particular decisions for publication as precedent decisions, but the Board can and frequently does designate a three-member panel decision as a precedent decision.
rule, an immigration judge will have 14 days to review the transcript and approve a decision (or 7 days after returning from an absence from the court).12 Also as in the proposed rule, an appealing party asserting that a three-member review is warranted must do so in the Notice of Appeal within the period allowed for an appeal. Once the record is completed and ready for adjudication, single Board member decisions must generally be made within 90 days and three-member decisions must be made within 180 days. Provisions for discretionary extensions of time have been expanded. The Department has also retained the provisions of the proposed rule on rehearings en banc.

1. Simultaneous Briefing

Several commenters expressed concern that the practice of simultaneous briefing, coupled with a shorter time frame, raises due process concerns because it would be unfairly burdensome to immigration practitioners and pro se litigants. Some commenters believe that, as a consequence of the compressed time frame, pro bono representation would decrease because of the difficulties associated with the new rule. Many commenters asserted that pro se respondents who are unfamiliar with English and the immigration laws will be unable to effectively articulate their position on appeal or to anticipate and rebut arguments presented by the Service. Furthermore, a few commenters argued that detained respondents will not even have the benefit of the 21-day period due to systemic problems in receiving the transcripts and briefing schedules in a timely manner while the defendant is detained or has been moved to other detention facilities. Finally, multiple commenters suggested that the reduced time frame would result in hastily drafted briefs that would be unhelpful to the Board in deciding appeals.

After reviewing the comments received, the Department has decided to change the proposed regulation with respect to the simultaneous briefing process but otherwise maintain the time limits as proposed. The final rule modifies the existing 8 CFR 3.3(c) by creating a distinction between detained and non-detained cases. In detained cases, the Department maintains its position that a 21-day simultaneous briefing schedule is sufficient. Simultaneous briefing is the common practice in detained cases. See, e.g., Matter of Jean, 23 I&N Dec. 373, 380 (A.G. 2002) (addressing simultaneous briefing before the Board in detained cases).

In non-detained cases, the Department will retain the proposed 21-day briefing schedule, but agrees with the commenters that this should be a sequential briefing schedule, which is currently the common practice in non-detained cases. Under existing regulations, parties are allowed 30 days each in which to file briefs (for a total of up to 60 days). Under the final rule, for non-detained cases, after a transcript is made available, the Board will establish a 21-day sequential briefing schedule. The ability of either party to seek an extension of the period for filing a brief or reply brief up to 90 days for good cause shown remains from current Board practice. The Department approves of the Board's current practice of granting extensions of only 21 days. Beyond that, the Board retains its discretion to consider briefs and reply briefs that are filed out of time. Furthermore, the parties also retain their ability to file motions to reconsider after the Board has rendered a decision. 8 CFR 3.2(b).

2. Transcript Timing

Other commenters indicated that, because the availability of a transcript is beyond an appellant's control, an appellant might be unfairly surprised by its arrival and unable to prepare a brief within the time frame. Some commenters stated that, in their experience, it has sometimes taken a year or more for the preparation of transcripts after the filing of an appeal with the Board.

The Department agrees that substantial delay in the production of transcripts in many cases has been a serious problem. The earlier a transcript is available, closer in time to the actual hearing and decision of the immigration judge, the more readily the respondent and the Service will be able to utilize that transcript. The longer a transcript is delayed, the more the events memorialized in that transcript may fade from the respondent, respondent's counsel, and the Service's trial attorney's mind. The Department believes that fairness requires that the transcript be made available to all of the parties at the earliest possible time.

The Department also recognizes that the Board has made substantial improvement in this area. For appeals filed in fiscal year 2001, the average time from the filing of the Notice of Appeal to setting the briefing schedule was 158 days. That statistic would appear to reflect the commenters' concerns. However, for fiscal year 2002 through June 2002, the average time was 97 days. The Department is not satisfied with this delay and believes that a 60-day time-frame is possible and should be implemented. If necessary, the Board and the immigration courts should alter their internal operating procedures to ensure that transcripts can be provided within this time-frame.

In response to this concern by the commenters, the Department has added a requirement in § 3.5(a) that the Chairman and the Chief Immigration Judge take such steps as necessary to ensure that transcripts are produced as soon as practical after the filing of the Notice of Appeal. This will also assist the immigration judges in reviewing any oral decision in the transcript. The Chairman and the Chief Immigration Judge are expected to report on progress in this area regularly.

3. Immigration Judge Time Limits To Review Decisions

Some commenters voiced a concern that the 14-day time limit for an immigration judge to review transcripts and any oral decision was unrealistic in high-volume jurisdictions. The Department disagrees. The Department recognizes that there will be some dislocation as the transcription process is accelerated and the immigration judges have a shorter period of time to review a number of transcripts to meet this deadline. However, once these processes are in place, that pressure will dissipate. The Department is confident that the immigration judges will be able to adjust their schedules to accommodate this implementation process.

4. 30-Day Notice of Appeal Filing Requirement

Some commenters felt that the 30-day period within which an appeal must be filed was too short a period within which a party can be expected to articulate reasons for contending that three-member review is warranted. The Department disagrees. The filing time for a Notice of Appeal has not been changed by the proposed or final rule. The existing 30-day period—a substantial increase in the 10-day limit
that formerly applied until recent years—appears to have worked well. As noted above, the parties are already familiar with the issues presented and should, in a short period of time, be able to articulate with some specificity the issues that they wish to raise on appeal. The transcript of hearings is not necessary for this process. The facts should be fresh in the parties' minds and the legal arguments should have been fleshed out before the immigration judge. The Department has found no reason to change this provision of the regulations.

5. Decisional Time Limits

Some commenters also argued that the 90- and 180-day time limits for adjudication were unrealistic and would result in rushed and erroneous decisions. Other commenters, however, supported the new time limits, and a few suggested that a 90-day limit be placed on deciding all detained cases. The Department is not persuaded that the proposed time frames for deciding a case will hinder the quality of decisions made by either single Board members or three-member panels. The rule provides adequate time for the Board to decide the vast majority of cases before it, and in those rare cases where more time is needed, the rule provides a procedure for extending that time. The Department also believes that 8 CFR 3.1(e)(6) sufficiently directs the Board to assign priority to deciding case appeals involving detained respondents, or bond appeals, which procedure is consistent with existing practice, without the need for separate time limits for those matters.

6. Holding Cases Pending Significant Changes in Law and Precedent

A few commenters noted that proposed § 3.1(e)(8)(iii) permits the Chairman to hold a case or cases pending resolution of issues pending before the United States Supreme Court or the courts of appeals that will substantially affect the outcome of the cases to be held. These comments suggested that the Board should be authorized to hold cases that are directly affected by pending legislation, pending regulatory changes, and pending en banc decisions. The Department agrees with these comments in part, and has expanded 8 CFR 3.1(e)(8)(iii) to cover pending Department regulations and pending en banc decisions. Because some issues will arise rapidly and in multiple cases, the Department expects that the Chairman, as a matter of discretion in managing the caseload, will be able to utilize the authority granted under this provision to group cases to determine which record provides the clearest issue for precedent decisions by the Board en banc. To facilitate the management of these cases and case-group holds with the legislative and regulatory programs of the Department, the Chairman is directed to inform the Director of EOIR and the Attorney General of all such holds.

1. Decisional Issues

1. Management of Decisions

Several commenters expressed the view that the regulation granted too much authority to the Attorney General, the Director of EOIR, and the Chairman of the Board to manage the decision-making of individual Board members. Some of these commenters generally challenged the Attorney General's authority over the Board. These comments misunderstand the nature of the Board. The Board is the creation of the Attorney General; it is not a statutory body. As discussed above, the Board's authority derives from a delegation of authority from the Attorney General. See Guentchev v. INS, supra; Matter of Hernandez-Casillas, supra, at 289 n.9. In this rule, the Department alters the process by which the caseload is managed, but does not dictate or determine the ultimate outcome in any case or group of cases. The Department expects the Board Members to continue to exercise independent judgment regarding the interpretation of the law, subject to applicable legal standards and review by the Attorney General, and in conformity with applicable judicial precedents.

2. Remand Motions

One commenter stated that under proposed § 3.1(e)(2), respondents should also be afforded the right to file a motion to remand on any substantive ground. The Department notes that this suggestion is outside the scope of the rulemaking and does not address that suggestion at this time. However, in the future, the Department may consider a more complete revision of the motions practice before the Board. At this time, the Department has changed § 3.1(e)(2) to more closely reflect the authority currently codified in § 3.1(e)(1) for a single Board member to make various procedural dispositions of cases. There is also no provision that bars a contested motion to remand the record; the Board has considered such motions for years.

3. Rehearing en banc

One commenter stated that rehearing en banc is almost never done, and suggested that revising the Board's rehearing en banc authority is effectively meaningless. The Department believes that en banc review is a valuable process in the establishment of precedential guidance for immigration judges, and one of the results of decreasing the size of the Board is to increase its ability to provide such guidance in a meaningful way. However, en banc proceedings are very resource intensive and should not be readily undertaken. The Department believes that the Board's electronic en banc process has been successful and should be continued. Moreover, the Board can and does designate panel decisions as precedent decisions without the need to convene a full en banc proceeding by using the electronic en banc, and should continue that practice whenever possible. The proposed rule added a sentence in 8 CFR 3.1(a)(5), taken from Federal Rules of Appellate Procedure Rule 35(a), with respect to rehearing en banc in the courts of appeals, providing that en banc proceedings are disfavored and shall ordinarily be ordered only for questions of exceptional importance or to secure or maintain the uniformity of the Board's decisions. However, to avoid concerns that this language might unintentionally inhibit the Board's use of the en banc process, the final rule uses the term "particular importance" rather than "exceptional" importance. The Department disagrees with the suggestion of some commenters that this provision is effectively meaningless.

4. Separate Opinions

One commenter suggested that the Department eliminate dissenting and concurring opinions for precedent decisions. This rule does not take a position on that suggestion. Dissenting and concurring opinions can serve a valuable purpose, within limits, in precedent decisions. Not all precedent decisions can resolve all aspects of an issue presented and there may be valuable disagreements that warrant further briefing in subsequent cases. The Department does not wish to limit the conversation that must occur to develop lines of precedent so long as the concurring and dissenting opinions are efficiently prepared. On the other hand, there is substantial reason to question the number of lengthy written dissents in unpublished, non-precedential decisions. Although the percentage of separate opinions may be relatively low, there is a serious question of the merits of committing substantial time and effort to writing separate opinions in a non-precedential case. Accordingly, while the
Department recognizes that Board members may wish to file such opinions. The Department also believes that it is appropriate that such opinions not adversely affect the time and resources of the Board.

5. Changes in the Notice of Appeal

Several commenters recognized that the Notice of Appeal forms must be modified to conform with the changes under the new rule. The Department agrees, and has made changes to Form EOIR–26 and Form EOIR–29 to incorporate the final rule.

Form EOIR–26 has generally been revised to include the new basis for summary dismissal and requires the respondent to identify the legal and factual bases for appeal when requesting review by a three-member panel. Form EOIR–29 also provides that a party appealing a decision of a Service officer (herein referred to as an “INS officer” for ease of understanding by the applicants) must file an appeal within 30 days of receiving the decision. The Department expects that these forms will be used upon the effective date of this regulation. We have attempted to make the requirements of the Notice of Appeal as clear as possible, taking into account the concerns expressed in cases such as Vargas-Garcia v. INS, 287 F.3d 882 (9th Cir. 2002).

6. Barring Oral Argument Before a Single Board Member

One commenter stated that eliminating oral argument in cases assigned to a single Board member for decision is a further erosion of a respondent’s due process rights. Section 3.1(e)(7) reflects the current authority of the Board to grant or deny requests for oral argument. It did not make clear that no oral argument would be available in any case assigned to a single Board Member for disposition. The Department disagrees that this provision is a further erosion of a respondent’s due process rights, initially because there is no due process right to an oral argument before the Board. Moreover, oral argument is rarely granted even in cases that are heard by a three-member panel, and the Department believes that it is entirely appropriate to establish a general rule barring oral argument in a case that does not even meet any of the factors meriting review by a three-member panel under §3.1(e)(6) of this rule.

7. Location of Oral Argument

One commenter noted that the Board has held oral argument in other cities, sometimes without regard to whether the cases being argued were from those localities, thus imposing burdens on the parties and the Board. Accordingly, the commenter suggested limiting the location of oral argument to EOIR’s headquarters. The Department agrees that it is generally unwarranted for the Board to hold oral argument other than in its own courtroom, unless such other location is more convenient to the Board and the parties. Accordingly, the final rule directs the Chairman to hold oral argument at the EOIR’s headquarters unless the Deputy Attorney General or his delegate specifically provides otherwise.

8. Summary Dismissal of Frivolous Appeals and Disciplinary Actions

The final rule in §3.1(d)(2)(i)(D) gives the Board the authority to summarily dismiss an appeal that the Board finds has been filed for an improper purpose, such as to cause unnecessary delay, or that lacks an arguable basis in fact or law, unless the appeal is supported by a good faith argument for extension, modification, or reversal of existing law. Attorneys who file appeals that are summarily dismissed under §3.1(d)(2)(i)(D) may be subject to a finding that they have engaged in frivolous behavior as defined in §3.102(j).

Several commenters expressed the view that giving the Board the authority to dismiss an appeal because it has been deemed frivolous under the standards of paragraph (D) will have a chilling effect on attorneys, so as to reduce the number of attorneys who will file appeals before the Board. These commenters believe that, if disciplinary measures are strictly enforced, attorneys will be deterred from filing an appeal on behalf of indigent respondents. Several commenters stated that the necessity of §3.1(d)(2)(i)(D) has not been sufficiently explained and that this section is unnecessary since regulations already exist to impose disciplinary measures on attorneys. These commenters maintained that the line between an appeal that has been deemed frivolous and a bona fide legal argument is hard to distinguish. Therefore, they argue, it will be difficult for the Board to appropriately determine what actually constitutes an appeal that should be dismissed under this section.

Several commenters expressed the view that this section will also deter attorneys from presenting arguments on appeal because the Board may deem them as frivolous. A few commenters maintained that the definition of “frivolous” as set forth by the Board in its determination should be consistent with the definition provided in prevailing law, common law, the Federal Rules of Civil Procedure, and the Canons of Professional Responsibility. Another comment contended that the definition of frivolous may change based on the state of immigration law.

The Department has decided to retain the regulation as proposed. The primary concern stated in all of these comments is the effect this ground will have on the types and number of appeals filed. The Attorney General has the authority to instruct the Board to set criteria for which appeals may be dismissed. An appeal that is filed for an improper purpose is chief among those appeals that the Board should not be forced to review. The Department concludes that these appeals should be dismissed in order to give Board members more time to adjudicate meritorious appeals. The Board previously had the authority to dismiss frivolous appeals. See 47 FR 16771, 16772 (April 20, 1982) (giving the Board authority to summarily dismiss a frivolous appeal); 3 CFR 3.1(d)(2)(i)(D) (1992). The Board has also dismissed frivolous appeals. See, e.g., Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972). There is no showing that, when these provisions were in effect, attorneys were deterred from filing appeals, or that the Board was actively dismissing appeals that truly had merit.

The prior experience of the Board in dismissing frivolous appeals also serves to address the concern that there is no appropriate definition for what constitutes a frivolous appeal. The Board can rely on earlier precedent decisions to make such a finding. See e.g., Matter of Gamboa, supra; Matter of L-O-G, 21 I&N Dec. 413 (BIA 1996); Matter of R-P, 20 I&N Dec. 230 (BIA 1991); Matter of Patel, 19 I&N Dec. 394 (BIA 1986). Along with this case law, the Board can draw from the definition for frivolous behavior in 8 CFR 3.102(j) to determine what constitutes a frivolous appeal. The Department also expects the Board to be guided by other interpretations of what amounts to “frivolous” in implementing the rule, including the decisions of the United States courts under F. R. Civ. P. 11 and the American Bar Association’s Standards of Professional Conduct. An attorney is clearly on notice as to the definition of frivolous behavior.

The commenters also stated that this section is unnecessary because regulations already exist to impose disciplinary measures on attorneys. The Department disagrees and will retain the rule as proposed. Section 3.1(d)(2)(iii) provides that filing an appeal that is summarily dismissed as frivolous may constitute grounds for disciplining an
attorney or representative under 8 CFR 3.102. The purpose of this provision is to invoke the disciplinary process, that is, to give the EOR Office of the General Counsel an opportunity to consider whether a complaint should be filed under the existing disciplinary process. EOR's General Counsel may commence the disciplinary process based on a referral by anyone. The process of a referral for review by EOR's General Counsel, and the possibility of a hearing and determination, may be invoked if the Board member or panel believes such an inquiry is justified.

Accordingly, the Department believes that there is no "chilling" effect from the promulgation of this rule.

9. Mandatory Summary Dismissals

Some commenters suggested that it was inappropriate to change the authority to summarily dismiss appeals from discretionary to mandatory, because respondents may not understand the requirements and the Board members should retain discretion.

The Department has considered the views of the commenters, as well as judicial decisions such as Vargas-Garcia v. INS, 287 F.3d 882 (9th Cir. 2002), which have challenged summary dismissals by the Board. The Department has decided not to make this proposed change at the present time, but to defer consideration of these issues for possible action in the future.

In the meantime, the Department notes that the grounds for summary dismissal in § 3.1(d)(2)(i), including the restored ground relating to frivolous appeals, will remain available for the Board to utilize, in all appropriate cases, in the exercise of discretion by the Board member or panel to which an appeal is assigned.

The rules have provided for years that an appeal may be dismissed if the appealing party "fails to specify the reasons for the appeal on [the Notice of Appeal] or other document filed therewith." 8 CFR 3.1(d)(2)(i)(A). See Toquero v. INS, 956 F.2d 193 (9th Cir. 1992); Alleyne v. INS, 879 F.2d 1177 (3rd Cir. 1989); Attehortua-Vanegas v. INS, 875 F.2d 238 (1st Cir. 1989); Bonne-Anne v. INS, 810 F.2d 1077 (11th Cir. 1987); Townsend v. United States Department of Justice, INS, 799 F.2d 179 (5th Cir. 1986); Matter of Lodge, 19 I & N Dec. 500 (BIA 1987); Matter of Valencia, 19 I & N Dec. 354 (BIA 1988). The Department expects the Board to continue to utilize this authority in appropriate cases and reiterates the view that these requirements are fundamentally sound and in conformity with due process.

10. Finality of Decisions and Remands

The final rule also reinserts former 8 CFR 3.1(d)(3) (2000), without change, dealing with finality of decisions and demands, as new § 3.1(d)(6). That provision had been part of the Board's regulations for many years but was inadvertently overwritten when unrelated changes in the regulations were made in 2000. Under the circumstances, the Department has determined that this preexisting provision may be reinserted in the Board's regulations without notice and comment under the Administrative Procedure Act.

In 1996, as part of the streamlining rule, the Department amended 8 CFR 3.1(d) to redesignate its paragraphs for clarity. 64 FR 56135 (Oct. 18, 1999). The streamlining rule redesignated former paragraphs (d)(1)-(a), (d)(2), and (d)(3) as new paragraphs (d)(2), (d)(3), and (d)(4), respectively. 64 FR at 56141. After the redesignation, paragraph (d)(2) on finality of decisions and demands was codified as § 3.1(d)(3) (2000).

However, this change was unintentionally disrupted by the subsequent final disciplinary rule in 2000. 65 FR 35513 (June 27, 2000). The preamble and the regulatory text make clear the intent to update the specific regulatory citations of the summary dismissal grounds to reflect the new codification of the disciplinary grounds, and to revise the paragraph dealing with rules of practice and discipline, § 3.1(d)(4) (2000). However, that final disciplinary rule incorrectly instructed the Federal Register to codify the revised paragraph dealing with rules of practice as paragraph (d)(3). The result of this error was effectively to overwrite the language of the preexisting paragraph (d)(3) on finality of decisions and demands, and to leave instead two different versions of the rules of practice provision in paragraphs (d)(3) and (d)(4).

Operationally, the Board's practice has not changed despite this error in codification. Given the clearly unintended result of the erroneous 2000 regulatory instructions, the Department is reinserting the overwritten language without change, as a new paragraph (d)(6).

J. Applicability of Procedural Reforms to Pending Cases

Many commenters raised concerns that the proposed rule would impose procedural obligations that would be impossible to meet for pending cases and would otherwise violate due process. The Department notes, however, that changes in procedural rules typically are made applicable to all cases pending as of the date the new procedural rules are promulgated. See, e.g., Order, 363 U.S. 1034 (1966) (transmitting amendments to the Federal Rules of Civil Procedure; including amendments to Fed. R. Civ. P. 12, 13, 19, 23; Landgraf v. USI Film Products, 511 U.S. 244, 273 n.29 (1994)). The Department has determined that the final rule will apply to all pending cases, with one exception. See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 739-40 (1996); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); United States v. Morton, 467 U.S. 822, 835-36 n.21 (1984); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

Some commenters were of the opinion that all the pending cases, "approximately 40,000," would have to be re-briefed in a short time, affecting the quality of representation. A few commenters argued that re-briefing all the pending cases would have a significant impact on small entities and therefore implicate the Small Business Regulatory Enforcement Fairness Act of 1996 and the Unfunded Mandates Reform Act of 1995.

After careful consideration of the public comments suggesting the need for an opportunity for those individuals with pending appeals at the Board to respond to the new screening criteria, the Department has adopted, in part, an approach suggested by some of the commenters. The final rule contains a notice provision at § 3.3(f) providing that a party who has an appeal pending at the Board on August 26, 2002, may file a supplemental brief or statement on why the appeal meets the criteria for three-member review under § 3.1(e)(6) of the final rule on or before September 25, 2002, or the due date for the party's brief, whichever is later. Following the effective date, the Board will apply the final rule to all appeals, with consideration given to any additional brief or statement filed in accordance with this provision. The filing of any such additional brief or statement, however, is entirely optional in all of the pending cases. The Board, in its discretion, will determine how these briefs will be considered and what procedure will be used in determining whether to apply a single-member or three-member panel review.

The Department disagrees with the notion that these cases cannot be reviewed under the standards specified in the rule for single-member and three-member panel review. Appellants do not have any vested right or entitlement to review by a three-member panel of the Board, or even an expectation that their case is more likely than not to be
referred to a three-member panel. At present, all pending cases are subject to review under the existing streamlining process under § 3.1(a)(7) of the existing rules, and this new rule would retain that streamlining process under § 3.1(e)(4). Even in FY 2001, long before the publication of the proposed rule to reform the Board's procedural rules, the Board already was resolving a clear majority of pending appeals by summary affirmance without opinion, issued by a single Board member, after determining that those cases meet the standards of the existing streamlining process. Under the new rule, all cases will be reviewed on the merits to determine if there are any factual or legal errors or other circumstances that meet the criteria for three-member review. The opportunity for those with pending cases to assert that an individual warrants three-member review is not intended as a substitute for Board screening; rather, it is an additional opportunity to facilitate the streamlining process. The burden of administering this provision is quite limited. A party is not required to make any filing, but may do so. Regardless of whether a party files an optional brief or statement under § 3.3(f) regarding a pending appeal, every case will be reviewed under the standards of this rule to determine whether or not the case meets the standards of § 3.1(e)(6).

The Department also disagrees with the notion that the application of the case management system to pending appeals at the Board will have a significant impact on small entities and implicate the Unfunded Mandates Act. In approximately one third of cases filed with the Board, the respondent is not represented. In a small percentage of cases, the Service has appealed. In those cases where the respondent has appealed through counsel or an accredited representative, it behooves the attorney or representative to review the case file to determine whether these standards warrant an additional filing. However, this does not mean, and the Department does not expect, that a large number of cases will warrant such an additional filing. This is not an open invitation to file a brief where a respondent has previously indicated that he or she would file a brief in the Notice of Appeal and has not done so. These cases may be subject to summary dismissal under existing standards or under the final rule. All cases are currently subject to the streamlining review and this rule does not appreciably change that review in any case where summary affirmance would be appropriate. Accordingly, while some individual attorneys or representatives may find a few cases that objectively warrant an additional filing, the Department does not expect the impact to be significant.

Some commenters suggested that Landgraf v. USI Film Products bars the application of the revised standard of review in § 3.1(d)(3) to pending cases. The Department believes that these rules are generally administrative and procedural in nature and do not implicate the retroactivity concerns expressed by Landgraf. Thus, the Department disagrees with the conclusion of some commenters that this rule would retroactively affect pending cases.

The Department acknowledges that an immigration judge's factual findings under § 3.1(d)(3) may prejudice an individual respondent. Section 3.1(d)(3)(i) of the rule establishes the scope of review for factual determinations of the immigration judge. However, the change in the standard would have no effect on any appeal that is based on a question of law or the exercise of discretion based on established facts, or any appeal where a disputed fact is not material to the decision. The provision does not have any bearing on motions before the Board or appeals from decisions by Service officers. Thus, the Department believes that the number of such cases would be very small.

In order for the application of the clearly erroneous standard to be prejudicial to the respondent in a pending case, the case must turn on an error of fact by the immigration judge—a factual finding that is erroneous, but not clearly erroneous—and that is also material to the basis for the decision of the immigration judge and the Board.

Even so, the Department recognizes that an application of the clearly erroneous standard to all pending cases would require the Board to review each case, on an individualized basis, to determine if such circumstances may be present. Rather than having the Board take the time to make these additional determinations in such pending appeals, the Department has determined that it would be more efficacious simply to continue the current scope of review standards for pending cases, and to apply the clearly erroneous standard only to the review of immigration judge decisions that are filed on or after the effective date. Accordingly, § 3.3(f) of the final rule provides that § 3.1(d)(3)(i) will not apply with respect to pending cases filed with the Board prior to September 25, 2002.

The Department notes that § 3.1(d)(3)(iv), which prohibits additional factfinding by the Board on appeal, will apply to all cases pending as of the effective date of this rule. There can be no prejudice in the application of this rule to pending cases, because the rule provides for a remand for further factfinding in any case where the Board determines that additional factfinding is required in a particular case.

K. Transition Period and Reduction of the Backlog

A number of commenters suggested that the period of time imposed within the proposed rule for the Board to meet the backlog reduction requirements was far too short. They argued that the sheer number of cases to be decided within that six-month period would reduce the amount of time available for each case, with some commenters offering calculations that this would be reduced to approximately 15 minutes.

The Department disagrees with these comments and has not altered the time frame for eliminating the backlog of pending cases. Pure mathematical formulas in this area have the beauty of simplicity, but are deceptive. Calculating an average amount of time for a single Board member to decide one case overlooks the differences in cases themselves and the preparatory work that goes into decisions. For example, the Department expects that a clearly untimely appeal can be dispatched promptly by a Board member under the streamlining process. For each such simple case (and the Board's experience streamlining has shown there are many), more time is afforded for considering the issues to which the Board's time should be devoted.

Moreover, the six-month time frame runs from the effective date of the rule, not the date on which it is published in the Federal Register. To say that the Board has not been on notice of this rule also diserves the Board. The Board has been diligently preparing for the implementation of this rule to reduce its backlog of pending cases since the Notice of Proposed Rulemaking was published on February 19, 2002. The Board has increased its disposition rate dramatically. In 2000, the first full year in which the Board utilized streamlining, the Board averaged 1800 decisions per month. With the expanded use of streamlining, disposnions increased to an average of 2600 per month in 2001, and in February 2002, when the proposed rule was published, the Board decided 3300
cases. In recent months, utilizing its authority under streamlining, the Board has increased dispositions to an average of over 5200 dispositions per month. With the additional authority granted by this final rule, the Department believes that it is reasonable to expect the Board to bring the case load backlog down to, or near, a current balance within the six-month transition period. The Department is aware, of course, that specific factors, such as the requirement that the Board improve on providing transcripts to the parties in a timely manner, may adversely impact the disposition rate against the number of cases available for disposition by accelerating the number of records that are available for disposition. The Department is convinced that the transition period is sufficient for the Board to reduce the backlog. Accordingly, the Department is uncommitted that this implementation period should be altered.

L. Administrative Fines Cases

The Department has decided to address the transfer of administrative fines cases to the Office of the Chief Hearing Examiner (OCAHO) in a separate final rule because of a technical legal issue unrelated to the proposed rule and the comments received on the proposed rule. The Department plans to publish this separate final rule in the near future.

M. Miscellaneous and Technical Issues

1. The Board's Pro Bono Project

Several commenters stated that the Department should not take any administrative actions that would disrupt the success of the Board's Pro Bono Project. Although these comments fall outside the scope of the proposed and final rule, the Department wishes to take this opportunity to assure the bench, bar, and public of its commitment to this process. On January 17, 2001, EOIR announced a Pro Bono Project that links volunteer representatives from around the country with detained immigrants who lack legal representation. The Department fully supports this partnership between the government and nonprofit organizations. The Department recognizes the value of representation for respondents in the removal process. Although respondents generally are able to present their points of view ably, often with the assistance of language translators, the availability of attorneys and representatives learned in the technical aspects of immigration law is useful both to guide the respondent and to conserve judicial resources of the immigration judges and the Board.

2. Fundamental Changes in Structure

Other commenters have suggested substantial changes in the underlying structure of the administrative immigration adjudication system. For example, some suggested that respondents should be charged filing and transcript fees more commensurate with the actual costs of the proceedings. Another comment, as well as a proposal by a former Member of the House Judiciary Committee, was that the Department abolish automatic appeals (either generally or of denial of asylum by Service asylum officers) or that only a discretionary appeal to the Board be allowed. The Department believes that these proposals fall outside the scope of the present rule and will not consider such proposals at this time.

3. Technical Amendments

The Department has changed the regulation in §3.1(e)(4) to permit administrative law judges (ALJs) retired from EOIR to serve as temporary Board members. Under the existing regulations, ALJs from OCAHO may participate in Board decisions as temporary members. Accordingly, the Department has determined that this technical change should be made in the final rule.

Section 3.1(e), dealing with the case management system, begins by instructing the Chairman to establish a case management system to screen all "appeals." The current streamlining process screens, and the proposed rule was designed to provide screening of, all cases filed with the Board, including motions as well as appeals. Accordingly, the term has been changed to reflect the existing practice and the intent behind the proposed rule.

The Department has changed the rule in §3.1(e)(6) to eliminate the words "denials of review as a matter of discretion" because it has been suggested that these words imply that the Board has authority to deny review as a matter of discretion. This was not the Department's intent. To eliminate this concern, the text has been changed. The proposed rule in §3.1(e)(8)(ii) provides the Chairmen with the authority, in exigent circumstances, to issue a decision where a panel is unable to meet the time limits. The Department has amended the rule to permit the Chairmen the authority to delegate such decisions to a Vice-Chairman.

Regulatory Flexibility Act

The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it affects only Departmental employees, aliens, or their representatives who appear in proceedings before the Board of Immigration Appeals, and carriers who appear to the Board of Immigration Appeals, and carriers who appear decisions of Immigration and Naturalization Service (INS) officers. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1995. 5 U.S.C. 604. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant a federalism summary impact statement.
Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Paperwork Reduction Act of 1995

The Executive Office of Immigration Review has submitted the following information collection requests to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collections are published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments on the estimated public burden or associated response rate, or if you need a copy of one of the proposed information collection instruments with instructions or additional information, please contact the Executive Office for Immigration Review as noted above. Written comments and suggestions from the public and affected agencies concerning the proposed collections of information are encouraged. Your comments should address one or more of the following four points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The first information collection, titled Notice of Appeal from a Decision of an Immigration Judge, is a revision of a currently approved collection. The agency form number is EOIR–26. The information collection will be sponsored by the Executive Office for Immigration Review for parties affected by a decision of an Immigration Judge who may appeal to the Board of Immigration Appeals, provided the Board has jurisdiction pursuant to 8 CFR 3.1(b). An appeal from an Immigration Judge's decision is taken by completing the form EOIR–29. It is then submitted to the Service office having administrative control over the record of proceedings. The collection will be distributed primarily to individuals and households. It is estimated that 3,156 responses with an estimated total of 1,578 annual burden hours, which is the same as currently required.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5100 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

List of Subjects in 8 CFR Part 3

Aliens, Immigration.

Accordingly, for the reasons set forth in the preamble, part 3 of chapter I of Title 8 of the Code of Federal Regulations is amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for 8 CFR part 3 continues to read as follows:


2. Amend § 3.1 by:

a. Revising the heading;

b. Revising paragraphs (a)(1) through (a)(6) and paragraph (b) introductory text;

c. Revising paragraphs (d)(1), (d)(2)(i), introductory text, (d)(2)(ii), (d)(2)(iii), and (d)(3);

d. Redesignating paragraphs (d)(2)(i)(D) through (G) as paragraphs (d)(2)(i)(E) through (H), respectively, and adding a new paragraph (d)(2)(i)(D);

e. Revising paragraph (d)(4) and adding paragraphs (d)(5) and (d)(6); and

f. Revising paragraphs (e) and (g), to read as follows:

§ 3.1 Organization, Jurisdiction, and Powers of the Board of Immigration Appeals.

(a)(1) Organization. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them. Within six months of the implementation of the case management screening system as provided in paragraph (e) of this section, or such other time as may be specified by the Attorney General, the Board shall be reduced to eleven members as designated by the Attorney General. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

(2) Chairman. The Attorney General shall designate one of the Board members to serve as Chairman. The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have the authority to:

(1) Issue operational instructions and policies, including procedural instructions regarding the implementation of new statutory or regulatory authorities;
(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;
(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases, and otherwise to manage the docket of matters to be decided by the Board;
(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;
(E) Adjudicate cases as a Board member; and
(F) Exercise such other authorities as the Director may provide.
(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.
(3) Panels. The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panels to implement the case management process as provided in paragraph (e) of this section.
(4) Temporary Board members. The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary, additional Board members for terms not to exceed six months. A temporary Board member assigned to a case may continue to participate in the case to its normal conclusion, but shall have no role in the actions of the Board en banc.
(5) En banc process. A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board en banc. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case en banc, or reconsider as the Board en banc any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.
(6) Board staff. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.
(b) Appellate jurisdiction. Appeals may be filed with the Board of Immigration Appeals from the following:
(d) Powers of the Board—(1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.
(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board); by written order, or by determination and ruling pursuant to section 103 of the Act.
(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.
(2) Summary dismissal of appeals—(i) Standards. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law:

(ii) Action by the Board. The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.
(iii) Disciplinary consequences. The filing by an attorney or representative accredited under § 292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 3.102(i). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.
(3) Scope of review. (i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.
(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.
(iii) The Board may review all questions arising in appeals from decisions issued by Service officers de novo.
(iv) Except for taking administrative notice of commonly known facts such as current events or the official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.
(4) Rules of practice. The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.
(5) Discipline of attorneys and representatives. The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 292.2 of this chapter. It shall also determine whether any organization desiring representation is of a kind described in
§ 1.1(f) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any immigration judge.

(f) Finality of decision. The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(e) Case management system. The Chairman shall establish a case management system to screen all cases and to manage the Board’s caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

(1) Initial screening. All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) Miscellaneous dispositions. A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a Service motion to remand any appeal from the decision of a Service officer where the Service requests that the matter be remanded to the Service for further consideration of the appellant’s arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) Merits review. In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) Affirmance without opinion. (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants issuance of a written opinion by the Board.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: “The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(e)(4).”

(5) Other decisions on the merits by single Board member. If the Board member to whom a case is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmation without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions. Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 3.1(e)(5).

(7) Oral argument. When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board en banc may hear oral argument, as a matter of discretion, at such date and time as is established under the Board’s case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or his designee authorizes oral argument to be held elsewhere. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) Timeliness. As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 120 days as matter of discretion. Except as provided in paragraph (e)(6)(iii) or (iv) of this section, in those cases where the panel
is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice-Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring opinion is not filed to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Departmental regulatory amendments, or an impending *en banc* Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) For any case ready for adjudication as of September 25, 2002, and that has not been completed within the established time lines, the Chairman may, as a matter of discretion, grant an extension of up to 120 days.

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

(vi) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.

(g) Decisions of the Board as precedents. Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or immigration judges in the administration of the Act. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.

3. In §3.2, paragraph (i) is amended by adding after the first sentence a new sentence, to read as follows:

§3.2 Reopening or reconsideration before the Board of Immigration Appeals.

(i) Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of §3.1(e)(6).

4. In §3.3, paragraphs (a) and (c) are revised, paragraph (b) is amended by adding a new sentence at the end thereof, and paragraph (f) is added, to read as follows:

§3.3 Notice of appeal.

(a) Filing—(1) Appeal from decision of an immigration judge. A party affected by a decision of an immigration judge which may be appealed to the Board under this chapter shall be given notice of the opportunity for filing an appeal. An appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) directly with the Board, within the time specified in §3.38. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. An appeal is properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A Notice of Appeal may not be filed by any party who has waived appeal pursuant to §3.39.

(2) Appeal from decision of a Service officer. A party affected by a decision of a Service officer that may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of an INS Officer (Form EOIR-29) directly with the Office of the Service having administrative control over the record of proceeding within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate office of the Service, together with all required documents, and the fee provisions of §3.8 are satisfied.

(b) * * * An appellant who asserts that the appeal may warrant review by a three-member panel under the standards of §3.1(e)(6) may identify in the Notice of Appeal the specific factual or legal basis for that contention.

(c) Briefs—(1) Appeal from decision of an immigration judge. Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In cases involving aliens in custody, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board. In cases involving aliens who are not in custody, the appellant shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Board. The appendix shall have the same period of time in which to file a reply brief that was initially granted by the Board to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) Appeal from decision of a Service officer. Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file. The appellant and the Service shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the
appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

5. In § 3.5, paragraph (a) is revised to read as follows:

§ 3.5 Forwarding of record on appeal.

(a) Appeal from decision of an immigration judge. If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location. The Chairman and the Chief Immigration Judge shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges, and take such steps as necessary to reduce the time required to produce transcripts of those proceedings and improve their quality.

John Ashcroft,
Attorney General.

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BILLING CODE 4410–30–P
April 21, 2003

Ms. Kathleen A. Moccio  
Dorsey & Whitney LLP  
50 South Sixth Street  
Suite 1500  
Minneapolis, Minnesota 55402-1498

Dear Ms. Moccio:

Thank you for your invitation to participate in an investigation and report regarding the Board of Immigration Appeals procedural reforms. As I have communicated to you previously by electronic mail, the Executive Office for Immigration Review (EOIR) declines to participate at this time. Recently, individuals within EOIR, including the Director of EOIR, have received similar requests to participate from Dorsey & Whitney. On April 17, 2003, the General Counsel of EOIR sent a formal letter responding to these requests. I have attached a copy of this letter for your information.

I can be reached at (703) 305-0289 if you have any further questions.

Sincerely,

Susan M. Eastwood  
Public Affairs Specialist

cc: Chuck Adkins-Blanch  
General Counsel
Ms. Tania W. Hanna  
Dorsey & Whitney LLP  
1001 Pennsylvania Avenue, N.W.  
Suite 300 South  
Washington, D.C. 20004

Dear Ms. Hanna:

The Executive Office for Immigration Review (EOIR) thanks you for your invitation to participate in an investigation and report of the regulation entitled “Board of Immigration Appeals: Procedural Reforms to Improve Case Management” which was published in the Federal Register on August 26, 2002, (Board Reform Regulation). 67 Fed. Reg. 54878. However, we decline to participate at this time.

The supplementary information to the regulation contains a detailed statement explaining the reasons for the regulation and responding to the public comments. This statement directly addresses the concerns you have raised in your letter.

You also may find useful information on EOIR’s website at www.usdoj.gov/oir. EOIR’s annual statistical report, along with a January 9, 2003 letter to the Los Angeles Times from the Chairman of the Board, may be of particular interest.

The Board Reform Regulation is also the subject of ongoing litigation. A challenge to this regulation under the Administrative Procedure Act has been filed in the United States District Court for the District of Columbia. Capital Area Immigrants Rights Coalition, et al. v. Dept. of Justice, et al., No. 1:02CV02081 (D.D.C.). As part of the litigation, a copy of the administrative record pertaining to the Board Reform Regulation was filed, along with extensive motions and briefs. These documents should be of substantial value to you in conducting your investigation and report.

Please be aware that EOIR has been contacted by several different representatives from your law firm on multiple occasions, including an unannounced visit at our headquarters.
location. It would be appreciated if you could coordinate and direct any further questions to Susan Eastwood at EOIR’s Public Affairs Office. Ms. Eastwood can be reached at (703) 305-0289.

Sincerely,

Chuck Adkins-Blanch
General Counsel

cc: Lori Scialabba
Chairman, Board of Immigration Appeals

Michael J. Creppy
Chief Immigration Judge

Kevin D. Rooney
Director
MEMORANDUM TO:    Board Members  
FROM:      Paul W. Schmidt  
Chairman  
SUBJECT:      Streamlining Implementation - Phase III  

This memorandum outlines the categories of cases I have selected to include in Phase III of the Streamlining Implementation Program which I have determined are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals. It also identifies the individual Board Members who, acting alone, will exercise the authority of the Board in those cases.

This memorandum is divided into 7 parts. Part I is an introduction. Part II identifies the categories of cases that may be affirmed without opinion. Part III lists the categories of cases that may be summarily dismissed. Part IV designates the categories of cases involving "other procedural and ministerial issues" which are appropriate for review and disposition by a single Board Member. Part V designates the individual Board Members who will exercise the authority of the Board of Immigration Appeals to affirm decisions of Immigration Judges and the Service without opinion. Part VI designates the individual Board Members who will exercise the authority of the Board of Immigration Appeals to summarily dismiss appeals. Part VII specifies that all Board Members have authority to dispose of cases designated by the Chairman as involving "other procedural or ministerial issues."

I. Introduction

I am very pleased that we are moving forward on Phase III, implementing the regulations authorizing streamlined appellate adjudications which were published on October 18, 1999. 64 Fed. Reg. 56135-42. This phase consists of a Pilot Program incorporating, for the first time, the summary affirmation procedures (although it also involves other streamlining methods already in use under Phases I and II).

Clearly, this is one of the most significant initiatives in our history. It directly supports our mission of adjudicating all appellate cases in a fair and timely manner and providing legal advice to the immigration community through clear, timely, easily understandable precedent decisions.
The key provision of the regulations permits a single Board Member to summarily affirm a decision below without opinion. A Board Member can exercise this authority only if three regulatory criteria are met: 1) the result is correct; 2) any errors in the decision are harmless or immaterial; and 3) the issue is either: a) squarely controlled by existing Board or Federal Court precedent and does not involve the application of precedent to a novel fact situation, or b) the factual and legal questions involved are so insubstantial that three-Member review is not warranted.

This authority can be applied, where appropriate, to either Immigration Judge or INS Director decisions, depending on the type of case. If a case is summarily affirmed, the decision becomes the final agency decision for judicial review purposes.

As we move forward with our Pilot Program, our efforts must continue to be guided by three essential principles: integrity, participation and flexibility. To ensure integrity, the regulations must be faithfully applied. The system we develop during the Pilot Program should encourage and promote meaningful discussion of issues and sharing of differing views among all Board Members. At the same time, we seek to reduce redundancy on issues already decided by the Board and the Federal Courts where there is no substantial argument for revisiting or reconsidering those issues.

To maximize participation, we will share the adjudication of streamlining cases equitably among the Board Members, and encourage maximum feasible participation among the staff within the framework we have established in cooperation with our local union.

We also must continue to be flexible. Our goal during the Pilot Program is to gather the information and develop the experience required to design a long-term operating system that will work and be in the public interest. To do this, we will need to evaluate results and make the changes necessary to encourage innovation and ensure continuous process improvement.

Please keep in mind the following two thoughts. First, the designated categories are similar to “mining claims.” They define areas where it preliminarily appears likely that we will locate cases appropriate for streamlining. But, not every case in a category actually will be suitable for streamlining. The three regulatory criteria always must be faithfully applied. When in doubt, the best practice is to refer the case for three-Member review.

Second, the categories set forth below are intended to be flexible. They can, and will, be expanded, contracted, or redefined on the basis of our experience during the Pilot Program. Streamlining is a dynamic process where the Board Members exercise substantial control over what cases are appropriate for our full, three-Member decision docket. By resolving legal issues and issuing clear, timely, easily understandable precedents covering certain types of recurring legal issues we can promote due process and the type of high-quality judicial decision-making below that is consistent with a streamlined appellate process.
On the other hand, statutory changes, regulatory changes, or new Federal Court decisions could create substantial legal issues in areas once thought to be "settled law." Thus, it is likely that some categories of cases once thought to be appropriate for streamlining may, as a result of such changes, once again require the deliberative process available through three-Member review.

We are indebted to the invaluable work of Board Members and staff that has brought us to this historic moment. I know that this spirit of teamwork and innovation will continue throughout the Program.

Some categories of cases, such as certain visa cases, may be affirmed without opinion under Part II or disposed of as "other procedural or ministerial issues" under Part IV. My preference is that those cases be affirmed without opinion, if appropriate, and that disposition as "other procedural or ministerial issues" be a secondary option.

II. Affirmance without opinion

Pursuant to the authority provided in 8 C.F.R. § 3.1(a)(7)(i), I hereby designate the following categories of cases to be appropriate for affirmance without opinion by a single Board Member exercising the authority of the Board of Immigration Appeals in accordance with 8 C.F.R. § 3.1(a)(7):

1. Visa petition appeals:
   a. Petitions based on relationships for which there is no authority under sections 201(b)(2)(A)(i) or 203(a) of the Act to accord immigrant status to the beneficiary;
   b. Petitions based on a step-child or step-parent relationship where the relationship was created after the child turned 18 years of age. See section 101(b)(1)(B) of the Act;
   c. Petitions for an adopted child in which the adoption took place after the child turned 16 years of age or in which the requirement of two-year joint residency under an order of legal custody has not been met. See section 101(b)(1)(E) of the Act;
   d. Petitions for which the Service has issued a Request for Additional Evidence under 8 C.F.R. § 204.1(h) or has issued a Notice of Intent to Deny and the petition was denied for failure to provide an adequate reply to such Request or Notice;
   e. Petitions for which the Service has requested a specific document of the types described in 8 C.F.R. § 204.1(f) or (g) (e.g. Haitian National Archives birth record, official divorce decree, or official record of adoption or legal custody) the request was appropriate, and the document is not provided;
   f. Petitions in which an appeal is based upon evidence submitted for the first time on appeal. See Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988);
   g. Petitions filed by widows/widowers under 8 C.F.R. § 204.2(b) in which the evidence shows that the marriage existed for less than two years before the U.S. citizen spouse died.
   h. Petitions filed by widows/widowers under 8 C.F.R. § 204.2(b) in which the evidence shows that more than two years have passed between the date of the death of the U.S. citizen spouse and the date of the filing of the petition;
   i. Petitions barred by section 204(c) where there was a prior finding of marriage fraud; and
2. Appeals from an Immigration Judge’s denial of a motion on the basis that the motion was untimely or number barred.

3. Appeals from an Immigration Judge’s order finding the respondent deportable or inadmissible where the underlying facts are not in dispute and there is no substantial question that the respondent is deportable or inadmissible.

4. Appeals in which the alien contests that an offense is an inadmissible or deportable offense and statute or Board precedent are settled that the offense renders the alien inadmissible or deportable.


6. Appeals involving claims for asylum barred by a conviction for an aggravated felony unless there is a substantial legal question whether the respondent has been convicted of an aggravated felony. *See 8 C.F.R. § 208.13(c).*


9. Appeals involving claims for suspension of deportation that are time-barred under *Matter of Nolasco*, Interim Decision 3385 (BIA 1999), or by application of 90-day or 180-day departure rules set forth in section 240A(d)(2) of the Act.


11. Appeals in which a claim for cancellation of removal under section 240A(b) of the Act is barred by a criminal conviction.

12. Appeals involving a claim for registry under section 249 of the Act where the alien was not present in the United States before January 1, 1972.

13. Appeals involving collateral attacks on underlying convictions.

15. Appeals in which the alien claims United States citizenship or lawful permanent resident status and there is no evidence to support the claim.

III. Summary Dismissal

Pursuant to 8 C.F.R. § 3.1(d)(2)(ii), I hereby designate the following categories of cases to be appropriate for summary dismissal by a single Board Member exercising the authority of the Board of Immigration Appeals:

1. Cases in which the BIA lacks jurisdiction.

2. Appeals which are untimely filed.

3. Appeals in which the right of appeal has been waived.


5. Appeals failing to meet essential regulatory or statutory requirements. See 8 C.F.R. § 3.1(d)(2)(i)(G).

6. Appeals from orders granting the relief requested. See 8 C.F.R. § 3.1(d)(2)(i)(C).

7. Appeals filed with the Board in which the Notice of Appeal does not specify any grounds for appeal. See 8 C.F.R. § 3.1(d)(2)(i)(A).

IV. “Other procedural or ministerial issues”

In addition to the authority already provided in 8 C.F.R. § 3.1(a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me in 8 C.F.R. § 3.1(a)(1), I hereby designate the following categories of cases to be cases involving “other procedural or ministerial issues” which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural and Ministerial: General

1. Untimely motions to reopen or reconsider, except where the Board Member would seriously consider reopening on his or her own motion under Matter of J-J, 21 I&N Dec. 976 (BIA 1997).
2. Motions to reopen or reconsider which are barred by regulatory time or number limitations. 8 C.F.R. § 3.2(b) and (c).

3. Interim Orders such as on a motion to remand for adjustment of status in exclusion proceedings over which the Board has no jurisdiction [Matter of Castro, 21 I&N Dec. 379 (BIA 1996)] or motions to withdraw as counsel. Also included are orders on the Board’s own motion reinstating proceedings.

4. Cases involving lost aliens (those who cannot be served because the Board does not have a valid address).

5. Case appeals or motions in which the fee requirement has not been satisfied because the remittance is found to be uncollectible. See 8 C.F.R. § 3.8(a).

6. Case appeals in which the appellant seeks voluntary dismissal of the appeal, whether or not the Immigration Judge granted voluntary departure.

7. Cases in which the motion has been withdrawn.

8. Cases in which the appeal is moot such as where the alien has become a lawful permanent resident, US citizen, or has died.

9. Cases involving a motion to reopen filed with the Board that are barred by Matter of Shaar, 21 I&N Dec. 541 (BIA 1996).

10. Administrative Closure orders for qualifying Liberian Nationals.

11. Non-Lawful Permanent Resident Repapering cases [any case in which the Attorney General is authorized to terminate deportation proceedings and reinitiate removal proceedings under section 309(c)(3) of IIRIRA].

12. Motions to reopen for adjustment after a final order has been entered in exclusion proceedings.

13. Routine Recognition and Accreditation cases under 8 C.F.R. §§ 292.2(b) and (d).

Procedural and Ministerial: Visa Petitions

14. Visa petitions based on relationships for which there is no authority under sections 201(b)(2)(A)(i) or 203(a) of the Act to accord immigrant status to the beneficiary.

15. Visa petitions where the appeal is filed by the beneficiary in contravention of 8 C.F.R. § 103.3(a)(1)(iii)(B).

16. Visa petitions based on a step-child or step-parent relationship where the relationship was created after the child turned 18 years of age. See section 101(b)(1)(B) of the Act.

17. Petitions for an adopted child in which the adoption took place after the child turned 16 years of age or in which
the requirement of two-year joint residency under an order of legal custody has not been met. See section 101(b)(1)(E) of the Act.

18. Petitions for which the Service has issued a Request for Additional Evidence under 8 C.F.R. § 204.1(b) or has issued a Notice of Intent to Deny and the petition was denied for failure to provide an adequate reply to such request or notice.

19. Petitions for which the Service has requested a specific document of the types described in 8 C.F.R. § 204.1(f) or (g) (e.g., Haitian National Archives birth record, official divorce decree, or official record of adoption or legal custody) or an original document, the request was appropriate, and the document was not provided.


21. Petitions filed by widows/widowers under 8 C.F.R. § 204.2(b) in which the evidence shows that the marriage existed for less than two years before the U.S. citizen spouse died.

22. Petitions filed by widows/oidowers under 8 C.F.R. § 204.2(b) in which the evidence shows that more than two years has passed between the date of the death of the U.S. citizen spouse and the date of the filing of the petition.

23. Petitions barred by section 204(c) where there was a prior finding of marriage fraud.


Procedural & Ministerial: Fine Cases.


27. Fine appeals where the disposition of the appeal is controlled by Matter of Varig Brazilian Airlines Flight No. 830, 21 I&N Dec. 744 (BIA 1997).

Procedural & Ministerial: Remands


29. Certain routine cases remanded to the Board from U.S. Circuit and District Courts.

31. Remands for missing Immigration Judge decisions. Remands for inclusion of an IJ decision under Matter of A-P-, Interim Decision 3375 (BIA 1999) will be limited to those cases in which allegations have not been admitted or the Immigration Judge has failed to issue a decision on a form of relief for which the respondent is or may be eligible to apply.

32. Cases involving an appeal from an Immigration Judge's administrative closure order in which the appropriate relief is a remand to the Immigration Court for the case to be recaledendar.

33. Cases where remand to the Immigration Court is appropriate because the alien has filed an appeal from Immigration Judge's entry of an in absentia order in deportation or removal proceedings and the record also contains a motion to reopen to the Immigration Judge. See Matter of Gonzalez-Lopez, 20 I&N Dec. 644 (BIA 1993), Matter of Guzman, Interim Decision 3392 (BIA 1999).

Procedural & Ministerial: Moot Bonds

34. The bond appeal is from an Immigration Judge's bond decision and the Board dismissed the case appeal or granted relief to the appealing party resulting in a final administrative order.

35. The bond appeal is from an Immigration Judge's bond decision and the case on the merits was completed by final administrative order at the Immigration Judge's level.

36. Pursuant to this Board's decision in Matter of Valles, 21 I&N Dec. 769 (BIA 1997), the Immigration Judge (or District Director if the appeal was from a District Director's bond decision) granted a subsequent bond redetermination.

37. The alien has been deported or has departed from the United States and, thus, is no longer in the custody of the Immigration and Naturalization Service.
V. Board Members Authorized to Summarily Affirm Decisions

Pursuant to 8 C.F.R. § 3.1(a)(7)(i), I hereby designate each of the following Board Members to exercise the authority of the Board of Immigration Appeals as a single Board Member to affirm decisions of Immigration Judges and the Service without opinion in cases coming before the Board as provided in 8 C.F.R. § 3.1(a)(7):

<table>
<thead>
<tr>
<th>Noel A. Brennan</th>
<th>Philemina M. Jones</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patricia A. Cole</td>
<td>Lauren R. Mathon</td>
</tr>
<tr>
<td>Mary Maguire Dunne</td>
<td>Neil P. Miller</td>
</tr>
<tr>
<td>Cecelia M. Espenoza</td>
<td>Anthony C. Moscato</td>
</tr>
<tr>
<td>Lauri S. Filppu</td>
<td>Juan P. Osuna*</td>
</tr>
<tr>
<td>Edward R. Grant</td>
<td>Lory D. Rosenberg</td>
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<tr>
<td>John W. Gundelsberger</td>
<td>Paul W. Schmidt</td>
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<tr>
<td>Michael J. Heilman</td>
<td>Lori L. Scialabba</td>
</tr>
<tr>
<td>David B. Holmes</td>
<td>Gustavo D. Villageliu</td>
</tr>
</tbody>
</table>

*Effective August 28, 2000
VI. Board Members Authorized to Summarily Dismiss Appeals

Pursuant to 8 C.F.R. § 3.1(d)(2)(ii), I hereby designate each of the following Board Members to exercise the authority of the Board of Immigration Appeals as a single Board Member to dismiss appeals in cases coming before the Board as provided in 8 C.F.R. § 3.1(d)(2):

Noel A. Brennan
Patricia A. Cole
Mary Maguire Dunne
Cecelia M. Espenoza
Lauri S. Filppu
Edward R. Grant
John W. Gundelsberger
Michael J. Heilman
David B. Holmes
Gerald S. Hurwitz

Philemina M. Jones
Lauren R. Mathon
Neil P. Miller
Anthony C. Moscato
Juan P. Osuna*
Lory D. Rosenberg
Paul W. Schmidt
Lori L. Scialabba
Gustavo D. Villageliu

*Effective August 28, 2000

VII. Board Members Authorized to Dispose of Procedural and Ministerial

Under the authority granted by the Attorney General in 8 C.F.R. § 3.1(a)(1), all Board Members are authorized to review and dispose of “other procedural or ministerial issues” as provided by the Chairman of the Board.
Appendix 4

Immigration to the United States, by Decade, 1821-2000

Source: 2001 Statistical Yearbook of the Immigration and Naturalization Services, Table 1
Appendix 5

Number of Aliens Expelled, by Decade, 1892-2002

Source: 2002 Yearbook of Immigration Statistics, Table 62
Appendix 6

Number of Aliens Expelled, by Year, 1961-2002

Source: 2002 Yearbook of Immigration Statistics, Table 62
Appendix 7

Reasons for Expulsion, 1991-2002

- Criminal: 30.36%
- Illegal Entry Attempted: 37.24%
- Unauthorized Presence: 31%
- Other: 1.03%

Source: 2002 Yearbook of Immigration Statistics, Table 64
Appendix 8

BIA Appeals Filed, 1992-2002

Source: Appendix 12 - 13
Appendix 9

BIA Appeals Decided, 1992-2002

Source: Appendix 12 - 13
Appendix 10

BIA Appeals Filed and Decided, 1992-2002

Est. Cases Decided
Est. New Cases

Source: Appendix 12 - 13
Appendix 11

BIA Backlog, 1992-2002

Source: Appendix 12 - 13
Appendix 12

The BIA Backlog: Data and Estimates

In generating Appendices 8, 9, 10 and 11 we have relied upon the following sources:

(a) Testimony of Mr. Brett M. Enders (Supervisory Program Analyst, U.S. Dept. of Justice, EOIR, Office of Planning and Analysis) before the Operations of the Executive Office of Immigration Review, Hearing before the Subcommittee On Immigration and Claims of the House Comm. on the Judiciary. 107th Congress at 19 (Feb. 6, 2002);

(b) Statistical Year Book FY00, U.S. Dept. of Justice, Executive Office of Immigration Review ("EOIR") (Jan. 9, 2001);

(c) Statistical Year Book FY01, U.S. Dept. of Justice, EOIR (March 2002);

(d) Statistical Year Book FY02, U.S. Dept. of Justice, EOIR (April 2003); and


We have utilized Mr. Enders’ testimony to set a baseline for the backlog, in fiscal year 1992 at 18,054 cases. The backlog in the subsequent years flows from this baseline. In particular, for fiscal years 1993 to 1996, we found no data regarding the backlog, the number of new cases received or the number of cases decided by the BIA. Therefore, for fiscal years 1993 to 1996, we projected the backlog as growing in a linear progression.1 With respect to fiscal years 1997 to 2002, we have projected the backlog’s growth based upon the differences reported between cases received and cases decided in the five sources (a – e) identified above.2 Using these projections, we estimate the backlog was greater than 60,000 case at the close of fiscal year 2000. These projections do not, however, account for cases that may have terminated for any reason prior to being considered by the BIA.

While the estimated backlog for each fiscal year set forth in Appendix 11 are mere estimates, we believe such estimates are accurate enough to illustrate the significant increase in the BIA’s backlog of cases over the period of fiscal year 1992 to fiscal year 2002 and the impact of the BIA’s “Streamlining Rules” upon the backlog. For example, Appendix 11 indicates that a

---

1 More specifically, this linear approximation was obtained by subtracting the number of cases received in FY (as reported by Mr. Enders as 12,823 cases) from the number of cases received in 1996 (as reported by the DOJ/EOIR FY00 Yearbook as 24,919 cases) and dividing the result by 4 to obtain a linear increase in the number of new cases received, from FY 93 to FY96 of 3,024 cases. Similarly, a linear projected yearly increase in the number of cases decided by the BIA for FY93 to FY96 was obtained using Mr. Enders FY92 base point of 11,720 cases being decided in FY92 and the DOJ/EOIR’s FY00 data point of 16,579 cases being decided in FY96. For a resulting increase of 1,214 additional cases being decided each year. The annual difference between the projected number of new cases minus the projected number of cases decided were then added to the backlog from the preceding year to obtain the estimated backlog in FY’s 1993 – 1996. Table 1 provides the results of such calculations. It is worth noting, that Mr. Enders testified that in FY97 the BIA received 29,913 new cases, decided 23,099 cases and the backlog was 47,295 cases. By subtracting the number of new cases in FY97 from the FY97 backlog and adding the number of decisions in FY97 to the FY97 backlog one obtains the derived backlog in FY96 of 40,481 cases. Similarly, using the linear approximation method discussed above, one obtains a FY96 backlog of 40,559 cases or a difference 78 cases (statistically a difference of less than 0.2%). As such, we have a high degree of confidence the backlog estimated for FY96 is statistically accurate.

2 In particular, the backlog for each of the following years was obtained based upon an averaging of differences between number of cases received versus cases decided by the BIA from the above mentioned five sources (a – e). Specifically, the backlog was determined for the following FYs by: FY97, averaging sources (a), (b) and (c); FY98/1999/2000, averaging sources (b), (c) and (d); FY01, averaging sources (a), (c), (d) and (e); FY02, averaging sources (d) and (e). These growth rates are those specified in the EOIR’s FY02 Statistical Yearbook, at page S1, as being the reported rate of increase in the BIA’s new cases and decisions.
reduction in the backlog of approximately 4,000 cases occurred in fiscal year 2001 (the first fiscal year following the implementation of the Streamlining Rules).

Further, as shown in Table 1, in fiscal year 2002 we estimate that the BIA received more than 34,000 new cases and reviewed more than 47,000 cases, for a reduction in the backlog of approximately 13,000 cases. While it is extremely difficult to determine whether this reduction in is attributable to the Streamlining Rules or the “Procedural Reforms,” it is worth noting that the Capital Area Immigrants Rights Coalition estimated that the BIA would decide 39,600 cases in fiscal year 2002, using the 1999 Streamlining Rules.

Table 1: Growth of the BIA Backlog

<table>
<thead>
<tr>
<th>Year</th>
<th>FY01</th>
<th>FY02</th>
<th>FY03</th>
<th>FY04</th>
<th>FY05</th>
<th>FY06</th>
<th>FY07</th>
<th>FY08</th>
<th>FY09</th>
<th>FY10</th>
</tr>
</thead>
<tbody>
<tr>
<td>New</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases</td>
<td>12,823</td>
<td>15,487</td>
<td>18,871</td>
<td>21,895</td>
<td>24,919</td>
<td>30,442</td>
<td>28,426</td>
<td>30,978</td>
<td>29,972</td>
<td>27,887</td>
</tr>
<tr>
<td></td>
<td>11,720</td>
<td>12,935</td>
<td>14,150</td>
<td>15,365</td>
<td>16,579</td>
<td>23,067</td>
<td>28,689</td>
<td>22,998</td>
<td>21,498</td>
<td>31,846</td>
</tr>
<tr>
<td>Total</td>
<td>18,544</td>
<td>20,606</td>
<td>25,327</td>
<td>31,257</td>
<td>40,197</td>
<td>47,572</td>
<td>47,309</td>
<td>55,289</td>
<td>61,763</td>
<td>39,804</td>
</tr>
</tbody>
</table>

3 It is difficult to determine when the BIA precisely began implementing the “Procedural Reforms.” These reforms were promulgated in February 2002 and the final rule was published in August 2002. Since August is ten months into the FY, it is reasonable to assume that a majority of the decrease in the backlog in FY02 is attributable to Streamlining and would have occurred regardless of whether the “Procedural Reforms” were implemented.

4 See Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment at 6, Capital Area Immigrants Rights Coalition et al. v. United States Dept. of Justice, (No. 1:02CV02081) (wherein the plaintiffs’ stated as follows: “In February of 2002, the last full month before the Department began issuing the BIA Memoranda and with four vacancies on the Board, it decided 3,300 cases. Id. at 54899, AR 711. At this rate, the Board should have been able to decide about 39,600 appeals annually; some 12,000 more than were incoming as “new” cases.”) Also see, Los Angeles Times analysis of EOIR statistics obtained under FOIA, Board of Immigration Appeals Decisions, June 2000 – Oct. 2002, (January 27, 2003) at http://www.latimes.com/news/nationsworld/ia-appeals-gif.0.3099912.png.
## Appendix 13: Data Supporting Backlog Calculations

<table>
<thead>
<tr>
<th></th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>1992</td>
<td>12,823</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>12,823</td>
<td>Enders</td>
<td>11,720</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>11,720</td>
<td>Enders</td>
<td>18,054</td>
<td>18,054</td>
<td>18,054</td>
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<td>1993</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>15,847</td>
<td>Estimate</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>12,935</td>
<td>Estimate</td>
<td>-2,912</td>
<td>20,966</td>
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<td>1994</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>18,871</td>
<td>Estimate</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>14,150</td>
<td>Estimate</td>
<td>-4,722</td>
<td>25,688</td>
<td></td>
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<tr>
<td>1995</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>21,895</td>
<td>Estimate</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>15,364</td>
<td>Estimate</td>
<td>-6,531</td>
<td>32,219</td>
<td></td>
<td></td>
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<tr>
<td>1996</td>
<td>N/A</td>
<td>24,919</td>
<td>N/A</td>
<td>N/A</td>
<td>24,919</td>
<td>DOJ FY00</td>
<td>N/A</td>
<td>16,579</td>
<td>N/A</td>
<td>N/A</td>
<td>16,579</td>
<td>DOJ FY00</td>
<td>-8,340</td>
<td>40,559</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>29,913</td>
<td>30,626</td>
<td>30,788</td>
<td>N/A</td>
<td>30,442</td>
<td>Avg. Enders, DOJ FYs 00 &amp; 01</td>
<td>23,099</td>
<td>22,727</td>
<td>22,826</td>
<td>N/A</td>
<td>23,067</td>
<td>Avg. Enders, DOJ FY00 &amp; FY01</td>
<td>-7,375</td>
<td>47,934</td>
<td>47,295</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>N/A</td>
<td>28,320</td>
<td>28,482</td>
<td>28,475</td>
<td>28,426</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>N/A</td>
<td>28,834</td>
<td>28,470</td>
<td>28,763</td>
<td>N/A</td>
<td>28,689</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>263</td>
<td>47,670</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>N/A</td>
<td>30,759</td>
<td>31,077</td>
<td>31,098</td>
<td>30,978</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>N/A</td>
<td>23,018</td>
<td>22,964</td>
<td>23,012</td>
<td>N/A</td>
<td>22,998</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>-7,980</td>
<td>55,650</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>N/A</td>
<td>29,847</td>
<td>30,019</td>
<td>30,050</td>
<td>29,972</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>N/A</td>
<td>21,507</td>
<td>21,608</td>
<td>21,378</td>
<td>N/A</td>
<td>21,498</td>
<td>Avg. DOJ FYs 00 - 02</td>
<td>-8,474</td>
<td>64,125</td>
<td></td>
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<tr>
<td>2001</td>
<td>27,505</td>
<td>N/A</td>
<td>28,104</td>
<td>28,140</td>
<td>27,800</td>
<td>27,887</td>
<td>31,789</td>
<td>31,996</td>
<td>31,797</td>
<td>31,800</td>
<td>N/A</td>
<td>31,846</td>
<td>Avg. Enders, DOJ FY 01-02 &amp; AILA-EOIR</td>
<td>3,958</td>
<td>60,166</td>
<td>57,597</td>
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<td>2002</td>
<td>N/A</td>
<td>N/A</td>
<td>34,653</td>
<td>34,100</td>
<td>34,377</td>
<td>Avg. DOJ FY02 &amp; AILA-EOIR</td>
<td>N/A</td>
<td>N/A</td>
<td>47,321</td>
<td>47,300</td>
<td>47,311</td>
<td>Avg. DOJ FY02 &amp; AILA-EOIR</td>
<td>12,934</td>
<td>47,232</td>
<td></td>
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</tr>
</tbody>
</table>
This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF JUSTICE

8 CFR Part 3

28 CFR Part 0

[EOIR No. 116F; AG Order No. 2062-96]

RIN 1125-AA17

Executive Office for Immigration Review; Board of Immigration Appeals; Board Members

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule expands the Board of Immigration Appeals (Board) to fifteen permanent members, including fourteen Board Members and a Chairman. This expansion is necessary because of the Board's increasing caseload. In order to maintain an effective, efficient system of appellate adjudication, it has become necessary to increase the number of Board Members.

EFFECTIVE DATE: This final rule is effective November 22, 1996.

FOR FURTHER INFORMATION CONTACT: Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone: (703) 305-0470.

SUPPLEMENTARY INFORMATION: This final rule provides for an expansion of the Board of Immigration Appeals to a fifteen-member permanent Board. This expansion is necessary because of the Board's increasing caseload. To maintain an effective, efficient system of appellate adjudication, it has become necessary to increase the number of Board Members. This change will allow the Board to sit in five permanent member panels of three. In addition, this change will further enhance effective, efficient adjudication while providing for en banc review in appropriate cases. This rule amends 8 CFR part 3 and 28 CFR part 0 to reflect the new fifteen member Board.

Compliance with 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date is unnecessary because this rule relates to agency procedure and practice.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

The Attorney General has determined that this rule is not a significant regulatory action under Executive Order No. 12866, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12612

This rule has no Federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order No. 12612.

Executive Order 12988

This rule complies with the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order No. 12988.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Lawyers, Organizations and functions (Government agencies), Reporting and recordkeeping requirements.

28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Whistleblowing.

For the reasons set forth in the preamble, part 3 of title 8 of the Code of Federal Regulations and part 0 of title 28 of the Code of Federal Regulations are amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:


Subpart A—Board of Immigration Appeals

§3.1 [Amended]

2. In §3.1, paragraph (a)(1) is amended by removing the word "eleven" in the second sentence and adding in its place the word "fourteen."

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

3. The authority citation for part 0 continues to read as follows:


Subpart U—Executive Office for Immigration Review

§0.116 [Amended]

4. Section 0.116 is amended by removing the word "eleven" in the first sentence and adding in its place the word "fourteen."

Dated: November 14, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96-29589 Filed 11-21-96; 8:45 am]

BILLING CODE 4410-19-M

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions

AGENCY: National Credit Union Administration.

ACTION: Interim final rule with request for comments and Interpretive Ruling and Policy Statement 96-2 (IRPS 96-2).

SUMMARY: The purpose of this interim Interpretive Ruling and Policy Statement is to permit federal credit unions to restructure their fields of membership consistent with the recent Court of Appeals decision ("the Decision") and District Court order ("the Order") limiting federal credit unions' ability to serve eligible credit union members and new select groups. NCUA recognizes that this interim policy will not provide complete relief to all multiple group federal credit unions, since any interim policy must meet the requirements set forth in the Decision and the Order. Similarly, this interim policy does not assist
information on the regulatory and informational impacts of this action on small businesses.

A proposed rule concerning this action was published in the Federal Register on Tuesday, August 11, 1998 (63 FR 42764). Copies of the rule were mailed or sent via facsimile to all committee members and to grapefruit growers and handlers. The rule was also made available through the Internet by the Office of the Federal Register.

A 20-day comment period was provided to allow interested persons to respond to the proposal. The comment period ended August 31, 1998. No comments were received.

As previously stated, subsequent to the end of the comment period, the committee met and recommended modifying its original recommendation. The committee recommended that the weekly percentages be changed from 25 percent for each of the 11 regulated weeks to 37 percent for the first seven weeks (September 21 through November 8), and 32 percent for the next four weeks (November 9 through December 6). Because of this recommendation, the Department has determined that interested parties should be provided the opportunity to comment on the changes to the original recommendation. However, the Department has further determined that extending the comment period with no percentage in effect limiting the shipments of small red seedless grapefruit when the period of regulation begins would be detrimental to the industry. Therefore, the Department is instituting the regulations on small red seedless grapefruit through this interim final rule which will allow an additional 10 days to comment.

After consideration of all relevant matter presented, including the information and recommendations submitted by the committee and other available information, it is hereby found that this rule, as hereafter set forth, will tend to effectuate the declared policy of the Act.

A 10-day comment period is provided to allow interested persons to respond to this interim final rule. Ten days is deemed appropriate because the regulatory period begins on September 21, 1998, and continues for 11 weeks. Adequate time will be necessary so that any changes made to the regulations based on comments filed could be made effective during the 11-week period. All written comments timely received will be considered before a final determination is made on this matter.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the Federal Register because this rule needs to be in place when the regulatory period begins on the week of September 21, 1998, and handlers begin shipping grapefruit. The committee has kept the industry well informed on this issue. It has also been widely discussed at various industry and association meetings. Interested persons have had time to determine and express their positions. In addition, these size small red grapefruit are already being harvested and handlers need to know the amount they will be allowed to ship, in order to determine harvesting quantities that will allow these increased amounts to be shipped.

This rule is necessary to help stabilize the market and to improve grower returns. Further, handlers are aware of this rule, which was recommended at public meetings. Also, a 20-day comment period was provided for in the proposed rule and a 10-comment period is provided in this rule.

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges. Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, 7 CFR part 905 is amended as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

1. The authority citation for 7 CFR Part 905 continues to read as follows:


2. A new §905.350 is added to read as follows:

§905.350 Red seedless grapefruit regulation.

This section establishes the weekly percentages to be used to calculate each handler's weekly allotment of small sizes. If the minimum size in effect under §905.306 for red seedless grapefruit is size 56, handlers can fill their allotment with size 56, size 48, or a combination of the two sizes such that the total of these shipments is within the established weekly limits. If the minimum size in effect under §905.306 for red seedless grapefruit is 48, handlers can fill their allotment with size 48 red seedless grapefruit such that the total of these shipments is within the established weekly limits. The weekly percentages for sizes 48 and/or 56 red seedless grapefruit grown in Florida, which may be handled during the specified weeks are as follows:

<table>
<thead>
<tr>
<th>Week</th>
<th>Weekly percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) 9/21/98 through 9/27/98</td>
<td>37</td>
</tr>
<tr>
<td>(b) 9/28/98 through 10/4/98</td>
<td>37</td>
</tr>
<tr>
<td>(c) 10/5/98 through 10/11/98</td>
<td>37</td>
</tr>
<tr>
<td>(d) 10/12/98 through 10/18/98</td>
<td>37</td>
</tr>
<tr>
<td>(e) 10/19/98 through 10/25/98</td>
<td>37</td>
</tr>
<tr>
<td>(f) 10/26/98 through 11/1/98</td>
<td>37</td>
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Dated: September 23, 1998

Robert C. Keeley,
Deputy Administrator. Fruit and Vegetable Programs

[FR Doc 98–25847 Filed 9–25–98; 8:45 am]
BILLING CODE 3410–02–U

DEPARTMENT OF JUSTICE

8 CFR Part 3

28 CFR Part 0

[EDIR No. 123F; AG Order No. 2180–98]

RIN 1125–AA24

Executive Office for Immigration Review, Board of Immigration Appeals; 18 Board Members

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule expands the Board of Immigration Appeals (Board) to eighteen permanent members, including sixteen Board Members, a Chairman, and a Vice Chairman. This rule also recognizes the position of Deputy Director in the organizational hierarchy of the Executive Office for Immigration Review.

EFFECTIVE DATE: This final rule is effective September 28, 1998.

FOR FURTHER INFORMATION CONTACT: Margaret M. Phiblin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone: (703) 305–0470.

SUPPLEMENTARY INFORMATION: This final rule provides for an expansion of the Board of Immigration Appeals to an 18–member permanent Board. This expansion is necessary because of the board’s increasing caseload. To maintain an effective, efficient system of appellate adjudication, it has become necessary to increase the number of Board Members. This change will further enhance effective, efficient adjudication while providing for en
banç review in appropriate cases. This rule amends 8 CFR part 3 and 28 CFR part 0 to reflect the new 18-member Board. Although this rule authorizes three additional Board member positions, the Department does not anticipate filling all of these positions at the present time.

This rule also recognizes the position of Deputy Director in the organizational hierarchy of the Executive Office for Immigration Review. The Deputy Director reports directly to the Director, and may accept any delegation of authority from the Director.

Finally, the rule makes minor technical changes to 8 CFR 0.115.

Compliance with 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date is not necessary because this rule relates to agency procedure and practice.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant economic impact on a substantial number of small entities.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12866

The Attorney General has determined that this rule is not a significant regulatory action under Executive Order No. 12866, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects
8 CFR Part 3

Administrative practice and procedure. Immigration, Lawyers. Organizations and functions (Government agencies). Reporting and recordkeeping requirements.

28 CFR Part 0

Authority delegation (Government agencies). Government employees, Organizations and functions (Government agencies). Whistleblowing.

For the reasons set forth in the preamble, Chapter 1 of Title 8 of the Code of Federal Regulations and Chapter 1 of Title 28 of the Code of Federal Regulations are to be amended as follows:

TITLE 8—ALIENS AND NATIONALITY

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for 8 CFR part 3 continues to read as follows:


2. In 8 CFR 3.0, revise paragraph (a) to read as follows:

§ 3.0 Executive Office for Immigration Review.

(a) Organization. The Executive Office for Immigration Review shall be headed by a Director who shall be assisted by a Deputy Director. The Director shall be responsible for the general supervision of the Board of Immigration Appeals and the Office of the Chief Immigration Judge in the execution of their duties in accordance with this part 3. The Director may delegate the authority delegated to him by the Attorney General to the Deputy Director, the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer in the execution of their duties.

(b) The Director may delegate the authority delegated to him by the Attorney General to the Deputy Director, the Chief Immigration Judge, or the Chief Administrative Hearing Officer.

6. In 28 CFR, amend § 0.116 by revising the first sentence to read as follows:

§ 0.116 Board of Immigration Appeals.

The Board of Immigration Appeals shall consist of a Chairman, a Vice Chairman, and sixteen other members.


Janet Reno,
Attorney General.
[FR Doc. 98-25882 Filed 9-25-98; 8:45 am]
BILLING CODE 4410-30-M
DEPARTMENT OF JUSTICE
8 CFR Part 3
28 CFR Part 0

[RIN 1125-AA28]

Executive Office for Immigration Review; Board of Immigration Appeals; 21 Board Members

AGENCY: Executive Office for Immigration Review, Justice.

ACTIONS: Final rule.

SUMMARY: This final rule amends the regulations relating to the organization of the Executive Office for Immigration Review by adding to the Board of Immigration Appeals (Board) an additional Vice Chairman position and two Board Member positions, thereby expanding the Board to 21 permanent members. This rule also eliminates the position of Chief Attorney Examiner. These amendments are necessary to maintain an effective, efficient system of appellate adjudication in light of the Board’s increasing caseload.

EFFECTIVE DATE: This final rule is effective April 14, 2000.

FOR FURTHER INFORMATION CONTACT: Charles Adkins-Blanch, Acting General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION: This final rule expands the Board to 21 permanent members by adding one Vice Chairman position and two Board Member positions. This rule also eliminates the position of Chief Attorney Examiner in the organizational hierarchy of the Board. These changes are necessary to maintain an effective, efficient system of appellate adjudication in light of the Board’s increasing caseload. This rule amends 8 CFR part 3 and 28 CFR part 0 to reflect these changes in the Board’s organization.

Compliance with 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date is not necessary because this rule relates to agency procedure and practice.

Regulatory Flexibility Act

The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure of State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 604. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department of Justice has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Summary Impact Statement.

Executive Order 12996: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12996.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, Acting General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305-0470.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Aliens, Immigration. Legal services. Organization and functions (Government agencies). Reporting and recordkeeping requirements.

28 CFR Part 0


Accordingly, for the reasons set forth in the preamble, part 3 of chapter I of title 8 of the Code of Federal Regulations and part 0 of chapter I of title 28 of the Code of Federal Regulations are amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for 8 CFR part 3 continues to read as follows:


Subpart A—Board of Immigration Appeals

2. In §3.1:
   a. Amend paragraph (a)(1) by revising the second sentence.
   b. Amend paragraph (a)(1) by removing the words “or the Chief Attorney Examiner” in the eleventh sentence.
   c. Amend paragraph (a)(2) by revising the third sentence.
   d. Amend paragraph (a)(2) by removing the last two sentences.
   e. Amend paragraph (a)(4)(ii) by removing the words “or the Chief Attorney Examiner” and adding in their place the words “one of the Vice Chairmen” in the third sentence.
   f. Amend paragraph (a)(4)(ii) by removing the words “Vice Chairman are both” and adding in their place the words “Vice Chairmen are all” in the fourth and fifth sentences.
   g. Amend paragraph (a)(4)(iii) by removing the words “the Vice Chairman” and adding in their place the words “one of the Vice Chairmen” in the sixth sentence.

The revisions read as follows:

§3.1 General authorities.
   (a)(1) * * * The Board shall consist of a Chairman, two Vice Chairmen, and eighteen other members. * * *
The Chairman shall be assisted in the performance of his duties by two Vice Chairman.

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

3. The authority citation for 28 CFR part 0 continues to read as follows:


Subpart U—Executive Office for Immigration Review

4. Amend §0.116 by revising the first sentence to read as follows:

§0.116 Board of Immigration Appeals.

The Board of Immigration Appeals shall consist of a Chairman, two Vice Chairmen, and eighteen other members.


Janet Reno,
Attorney General.

[FR Doc. 00-8533 Filed 4-13-00; 8:45 am]
BILLING CODE 4456-00-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 245

[INS No. 1825-97]

RIN 1115-AE25

Adjustment of Status for Certain Polish and Hungarian Parolees

AGENCY: Immigration and Naturalization Service.

ACTION: Final rule.

SUMMARY: This final rule adopts, with changes, the interim rule the Immigration and Naturalization Service (Service) published in the Federal Register on May 23, 1997. The interim rule provided for the adjustment to lawful permanent resident status of certain alien parolees from Poland or Hungary who were paroled into the United States between November 1, 1989, and December 31, 1991, and established terms that enabled these individuals to apply for permanent resident status. This final rule responds to a comment the Service received by adding a list of the eligibility requirements for adjustment under this provision.

DATES: This final rule is effective May 15, 2000.

FOR FURTHER INFORMATION CONTACT: Michael Valverde, Program Analyst, Immigration and Naturalization Service, Adjudications Division, 425 I Street, NW, Room 3214, Washington, DC 20536; telephone (202) 514-3228.

SUPPLEMENTARY INFORMATION:

Background

What Authority Provides for Adjustment of Status for Nationals From Poland or Hungary?

Section 646 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, dated September 30, 1996, provides for the adjustment to lawful permanent resident status for certain nationals of Poland or Hungary who, after having been denied refugee status, were inspected and granted parole in the United States during the period beginning on November 1, 1989, and ending on December 31, 1991.

How Did the Service Implement the Provisions of Section 646 of the IIRIRA?

On May 23, 1997, the Service published an interim rule in the Federal Register at 62 FR 28314, which added §245.12, to establish the procedures by which eligible aliens may obtain the benefits of section 646(b) of the IIRIRA. The public was given a 60-day period to comment on the interim rule.

What Comments did the Service Receive?

The Service received one written comment on the interim rule. The commenter noted the eligibility requirements for benefits, under section 646 of Public Law 104-208, were not stated in the Immigration and Nationality Act (Act). The commenter felt it was necessary to state the eligibility requirements for benefits in this rule for prospective applicants.

The Service agrees with the commenter that eligibility requirements for benefits, under section 646 of Public Law 104-208, are not stated in the Act. Accordingly, the Service has incorporated these statutory requirements into §245.12(a)(3) and (4) of the final rule.

What Other Changes to the Final Rule did the Service Make?

The Service is also amending §245.12 to reflect changes made by section 308 of the IIRIRA. Section 308 redesignated several sections of the Act, including section 232 of the Act regarding medical examinations. An applicant's medical examination must comply with §232.1 and §245.5 to meet the eligibility requirements for adjustment of status. Accordingly, the Service is amending §245.12(a) by adding a reference to §232.1. Section 245.12(a) in the interim rule made reference to collecting information on Form I-643. Health and Human Services Statistical Data, as a part of the filing process. However, the reference to Form I-643 has been removed because it does not properly apply to applicants under section 646 of the IIRIRA, but rather to refugees.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 603(b)), has reviewed this regulation, and by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because this rule affects individuals who are adjusting status to permanent resident.

Unfunded Mandates Reform Act of 1995

This rule will not result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order E.O., 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget (OMB) has waived its review under section 6(a)(3)(A).

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and
SUBCHAPTER A—GENERAL PROVISIONS

PART 1—DEFINITIONS


§ 1.1 Definitions.

As used in this chapter:

(a) The terms defined in section 101 of the Immigration and Nationality Act (66 Stat. 163) shall have the meanings ascribed to them in that section and as supplemented, explained, and further defined in this chapter.

(b) The term Act means the Immigration and Nationality Act, as amended.

(c) The term Service means the Immigration and Naturalization Service.

(d) The term Commissioner means the Commissioner of Immigration and Naturalization.

(e) The term Board means the Board of Immigration Appeals.

(f) The term attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarment, or otherwise restricting him in the practice of law.

(g) Unless the context otherwise requires, the term case means any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceeding, including preliminary steps by any private person or corporation preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service or the Board is initiated.

(h) The term day when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(i) The term practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board.

(j) The term representative refers to a person who is entitled to represent others as provided in §§ 292.1(a)(2), (3), (4), (5), (6), and 292.1(b) of this chapter.

(k) The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not himself out as qualified in legal matters or in immigration and naturalization procedure.

(l) The term immigration judge means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(m) The term representation before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section.

(n) The term Executive Office means Executive Office for Immigration Review.

(o) The term director means either district director or regional service center director, unless otherwise specified.

(p) The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such
status terminates upon entry of a final administrative order of exclusion or deportation.

(q) The term arriving alien means an alien who seeks admission to or transit through the United States, as provided in 8 CFR part 235, at a port-of-entry, or an alien who is interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act.

(r) The term respondent means a person named in a Notice to Appear issued in accordance with section 239(a) of the Act, or in an Order to Show Cause issued in accordance with §242.1 of this chapter as it existed prior to April 1, 1997.

(s) The term Service counsel means any immigration officer assigned to represent the Service in any proceeding before an immigration judge or the Board of Immigration Appeals.

(t) The term aggravated felony means a crime (or a conspiracy or attempt to commit a crime) described in section 101(a)(43) of the Act. This definition is applicable to any proceeding, application, custody determination, or adjudication pending on or after September 30, 1996, but shall apply under section 276(b) of the Act only to violations of section 276(a) of the Act occurring on or after that date.


PART 2—AUTHORITY OF THE COMMISSIONER


§2.1 Authority of the Commissioner.

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Executive Office, the Board, the Office of the Chief Special Inquiry Officer, and Special Inquiry Officers, there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.

[48 FR 8039, Feb. 25, 1983]

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Sec.
3.0 Executive Office for Immigration Review.

Subpart A—Board of Immigration Appeals

3.1 General authorities.
3.2 Reopening or reconsideration before the Board of Immigration Appeals.
3.3 Notice of appeal.
3.4 Withdrawal of appeal.
3.5 Forwarding of record on appeal.
3.6 Stay of execution of decision.
3.7 Notice of certification.
3.8 Fees.

Subpart B—Immigration Court

3.9 Chief Immigration Judge.
3.10 Immigration Judges.
3.11 Administrative control Immigration Courts.

Subpart C—Immigration Court—Rules of Procedure

3.12 Scope of rules.
3.13 Definitions.
3.14 Jurisdiction and commencement of proceedings.
3.15 Contents of the order to show cause and notice to appear and notification of change of address.
3.16 Representation.
3.17 Appearances.
3.18 Scheduling of cases.
3.19 Custody/bond.
3.20 Change of venue.
3.21 Pre-hearing conferences and statement.
3.22 Interpreters.
3.23 Reopening or reconsideration before the Immigration Court.
3.24 Fees pertaining to matters within the jurisdiction of the Immigration Judge.
3.25 Form of the proceeding.
3.26 In absentia hearings.
§ 3.0 Executive Office for Immigration Review.

(a) Organization. The Executive Office for Immigration Review shall be headed by a Director, who shall be responsible for the general supervision of the Board of Immigration Appeals and the Office of the Chief Immigration Judge in the execution of their duties in accordance with 8 CFR part 3. The Director may redelegate the authority delegated to him by the Attorney General to the Chairman of the Board of Immigration Appeals or the Chief Immigration Judge. The Director shall be assisted in the performance of his duties by an Executive Assistant.

(b) Citizenship Requirement for Employment. (1) An application to work at the Executive Office for Immigration Review (EOIR or Agency), either as an employee or as a volunteer, must include a signed affirmation from the applicant that he or she is a citizen of the United States of America. Upon the Agency's request, the applicant must document United States citizenship.

(2) The Director of EOIR may, by explicit written determination and to the extent permitted by law, authorize the appointment of an alien to an Agency position when necessary to accomplish the work of EOIR.

[48 FR 8039, Feb. 25, 1983, as amended at 60 FR 29469, June 5, 1995]

Subpart A—Board of Immigration Appeals

§ 3.1 General authorities.

(a)(1) Organization. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall consist of a Chairman and fourteen other members. The Board Members shall exercise their independent judgment and discretion in the cases coming before the Board. A majority of the permanent Board Members shall constitute a quorum of the Board sitting en banc. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Director may in his discretion designate Immigration Judges to act as temporary, additional Board Members for whatever time the Director deems necessary. The Chairman may divide the Board into three-member panels and designate a presiding member of each panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each panel shall be empowered to review cases by majority vote. A majority of the number of Board Members authorized to constitute a panel shall constitute a quorum for such panel. Each panel may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of cases before it. In the case of an unopposed motion or a motion to withdraw an appeal pending before the Board, a single Board Member or the Chief Attorney Examiner may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of such motions before it. The permanent Board may, by majority vote on
its own motion or by direction of the Chairman, consider any case en banc or reconsider en banc any case decided by a panel. By majority vote of the permanent Board, decisions of the Board shall be designated to serve as precedents pursuant to paragraph (g) of this section. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(2) Chairman. The Chairman shall direct, supervise, and establish internal operating procedures and policies of the Board. He shall designate a member of the Board to act as Chairman in his absence or unavailability. The Chairman shall be assisted in the performance of his duties by a Chief Attorney Examiner, who shall be directly responsible to the Chairman. The Chief Attorney Examiner shall serve as an Alternate Board Member when, in the absence or unavailability of a Board Member or Members or for other good cause, his participation is deemed necessary by the Chairman. Once designated, his participation in a case shall continue to its normal conclusion.

(3) Board Members. Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board.

(b) Appellate jurisdiction. Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 240, subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to §208.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 244.

(11) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals therefrom pursuant to §3.65.

(c) Jurisdiction by certification. The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of §3.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) Powers of the Board—(1) Generally. Subject to any specific limitation prescribed by this chapter, in considering
and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.

(1–a) Summary dismissal of appeals. (1) Standards. The Board may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR–26 or Form EOIR–29 (Notice of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in law or fact unless the Board determines that it is supported by a good faith argument for extension, modification or reversal of existing law.

(E) The party concerned indicates on Form EOIR–26 or Form EOIR–29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing; or

(F) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) Disciplinary consequences. The filing by an attorney or representative accredited under §292.2(d) of this chapter of an appeal which is summarily dismissed under paragraph (d)(1–a)(1) of this section may constitute frivolous behavior under §292.3(a)(15) of this chapter. Summary dismissal of an appeal under paragraph (d)(1–a)(1) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(2) Finality of decision. The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(3) Rules of practice: Discipline of attorneys and representatives. The Board shall have authority, with the approval of the Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization desiring representation is of a kind described in §1.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any special Inquiry Officer.

(e) Oral argument. When an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. Oral argument shall be heard at the discretion of the Board at such date and time as the Board shall fix. The Service may be represented before the Board by an officer of the Service designated by the Service.

(f) Service of Board decisions. The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) Decisions of the Board as precedents. Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or Immigration Judges in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues.

(h) Referral of cases to the Attorney General. (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.
(iii) The Commissioner requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.


§ 3.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider. (1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(c) Motion to reopen. (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in §1.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation
or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of §3.23(b)(4)(ii)(A). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(1) Filed pursuant to the provisions of §3.23(b)(4)(ii)(A)(i) or §3.23(b)(4)(ii)(A)(ii); or

(2) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(3) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(4) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with §208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) Judicial proceedings. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) Stay of deportation. Except where a motion is filed pursuant to the provisions of §§3.23(b)(4)(ii) and 3.23(b)(4)(ii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) Filing procedures—(1) English language, entry of appearance, and proof of
service requirements. A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

(2) Distribution of motion papers. (i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of §3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) Briefs and response. The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) Oral argument. A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) Ruling on motion. Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.


§3.3 Notice of appeal.

(a) Filing—(1) Appeal from decision of an Immigration Judge. A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of an Immigration Judge shall be given notice of his or her right to appeal. An appeal from a decision of an Immigration Judge shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) directly with the Board, within the time specified in the governing sections of this chapter. The appealing parties are only those parties who are covered by
the decision of an Immigration Judge and who are specifically named on the Notice of Appeal. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of §3.8. If the respondent/applicant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27) must be filed with the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. The appeal and all attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A notice of appeal may not be filed by any party who has waived appeal pursuant to §3.39.

(2) Appeal from decision of a Service officer. A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of a Service officer shall be given notice of his or her right to appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR–29) directly with the office of the Service having administrative control over the record of proceeding within the time specified in the governing sections of this chapter. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of §3.8 and, if the appellant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27). The appeal and all attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed until its receipt at the appropriate office of the Service, together with all required documents and fees, and the fee provisions of §3.8 are satisfied.

(b) Statement of the basis of appeal. The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to §3.1(d)(1–a)(1). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. The appellant must also indicate in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) whether he or she desires oral argument before the Board and whether he or she will be filing a separate written brief or statement in support of the appeal.

(c) Briefs.—(1) Appeal from decision of an Immigration Judge. Briefs in support of or in opposition to an appeal from a decision of an Immigration Judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. An appellant shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) Appeal from decision of a Service officer. Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file in accordance with a briefing schedule set
by that office. The alien shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the appeal is taken. The Service shall have the same period of time in which to file a reply brief that was initially granted to the alien to file his or her brief. The time to file a reply brief commences from the date upon which the alien’s brief was due, as originally set or extended. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

(d) Effect of certification. The certification of a case, as provided in this part, shall not relieve the party affected from compliance with the provisions of this section in the event that he or she is entitled and desires to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal.

(e) Effect of departure from the United States. Departure from the United States of a person who is the subject of deportation proceedings, prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal.

§ 3.4 Withdrawal of appeal.

In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the notice of appeal was filed. If the record in the case has not been forwarded to the Board on appeal in accordance with §3.3, the decision made in the case shall be final to the same extent as if no appeal had been taken. If the record has been forwarded on appeal, the withdrawal of the appeal shall be forwarded to the Board and, if no decision in the case has been made on the appeal, the record shall be returned and the initial decision shall be final to the same extent as if no appeal had been taken. If a decision on the appeal has been made by the Board in the case, further action shall be taken in accordance therewith.

Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken. Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in §1.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.


§ 3.5 Forwarding of record on appeal.

(a) Appeal from decision of an Immigration Judge. If an appeal is taken from a decision of an Immigration Judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board.

(b) Appeal from decision of a Service officer. If an appeal is taken from a decision of a Service officer, the record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A Service officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the benefit that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does
§3.6 Stay of execution of decision.

(a) Except as provided under §242.2(d) of this chapter and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of an Immigration Judge under §3.23 or §242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except where such order expressly grants a stay or where the motion was filed pursuant to the provisions of §3.23(b)(4)(viii). The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge or a Service officer.

[61 FR 18907, Apr. 29, 1996; 61 FR 21065, May 9, 1996]

§3.7 Notice of certification.

Whenever, in accordance with the provisions of §3.1(c), a case is certified to the Board, the alien or other party affected shall be given notice of certification. An Immigration Judge or Service officer may certify a case only after an initial decision has been made and before an appeal has been taken. If it is known at the time the initial decision is rendered that the case will be certified, the notice of certification shall be included in such decision and no further notice of certification shall be required. If it is not known until after the initial decision is rendered that the case will be certified, the office of the Service or the Immigration Court having administrative control over the record of proceeding shall cause a Notice of Certification to be served upon the parties. In either case, the notice shall inform the parties that the case is required to be certified to the Board and that they have the right to make representations before the Board, including the making of a request for oral argument and the submission of a brief. If either party desires to submit a brief, it shall be submitted to the office of the Service or the Immigration Court having administrative control over the record of proceeding for transmission to the Board within the time prescribed in §3.3(c). The case shall be certified and forwarded to the Board by the office of the Service or Immigration Court having administrative jurisdiction over the case upon receipt of the brief, or upon the expiration of the time within which the brief may be submitted, or upon receipt of a written waiver of the right to submit a brief. The Board in its discretion may elect to accept for review or not accept for review any such certified case. If the Board declines to accept a certified case for review, the underlying decision shall become final on the date the Board declined to accept the case.

[61 FR 18907, Apr. 29, 1996]

§3.8 Fees.

(a) Appeal from decision of an Immigration Judge or motion within the jurisdiction of the Board. Except as provided in paragraph (c) of this section or when filed by an officer of the Service, a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-25) filed pursuant to §3.3(a), or a motion related to Immigration Judge proceedings that is within the jurisdiction of the Board and is filed directly with the Board pursuant to §3.2(g), shall be accompanied by the fee specified in applicable provisions of §103.7(b)(1) of this chapter. Fees shall be paid by check or money order payable to the “United States Department of Justice.” Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. A remittance shall not satisfy the fee requirements of this section if the remittance is found uncollectible.

(b) Appeal from decision of a Service officer or motion within the jurisdiction of
§ 3.9

the Board. Except as provided in paragraph (c) of this section, a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR-29), or a motion related to such a case filed under this part by any person other than an officer of the Service, filed directly with the Service shall be accompanied by the appropriate fee specified, and remitted in accordance with the provisions of §103.7 of this chapter.

(c) Waiver of fees. The Board may, in its discretion, authorize the prosecution of any appeal or any motion over which the Board has jurisdiction without payment of the required fee. In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or motion, he or she shall file with the Notice of Appeal (Form EOIR-26 or Form EOIR-29) or motion, an Appeal Fee Waiver Request, (Form EOIR-26A). If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.

[61 FR 18907, Apr. 29, 1996]

Subpart B—Immigration Court

SOURCE: 62 FR 10331, Mar. 6, 1997, unless otherwise noted.

§ 3.9 Chief Immigration Judge.

The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges i.e., the conduct of the various programs assigned to them. The Chief Immigration Judge shall be assisted by Deputy Chief Immigration Judges and Assistant Chief Immigration Judges in the performance of his or her duties. These shall include, but are not limited to:

(a) Establishment of operational policies; and

(b) Evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated.

§ 3.10 Immigration Judges.

Immigration Judges, as defined in 8 CFR part 1, shall exercise the powers and duties in this chapter regarding the conduct of exclusion, deportation, removal, and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct.

§ 3.11 Administrative control Immigration Courts.

An administrative control Immigration Court is one that creates and maintains Records of Proceedings for Immigration Courts 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 and shall not be filed with any other Immigration Court. A list of the administrative control Immigration Courts with their assigned geographical areas will be made available to the public at any Immigration Court.

Subpart C—Immigration Court—Rules of Procedure

SOURCE: 52 FR 2936, Jan. 29, 1987, unless otherwise noted.

§ 3.12 Scope of rules.

These rules are promulgated to assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges. Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to, deportation, exclusion, removal, bond, rescission, departure control, asylum proceedings, and disciplinary proceedings under §292.3 of this chapter. The sole procedures for review of credible fear determinations by Immigration Judges are provided for in §3.42.

[57 FR 11571, Apr. 6, 1992, as amended at 62 FR 10331, Mar. 6, 1997]

§ 3.13 Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in §3.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order
remainder of the crop year ending June 30, 2000, and subsequent crop years. The Committee discussed alternatives to this rule, including making no change, but unanimously concluded that such alternatives would not be in the best interests of the industry. This action relaxes the outgoing quality regulations imposed on all domestic peanut handlers and importers. It is applied uniformly on all peanut handlers and importers, and should tend to reduce their costs slightly since less lots will likely have to be remailed to meet outgoing quality requirements. Also, this relaxation may slightly reduce any reporting and recordkeeping burden on regulated persons. As with all Federal marketing agreement and order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meetings were widely publicized throughout the peanut industry and all interested persons were invited to attend the meetings and participate in deliberations on all issues. Like all Committee meetings, the February 2, 1999, and March 18, 1999, meetings were public meetings and all entities, both large and small, were able to express views on this issue. The Committee itself consists of 18 members of whom 9 represent handlers and 9 represent producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses. After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act. This rule invites comments on a change to the outgoing quality control requirements currently prescribed under the Agreement, the Non-signers Program and the Import Regulation. Any comments received will be considered prior to finalization of this rule. Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register because: (1) This action relaxes the foreign material allowance for the three 'with splits' categories of peanuts; (2) harvesting of the 1999-2000 crop year domestic peanuts is already underway and the rule should cover as much of the remainder of the crop year ending June 30, 2000, as possible; (3) all peanuts in the domestic and export markets must fully comply with all quality requirements under the Agreement; (4) the changes need to be effective before the 2000 Mexican peanut import quota opens January 3, 2000, so that all peanut importers are treated equally during 2000, as required by international trade agreements; (5) many signatory handlers, importers, and others in the industry are aware of this action, which was unanimously recommended by the Committee at a public meeting and interested parties had an opportunity to provide input; and (6) this interim final rule provides a 60-day comment period, and all written comments timely received will be considered prior to finalization of this rule.

List of Subjects
7 CFR Part 997
Food grades and standards, Peanuts, Reporting and recordkeeping requirements.
7 CFR Part 998
Marketing agreements, Peanuts, Reporting and recordkeeping requirements.
7 CFR Part 999
Dates, Food grades and standards, Hazelnuts, Imports, Nuts, Peanuts, Prunes, Raisins, Reporting and recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, 7 CFR parts 997, 998, and 999 are amended as follows:

1. The authority citation for 7 CFR parts 997, 998, and 999 continues to read as follows:


PART 997—PROVISIONS REGULATING THE QUALITY OF DOMESTICALLY PRODUCED PEANUTS HANDLED BY PERSONS NOT SUBJECT TO MARKETING AGREEMENT NO. 146

2. In §997.30, the "MAXIMUM LIMITATIONS" table is amended in the first column "Type and grade category", for the entries "Runner with splits * * *", "Virginia with splits * * *", "Virginia with splits * * *", and "Spanish and Valencia with splits * * *", in the seventh column "Foreign materials (percent)", by removing the number ".10" and adding ".20" in its place.

PART 998—MARKETING AGREEMENT REGULATING THE QUALITY OF DOMESTICALLY PRODUCED PEANUTS

3. In §998.200, the "MAXIMUM LIMITATIONS" table is amended in the first column "Type and grade category", for the entries "Runner with splits * * *", "Virginia with splits * * *", and "Spanish and Valencia with splits * * *", in the seventh column "Foreign materials (percent)", by removing the number ".10" and adding ".20" in its place.

PART 999—SPECIALTY CROPS; IMPORT REGULATIONS

4. In §999.600, the "MINIMUM GRADE REQUIREMENTS—PEANUTS FOR HUMAN CONSUMPTION" table is amended in the first column, "Type and grade category", for the entries "Runner with splits * * *", "Virginia with splits * * *", and "Spanish and Valencia with splits * * *", in the seventh column "Foreign materials" by removing the number ".10" and adding ".20%" in its place.

Dated: October 12, 1999.
Robert C. Keeley,
Deputy Administrator, Fruit and Vegetable Programs.
[FR Doc. 99-27134 Filed 10-15-99; 8:45 am]
BILLING CODE 3410-02-P

DEPARTMENT OF JUSTICE
8 CFR Part 3
[EOIR No. 122F; AG Order No. 2263-99]
RIN 1125-AA22
Executive Office for Immigration Review; Board of Immigration Appeals; Streamlining
AGENCY: Department of Justice.
ACTION: Final rule.

SUMMARY: This final rule establishes a streamlined appellate review procedure for the Board of Immigration Appeals. The final rule responds to an enormous and unprecedented increase in the caseload of the Board. The rule recognizes that in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal. In these cases, the rule authorizes a single permanent Board Member to review the record and affirm.
the result reached below without issuing an opinion. This procedure will enable the Board to render decisions in a more timely manner, while concentrating its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new or significant issue is presented. In addition, the rule provides that a single Board Member may decide certain additional types of cases, motions, or other procedural matters and appeals, where the result is clearly dictated by statute, regulation, or precedential decision.

**EFFECTIVE DATE:** This rule is effective on October 18, 1999.

**SUPPLEMENTARY INFORMATION:**

**Background**

The mission of the Board of Immigration Appeals is to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws. Rapid growth in the Board's caseload has severely challenged the Board's ability to accomplish its mission and requires the adoption of new case management techniques.

In 1984, the Board received fewer than 3,000 new appeals and motions. In 1994 it received more than 14,000 new appeals and motions. In 1998, in excess of 28,000 new appeals and motions were filed. There is no reason to believe that the number of matters filed with the Board will decrease in the foreseeable future, especially as the number of Immigration Judges continues to increase.

As the number of appellate filings has increased, the need for the Board to provide guidance and uniformity to the Immigration Judges, the immigration and Naturalization Service, affected individuals, the immigration bar, and the general public has grown. The Board now reviews the decisions of more than 200 Immigration Judges. There were, in comparison, 69 Immigration Judges in 1990 and 85 Judges in 1994. Frequent and significant changes in the complex immigration laws over the last several years, including a major overhaul of those laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, heighten the need for the Board's authoritative guidance in the immigration area, particularly in view of the fact that the 1996 legislation drastically reduced aliens' rights to judicial review.

To meet its overriding objective of providing fairness in adjudicating appeals, the Board must achieve four goals. It must: (1) Promote uniformity in dispositions by Immigration Judges by providing authoritative guidance in high quality appellate decisions; (2) decide all incoming cases in a timely and fair manner; (3) assure that individual cases are decided correctly; and (4) eliminate its backlog of cases.

To accomplish these goals under current conditions, the Board must limit its use of three-member panels to cases where there is a reasonable possibility of reversible error in the result below. The Department published a proposed rule on September 14, 1998, at 63 FR 49043 (Sept. 14, 1998), with written comments due by November 13, 1998. The proposed rule included a new provision, now designated as 8 CFR 3.1(a)(7),1 designed to allow single permanent Board Members, selected by the Board Chairman to affirm the results reached below without an opinion where (1) the result reached in the decision under review is correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) either (a) the issue on appeal was squarely controlled by existing Board or federal court precedent and did not involve the application of such precedent to a novel fact situation; or (b) the factual and legal questions raised on appeal were so insubstantial that three-Member review was not warranted.

Under the proposed rule, if the single permanent Board Member found the case to be appropriate for affirmation without opinion, that Board Member would sign a simple order to that effect, without additional explanation or reasoning. If the Board Member found affirmation without opinion to be inappropriate, the case would be assigned to a three-Member panel for review and decision. Thus, the proposed rule described an affirmation without opinion as a determination that the result reached below was correct and that the case did not warrant three-Member review. The proposed rule also authorized three-Member panels to affirm without opinion, where such a disposition was determined to be appropriate.

The proposed rule at 8 CFR 3.1(a)(5) (now 8 CFR 3.1(a)(7)) also included provisions that would authorize the Chairman to designate certain categories of cases as suitable for affirmation without opinion by a single permanent Board Member or by a three-Member panel. These categories could include, but would not be limited to, the following: (1) Cases challenging findings of fact where the findings below are not against the weight of the evidence; (2) cases controlled by precedents of the Board where there is no basis for overruling the precedent, or by precedents of the relevant United States Court of Appeals, or the United States Supreme Court; (3) cases seeking discretionary relief for which the appellant is clearly ineligible; (4) cases challenging discretionary decisions where the decision maker has neither applied the wrong criteria nor deviated from precedents of the Board or the controlling law from the United States Court of Appeals or the United States Supreme Court; and (5) cases challenging only procedural rulings or deficiencies that are not material to the outcome of the case.

The proposed rule also contained provisions that would authorize the Chairman to designate the permanent Board Members who would be authorized to affirm cases without opinion. The proposed rule also suggested amendments to the regulation regarding motions to reconsider. Under proposed 8 CFR 3.2(b)(3), a motion to reconsider, based solely on an argument that the case should not have been summarily affirmed—that a full opinion was required—would be barred. Otherwise, the standard motions to reconsider and/or reopen are allowed, but are subject to all the regular requirements and restrictions regarding motions, including the time and number limitations.

In addition to describing a new procedure for affirmation without opinion by a single Board Member, the proposed rule also included provisions that would empower a single Board Member or the Chief Attorney Examiner to rule on certain dispositive motions or to issue other orders disposing of appeals on procedural or ministerial grounds. Presently, the regulations allow a single Board Member to adjudicate unopposed motions or motions to withdraw an appeal. See 8 CFR 3.1(a). The proposed rule identified additional categories of cases that were deemed suitable for disposition by a single Board Member. Unlike the one-line affirmances by single Board Members that the proposed rule would authorize, these dispositions generally would not affirm a result below. Rather, in these cases, a single fact, easily identified in the record of proceedings, dictates the result through a straightforward, nondiscretionary application of a statutory, regulation, or a controlling precedent. Dispositions under this procedure are separate and
distinct from affirmances without opinions.

Under §3.11(a) of the proposed rule, a single Board Member would be authorized to issue orders (1) remanding an appeal from the denial of a visa petition where the Regional Service Center Director requests a remand for further consideration of the appellant's arguments or evidence raised upon appeal, (2) remanding to correct for a defective or missing transcript, and (3) disposing of other procedural or ministerial matters designated by the Chairman. Possible examples might include dismissal of an appeal as moot where the alien has since become a lawful permanent resident.

The proposed rule also set forth proposed amendments to the regulation regarding summary dismissals of appeals. This regulation, presently codified at 8 CFR 3.11(d)(1)-(a), generally provides for dismissals on grounds that do not go to the underlying merits of a case. The proposed revisions to this provision, redesignated as §3.11(d)(1), would add to the existing rule's listing of the types of cases that are appropriate for summary dismissal, authorize a single Board Member to dispose of such cases, and empower the Chairman to designate who among the Board Members may exercise this authority. Summary dismissal under proposed section 3.11(d)(2) would be separate and distinct from affirmation without opinion.

The proposed rule also would augment existing grounds for summary dismissals, authorizing dismissal of (1) cases in which the appeal or motion does not fall within the Board's jurisdiction; (2) cases in which jurisdiction over a motion lies with the Immigration Judge rather than with the Board; (3) untimely appeals and motions; and (4) cases in which it is clear that the right of appeal was affirmatively waived.

Comments

In response to the proposed rule, the Department received 24 comments pertaining to the proposed summary affirmation procedures. Because a number of these comments overlap or endorse the submissions of other commenters, the comments are addressed by topic rather than individually. Before describing the comments and the Department's responses, it is important to mention two changes that the Department has decided to make to the proposed rule for reasons not presented in the comments. First, although the Department did not receive any comments criticizing our proposal to change the summary

dismissal regulation, we have determined that an additional change is warranted. In particular, current 8 CFR 3.11(d)(1-a) will be deleted to avoid confusion in light of the new summary affirmation procedure. Current §3.11(d)(1) will be removed and submitted for reconsideration if the Board is satisfied from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in law or fact unless the Board determines that it is supported by a good faith argument for extension, modification or reversal of existing law. This summary dismissal authority is virtually never used by the Board and retaining it could lead to confusion concerning the relationship between this provision and the new summary affirmation procedure. Accordingly, this part of the existing summary dismissal regulation will be deleted.

A second change that was not advocated by any commenter concerns the proposed rule's references to the Chief Attorney Examiner. Because that position was eliminated after publication of the proposed rule, references to the Chief Attorney Examiner will be eliminated from the final rule.

The Department has also concluded, in the course of preparing this streamlined rule, that the regulations governing BIA procedures have become unduly complex and that a complete reorganization of part 3 of 8 CFR is needed. The Executive Office for Immigration Review is presently working on such a reorganization. This final rule is being published in advance of that reorganization because of the overriding need to implement the streamlined procedures.

Single Board Member Summary Affirmance Without Opinion

Comments: Twenty-three commenters objected to the proposal to allow a single permanent Board Member to affirm the result reached below by issuing a form, one-line affirmation order. Most of the commenters recognized the difficulties the Board faces in managing its expanding caseload, and several offered alternatives for accomplishing that task. However, the commenters uniformly stated that an appellate body such as the Board should meaningfully address the issues before it by providing reasons for its decisions. A number of the commenters' concerns mirror those raised in Eldridge v. Eldridge, 424 U.S. 319 (1976), as support for their contention that the Due Process Clause of the Fifth Amendment requires the Board to provide a rationale for its decisions. Some pointed out that several courts of appeals have criticized the Board when it did not provide an adequate rationale, suggesting that the proposed rule could therefore be struck down in court. Some suggested that, given the Board's caseload, there would be a temptation to avoid detailed review or consideration of complex issues.

Response and Disposition: The Department has carefully considered the comments regarding the proposal to allow one permanent Board Member to affirm a decision by issuing a one-line form order, and has decided to retain the regulation as proposed. To operate effectively in an environment where over 29,000 appeals and motions are filed yearly, the Board must have discretion over the methods by which it handles its cases. The process of screening, assigning, tracking, drafting, revising, and circulating cases is extremely time consuming. Even in routine cases in which all Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve. The Department has determined that the Board's resources are better spent on cases where there is a reasonable possibility of reversible error in the result reached below.

Appellants have a right to a reasoned administrative decision. In cases that are adjudicated by one Board Member, that right will be protected by a written decision by the Immigration Judge or the INS Director and a determination by the Board that the result below is correct. A permanent Board Member will review and consider every case. The decision rendered below will be the final agency decision for judicial review purposes. Under this new system of streamlined review, complex and significant cases will not be avoided, nor will they be adjudicated by one Board Member. Rather, they will be given additional time and consideration by three-Member panels of the Board. The most important of the three-Member panel cases may receive en banc review (either full or limited) by the Board.

The streamlined review process that the Board will follow is different from the "leave to appeal" and certiorari systems that some state courts and administrative tribunals use to control their dockets. These systems often look to a variety of factors apart from whether the decision for which appellate review is sought reached a correct result. In contrast, the summary affirmation system the Department is adopting will continue to focus on the importance of correct results, even in
cases that do not present significant legal or factual issues or a question requiring guidance from the Board. The summary affirmation system represents a careful balancing of the need to ensure correct results in individual cases with the efficiencies necessary to maintain a viable appellate organization that handles an extraordinarily large caseload. The streamlining system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues.

In Matthews v. Edtridge, supra, the Supreme Court held that due process is a flexible concept and identified three factors that agencies and courts must consider in determining the administrative procedures that due process requires in a particular setting. Those factors are: (first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In the case of immigration proceedings, the private interests at stake are undoubtedly very weighty, as many commenters have pointed out. However, the Department believes that the risk of erroneous decisions resulting from the streamlining of Board procedures is minimal. Most appellants will already have had a full evidentiary hearing before an Immigration Judge: some will have had their cases considered by an INS Director. The case will then be considered on its merits by a permanent Member of the Board. If that Board Member finds a reasonable possibility that the result reached below was incorrect, the case will be referred to a three-Member Panel, and a written decision will be provided. Only if the permanent Board Member determines, after review of the appeal, that the regulatory criteria are satisfied and, consequently, that there is no reasonable possibility that the result below was incorrect, will he or she issue a one-line, form order affirmation. The Department believes that appellants’ rights are protected by these procedures. Finally, as noted earlier, the Government’s interests are also significant here. The number of appeals filed with the Board in recent years has exceeded the Board’s capacity to give meaningful three-Member consideration to each appeal, and to issue written decisions in every case. The summary affirmation process is a reasonable response to the current situation, because it allows the Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised in the appeal, while still providing assurances that correct results are achieved in all cases under the Board’s appellate jurisdiction.

The Department is aware of one federal appeals court decision indicating that due process requires the Board to state reasons for its decisions. See De la Llana-Castellon v. INS, 16 F.3d 1033, 1036 (10th Cir. 1994) (due process requires that the decisionmaker actually consider the evidence and argument that a party presents’). In addition, several other appeals court decisions have struck down, on statutory grounds, Board decisions that were found to have lacked adequate explanations of the Board’s reasoning. See, e.g., Velarde v. INS, 140 F.3d 1305, 1310–11 (9th Cir. 1998) (BIA abused its discretion by failing to provide reasonable basis for its decision); Sanon v. INS, 52 F.3d 648, 651 (7th Cir. 1995) (in reviewing BIA denials of asylum requests, court requires ‘some proof that the Board has exercised its expertise in hearing a case’); Turri v. INS, 997 F.2d 1306, 1308 (10th Cir. 1993) (to survive statutory review, Board decision must contain terms sufficient to demonstrate that the Board heard, considered, and decided the case); Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992) (Board decision will be reversed as arbitrary if it ‘fails to address meaningfully all material aspects of the case’).

Notwithstanding these decisions, eight federal courts of appeals have rejected direct challenges to the Board’s practice of affirming decisions of Immigration Judges, where appropriate, for the reasons given in those decisions. See Giday v. INS, 113 F.3d 230, 234 (D.C. Cir. 1997) (Board’s summary affirmation of an Immigration Judge’s decision for the reasons given by the Immigration Judge is ‘not only common practice, but universally accepted by every other court addressing the issue’); Chen v. INS, 87 F.3d 5, 7–8 (1st Cir. 1996) (‘[i]f the Board’s view is that the Immigration Judge “got it right,” the law does not demand that the Board go through the idle motions of discussing the Immigration Judge’s findings in its own prose.’); Prado-Gonzalez v. INS, 75 F.3d 631, 632 (11th Cir. 1996); Urokov v. INS, 55 F.3d 222, 227–28 (7th Cir. 1995); Añel, v. INS, 45 F.3d 1379, 1382 (9th Cir. 1995); Maashov v. INS, 45 F.3d 1235, 1238 (8th Cir. 1995); Pantri v. INS, 19 F.3d 544, 545–46 (10th Cir. 1994) (distinguishing Turri v. INS); Arango-Arando v. INS, 13 F.3d 610, 613 (2d Cir. 1994). In addition, two other federal courts of appeals have treated summary affirmation by the BIA as a proper method of disposing of appeals, sustaining such summary affirmances against merits challenges after review of the reasoning set forth in the Immigration Judge’s decision that the BIA affirmed. See, e.g., Gomez-Media v. INS, 56 F.3d 700, 702 (5th Cir. 1995) (court will review the Immigration Judge’s decision where the Board affirms without any additional reasoning); Gandarillas-Zambrano v. BIA, 44 F.3d 1251, 1255 (4th Cir. 1995) (where the Board relies on the Immigration Judge’s decision, the Immigration Judge’s reasoning will be the sole basis for the court review).

It is therefore well-established that the Board may decline to write a full decision in any given case, and may instead summarily affirm the Immigration Judge’s decision. The summary affirmation procedure set forth in this streamlining rule makes clear that a summary affirmation does not necessarily indicate that the Board Member is adopting the Immigration Judge’s or Service Officer’s decision in its entirety, including all its reasoning; rather, it is a determination by the Board Member, upon review of the record, that the result reached below is correct. For purposes of judicial review, however, the Immigration Judge’s decision becomes the decision reviewed.

In addressing any due process concerns, it is also important to point out that due process does not confer a right to appeal, even in criminal prosecutions. See Ross v. Moffitt, 417 U.S. 600, 611 (1974) (‘While no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all.’); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (noting that ‘a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all’); (citation omitted). Instead, one federal court has specifically stated that ‘[t]he Constitution does not entitle aliens to administrative appeals * * *’. The Attorney General could dispense with the Board and delegate her power to the Immigration Judge’s, or could give the Board discretion to choose which cases to review.” Guentchev v. INS, 77 F.3d 1036, 1037 (7th Cir. 1996).
It is true that the power to eliminate appeals does not carry with it the power to maintain a procedurally deficient appellate process. See, e.g., Evitts v. Lucey, 469 U.S. 387, 400-05 (1985) (although due process does not require that a state provide any appeal, it does require that a defendant receive effective assistance of counsel on the first appeal as of right, if such an appeal is provided); Mapp v. Chicago, 404 U.S. 189, 198 (1971) (if the Government chooses to provide for appeals, an impecunious defendant in a petty offense prosecution “cannot be denied a record of sufficient completeness to permit proper (appellate) consideration of his claims” (internal quotation marks omitted)); see also M.L.B. v. S.L.J., 519 U.S. 102, 117-124 (1996) (state cannot use parent’s inability to pay record preparation fees as grounds for denying an appeal in a proceeding that could result in permanent termination of her parental rights). However, the omission of a case-specific statement of reasons for an appellate ruling does not represent a constitutional deficiency in appellate procedure. In sum, appeals are not constitutionally required, and an endorsement of the result reached by the decision-maker below satisfies any conceivable due process requirement concerning justifications for the decisions made in any appellate process that the government decides to provide. The Department believes it is within the Attorney General’s authority to provide for the streamlined BIA procedures in appropriate cases, as described in this final rule.

Single Board Member Adjudication on the Merits

Comments: In addition to objecting to a one-line, form order, most of the 23 commenters objected to allowing a single permanent Board Member to decide appeals on the merits. Commenters noted that appellate review by a single Board Member increases the risk of error resulting from the mistakes or prejudices of one person. Three-Member panels provide both a moderating influence and a check against possible undetected error. Commenters also feared that review by a single Board Member would compromise consistency and thereby devalue the guidance that the Board provides.

Response and Disposition: After careful consideration, the Department has decided to retain the provision that allows a single Board Member to adjudicate certain routine appeals on the merits. While three-Member review can reduce the risk of error in complex cases, this process is extremely time and labor intensive and is of significantly less value in routine cases. The Department believes that single-Member review without appellate opinion represents an appropriate means of resolving routine appeals that do not present substantial legal issues or substantial arguments for reversal of the result reached below. The current requirement that three Board Members review such cases results in a serious misallocation of resources in an agency that receives over 28,000 appeals and motions per year. The Department believes that the Board Members’ time will be more effectively used if they are able to concentrate on the more significant issues, and on cases where there is a reasonable possibility of reversible error in the result reached below. Authorizing a single permanent Board Member to adjudicate cases where there is no reasonable possibility of reversible error and no significant legal issues is presented will allow this more effective use of Board Member time. Single-Member review and summary affirmance in routine cases will actually preserve the ability of the Board to conduct three-Member review and prepare careful opinions in a significant number of more complex cases.

Single Board Member Adjudications for All Cases

Comments: Two commenters suggested that the Board adopt a system of single Board Member adjudication of most cases, but with reasons given in every case. One of these comments was signed by 32 individuals and organizations. These commenters acknowledged that under current conditions, the Board cannot continue to give full three-Member review to all cases. Further recognized that most cases do not require three-Member review. It was suggested that only a few cases per year would need to be considered by the en banc Board, and that single-Member review of the rest of the cases would be appropriate, so long as the reasons for the decisions were provided, even briefly. Several other commenters also referred to this comment with approval.

Response and Disposition: The Department carefully considered the option of moving to single-Member review of most cases, but has decided not to adopt that option at this time. The Department believes that single-Member review is appropriate in many cases coming before the Board. However, in cases where a significant issue is presented, where there is a reasonable possibility that the result below was incorrect, three-Member adjudication is preferable for the reasons discussed above. Three-Member adjudication of such cases also provides an additional check, and provides more guidance to the Immigration Judges, the Service, the bar, and the public.

In addition, a move to single-Member adjudication of nearly all cases would make it more difficult to maintain the consistency of adjudication that the Board attempts to provide. Therefore, the Department has decided to adopt the system as proposed, under which some cases will be adjudicated on the merits by a single Board Member, while those presenting significant issues or a reasonable possibility of a change in the result reached below, will continue to be decided by three-Member panels. Of course, the Board also retains the authority to consider cases under its en banc or limited en banc procedures.

Expand Board To Handle Caseload

Comments: Several commenters noted the recent expansion of the Board and staff. Some questioned why these increases had not been adequate to handle all cases and several suggested that the Board should be further expanded as necessary to deal with current and incoming cases.

Response and Disposition: The Department has carefully considered these comments and has decided against further expansion of the Board at this time. The Attorney General has made significant efforts to aid the Board in handling its burgeoning caseload by increasing its size from 5 to 12 Members in 1995, from 12 to 15 in 1998, and by recently authorizing four additional permanent Board Members, which will bring the total to 19 Board Members. Significant staff increases have accompanied the expansion of the Board.

Board production has increased commensurately with these expansions. For example, in fiscal year 1998, more than 29,000 final dispositions were issued by the Board. However, this figure included some 6000 routine, form dispositions resulting from new legislation, including approximately 5000 cases that the Board remedied following enactment of the Nicaraguan Adjustment and Central American Relief Act. Moreover, while the Board was able to reduce its backlog by 1000 cases in 1998, the pending caseload at the Board is over 47,000 cases. The backlog must be reduced at a greater rate than 1000 cases per year.

Even with Board airflow and staff increases, the Board is not currently able to adjudicate its pending caseload, to deal with its entire incoming caseload
on a timely basis, to meaningfully reduce its backlog, to position itself to deal with future increases in caseload, and to provide nationwide guidance through published precedents (most of which are issued by the full en banc Board) in a growing number of complex cases involving application of new statutory and regulatory provisions. Moreover, continued expansion of the Board and its staff would have significant institutional costs in terms of the collegiality of the Board's decision-making process, the uniformity of its decisions, and the administration and supervision of its staff.

**Standards for Selecting Cases for Adjudication by a Single Board Member**

**Comments:** Several commentators stated that the proposed rule contained inconsistent formulations of the standard for determining which cases would be adjudicated on the merits by a single Board Member. They pointed out that the Supplementary Information accompanying the proposed rule referred variously to one-Member review in cases where there is a "realistic chance" that three-Member review would change the result below, where the factual and legal questions raised on appeal are "so insubstantial" that three-Member review is not warranted, or where no legal or factual basis for reversal is apparent." In addition, the Supplementary Information also stated that an affirmative opinion would not be issued if an appellant made a "substantial argument for reversal." The commentators pointed out that the proposed regulation itself allows single-Member review if a three-Member review "may be impractical." These commentators suggested that the Department adopt a realistic and consistent standard for determining which cases are subject to summary affirmance.

One commentator, responding to the proposed rule's statement that a single Board Member review can be appropriate where the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of such precedent to a novel fact situation, suggested that virtually every case will present a novel fact situation.

**Response and Disposition:** The Department agrees that some of the language in the Supplementary Information of the proposed rule could have been clearer. However, the Department also recognizes that any standard adopted could be attacked as involving a subjective element. The Department believes that use of the three-part test set forth above—requiring determinations that the result below was correct, that any errors were harmless, and that the factual or legal questions raised were insubstantial—will ensure that only cases where there is no reasonable possibility of changing the result reached below will be subject to single-Member summary affirmance. Moreover, the Department believes it is reasonable to require an appellant to make a substantial argument that the result reached below should be reversed.

The Department believes that the language regarding a "novel fact situation" requires clarification. The Department notes that while the facts of each case are different, the legally significant facts often fall into recognizable patterns, and that where this occurs, a novel fact situation may not be presented. As just one example, the Attorney General's decision in Matter of Soriano held that section 212(c) relief was no longer available to aliens in certain appeals pending before the Board. See Matter of Soriano, Op. Att'y Gen. (Feb. 21, 1997), overruling Interim Dec. No. 3289 (BIA June 27, 1996) (en banc). That decision made the factual differences in a large number of those cases legally insignificant from the standpoint of the Board's appellate review. Such cases would be appropriate for single-Member affirmance even though each case presented a different set of facts.

**Single Board Member Authority To Reverse or Remand**

**Comments:** Several commentators suggested that the proposed rule was biased in favor of the Government because it would allow a single Board Member to affirm by summary decision but not to reverse or remand without referral to a three-Member panel. These commentators stated that in some cases an obvious error may appear that clearly warrants reversal or remand, without the necessity of three-Member review, and the regulation should allow single-Member reversals or remands in such cases.

**Response and Disposition:** The Department has considered these comments and has decided to retain the regulation as proposed on this point. The cornerstone of the new streamlined procedures is that summary affirmance by a single permanent Board Member is authorized only when the result reached below was correct. A reversal or remand will necessarily require some explanation, while an affirmation without opinion leaves the decision below as the final agency decision. The Department has determined that it is appropriate to allow the Board to affirm without opinion only when this disposition leaves intact correct results reached below. The Department also notes that a decision below that is unfavorable to the Government may also be summarily affirmed.

**Chairman's Authority**

**Comments:** Several commentators expressed concern about the authority given to the Chairman to select the Board Members who will be authorized to affirm cases without opinion. They stated that giving this authority to the Chairman could invite an abuse of authority and suggested that a more neutral or random selection process be established.

**Response and Disposition:** The Department has considered this comment and decided to retain the regulation as proposed. It is anticipated that all Board Members will be given the opportunity to participate in the streamlined adjudication process. However, the Chairman must have the flexibility to administer the program as he sees fit. The selection of Board Members for participation in the single Board Member affirmance process, and the process of selection, are internal Board matters and will remain so.

**Fine Cases**

**Comment:** One of the 24 comments came from an airline. It noted that there was a large backlog of airline fine cases, and suggested that the rule should specifically address the Board's handling of these cases.

**Response and Disposition:** Fine cases could potentially be handled under the procedures set forth in the new rule. The Department does not find it necessary to establish special streamlined procedures for fine cases at this time.

**Regulatory Flexibility Act**

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule will only affect individuals involved in immigration proceedings and transportation firms subject to fines under 8 CFR part 280. See 8 CFR 3.1(b)(4). This rule will not have a significant economic impact on these firms because it will only change the procedures under which the BIA adjudicates appeals of such fines. These
procedural reforms are not expected to alter substantive outcomes except to the extent the BIA’s redirection of its resources improves the consistency and uniformity of its adjudications and the quality of the legal guidance that the Board provides to Immigration Judges and the Service.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b). Principles of Regulation. This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute ‘significant regulatory actions’ under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and accordingly has not been submitted to OMB for review.

Executive Order 12612

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 12612, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

The final rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 8 CFR Part 3

Administrative practice and procedure. Immigration. Lawyers. Organizations and functions (Government agencies). Reporting and recordkeeping requirements.

Accordingly, part 3 of chapter 1 of title 8 of the Code of Federal Regulations is to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:


2. Section 3.1 is amended by:

a. Adding two sentences at the end of paragraph (a)(1);

b. Adding a new paragraph (a)(7);

c. Redesignating paragraphs (d)(1–a), (2), and (3) as paragraphs (d)(2), (3), and (4), respectively;

d. Removing redesignated paragraph (d)(2)(i)(D);

e. Redesignating paragraph (d)(2)(i)(E) as paragraph (d)(2)(i)(D) and removing the word ‘or’ at the end of that paragraph;

f. Redesignating paragraph (d)(2)(i)(F) as paragraph (d)(2)(i)(G);

g. Adding new paragraphs (d)(2)(i)(E) and (F);

h. Redesigning paragraph (d)(2)(ii) as paragraph (d)(2)(iii); and by

i. Adding a new paragraph (d)(2)(ii).

The additions to §3.1 read as follows:

§3.1 General authorities.

(a)(1) Organization:* * *

In addition, a single Board Member may exercise such authority in disposing of the following matters: a Service motion to remand an appeal from the denial of a visa petition where the Regional Service Center Director requests that the matter be remanded to the Service for further consideration of the appellant’s arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the Chairman. A motion to reconsider or to reopen a decision that was rendered by a single Board Member may be adjudicated by that Board Member.

(7) Affirmance without opinion. (i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: ‘The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 5.1(a)(7).’ An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board’s conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmation without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

(d) Powers of the Board—(1) * * *

(2) Summary dismissal of appeals. (i) Standards.

(E) The appeal does not fall within the Board’s jurisdiction, or lies with the Immigration Judge rather than the Board.

(F) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(ii) Action by the Board. The Chairman may provide for the exercise of the appropriate authority of the Board
to dismiss an appeal pursuant to paragraph (d)(2) of this section by a three-Member panel, or by a single Board Member. The Chairman may determine who from among the Board Members is authorized to exercise the authority under this paragraph and the designation may be changed by the Chairman as he deems appropriate. Except as provided in this part for review by the Board en banc or by the Attorney General, or for consideration of motions to reconsider or reopen, an order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board. If the single Board Member to whom the case is assigned determines that the case is not appropriate for summary dismissal, the case will be assigned for review and decision pursuant to paragraph (a) of this section.

3. Section 3.2 is amended by adding a new paragraph (b)(3) to read as follows:

§3.2 Reopening or reconsideration before the Board of Immigration Appeals.

(b)...

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

Dated: October 6, 1999.

Janet Reno,
Attorney General.

[FR Doc. 99-26887 Filed 10-15-99; 8:45 am]
BILLING CODE 4140-30-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 3

[Docket No. 95-029-2]

Animal Welfare; Perimeter Fence Requirements

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Animal Welfare regulations to require that a perimeter fence be placed around outdoor housing facilities for marine mammals and certain other regulated animals. Although it has been our policy that such fences should be in place around outdoor housing facilities for such animals, there have been no provisions in the regulations specifically requiring their use. Adding the perimeter fence requirement to the regulations for these additional categories of animals will serve to protect the safety of the animals and provide for their well-being.

DATES: Effective date: November 17, 1999.

Compliance date: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Dr. Barbara Kohn, Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737-1234; (301) 734-7833.

SUPPLEMENTARY INFORMATION:

Background

The Animal Welfare regulations contained in 9 CFR chapter I, subchapter A, part 3 (referred to below as the regulations), provide specifications for the humane handling, care, treatment, and transportation, by regulated entities, of animals covered by the Animal Welfare Act (the Act) (7 U.S.C. 2131, et seq.). The regulations in part 3 are divided into six subparts, subparts A through F, each of which contains facility and operating standards, animal health and husbandry standards, and transportation standards for a specific category of animals. These categories are: (A) Cats and dogs, (B) guinea pigs and hamsters, (C) rabbits, (D) nonhuman primates, (E) marine mammals, and (F) animals other than cats, dogs, guinea pigs, hamsters, rabbits, nonhuman primates, and marine mammals.

On May 6, 1997, we published in the Federal Register (62 FR 24611-24614, Docket No. 95-029-1) a proposal to amend the regulations in subparts E and F of the regulations by requiring that perimeter fences be placed around outdoor housing facilities for marine mammals and for other animals covered by the regulations, other than cats, dogs, guinea pigs, hamsters, and rabbits.

We proposed the following minimum perimeter fence heights:

<table>
<thead>
<tr>
<th>Type of facility</th>
<th>Minimum perimeter fence height (feet)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marine Mammals, other than Polar Bears</td>
<td>6</td>
</tr>
<tr>
<td>Polar Bears</td>
<td>8</td>
</tr>
<tr>
<td>Other Nondangerous Animals</td>
<td>6</td>
</tr>
<tr>
<td>Other Potentially Dangerous Animals</td>
<td>8</td>
</tr>
</tbody>
</table>

In our proposed rule, we stated that the perimeter fence would act as a secondary containment system for the animals in the facility when appropriate, reasonably restrict animals and unauthorized persons from entering the facilities or having contact with the animals, and prevent exposure to diseases. We intended these requirements to protect the safety and provide for the well-being of the animals.

We also proposed a minimum distance of 3 feet between the perimeter fence and any primary enclosure to prevent physical contact between animals inside the enclosure and animals and persons outside the perimeter fence.

We solicited comments concerning our proposal for 60 days ending July 7, 1997. We received 23 comments by that date. They were from exhibitors, exhibitor and trade associations, wildlife associations, animal parks, humane organizations, and a Federal government agency, among others. The comments are discussed below by topic.

Primary Enclosure and Perimeter Fencing

Several commenters opposed the installation of a perimeter fence around each primary enclosure. Some were concerned that the perimeter fence would obscure the public's view of the animals or detract from the aesthetic draw of the facilities and decrease the number of visitors. Another commenter stated that the perimeter fence would interfere with the ability of the public to have physical contact with animals in petting zoos. One commenter expressed concern that the perimeter fence would conflict with the Americans with Disabilities Act by impairing access to areas around the primary enclosures.

We believe these commenters misunderstood the proposal. The perimeter fence would surround the area or areas where the outdoor housing facilities are located. Each individual primary enclosure would not have to be surrounded by a second fence. Therefore, a perimeter fence would not obstruct the public's view of the animals, hinder the petting of the animals at petting zoos, or impair access to the primary enclosures by people with disabilities.

Height of the Perimeter Fence

One commenter asked how we determined that a perimeter fence should be 8 feet high for potentially dangerous animals and 6 feet high for marine mammals other than polar bears. This commenter stated that the required heights were arbitrary and had no scientific basis. Several commenters stated that an 8-foot fence would not provide security against the escape of large felines or the entry of unwanted animals or people and pointed out that certain animals and people would be
MEMORANDUM TO: Board Members

FROM: Paul W. Schmidt
Chairman

SUBJECT: Additional Streamlining Categories - Phase III

Affirmance Without Opinion

Pursuant to the authority provided in 8 C.F.R. § 3.1(a)(7)(i), I hereby designate the following categories of cases to be appropriate for affirmance without opinion by a single Board Member exercising the authority of the Board of Immigration Appeals in accordance with 8 C.F.R. § 3.1(a)(7):

1. Appeals from an Immigration Judge’s order finding the respondent deportable or inadmissible where the underlying facts are not in dispute, there is no substantial question that the respondent is deportable or inadmissible and it is clear from the statute, regulation, or Board precedent that the respondent is ineligible for any form of relief requested on appeal. If the appeal presents multiple claims for relief, the respondent must be ineligible for all.

2. Appeals in which the respondent is ineligible for cancellation of removal under section 240A(a) of the Act because of undisputed failure to meet one or more of the elements specified in the statute.

3. Appeals involving claims for cancellation of removal under section 240A of the Act where there is no substantial question that the respondent has failed to establish sufficient continuous physical presence to meet the statutory requirement or is barred by application of 90-day or 180-day departure rules set forth in section 240A(d)(2) of the Act.
4. Appeals involving claims for cancellation of removal under section 240A of the Act where there is no substantial question that the alien is ineligible for relief under section 240A(c) of the Act.

Paul W. Schmidt
Chairman
NEWS RELEASE

Contact: Public Affairs Office

(703)305-0289, Fax: (703) 605-0365

Internet: www.usdoj.gov/eoir

March 20, 2001

SCHMIDT STEPS DOWN AS BOARD CHAIRMAN

The Executive Office for Immigration Review (EOIR) announced today that Paul Wickham Schmidt will be stepping down as the Chairman of the Board of Immigration Appeals (Board), effective April 9, 2001. Schmidt, who has served as Chairman since joining the Board in February 1995, will continue to serve as a Board Member on the 21-member appellate body, the Nation's highest tribunal interpreting the immigration laws.

"Having fostered a number of initiatives to improve case processing and customer service during my term as Chairman, I have decided on reflection that this is a good stopping point," said Schmidt. "I would like to shift my focus to our deliberative process, and I feel that I could best contribute by adjudicating appellate matters full time."

Accepting Schmidt's decision to step down as Board Chairman, EOIR Director Kevin D. Rooney praised him as "an exemplary leader during a time of dynamic change and tremendous progress at the Board."

During Schmidt's term as Chairman, the Board expanded from 5 to 21 Members and decided more than 130,000 cases, including nearly 200 precedent decisions that provide essential national guidance on immigration law. Under his leadership, the Board also created a new management structure; established the first unified Clerk's Office to support the direct filing of appeals; developed a more efficient and productive en banc deliberative process; held oral arguments outside the Washington, DC, area for the first time; issued its award-winning Board of Immigration Appeals Practice Manual and Questions and Answers; created a highly successful Virtual Law Library on the EOIR Web site to provide precedent decisions and up-to-date research information at no charge to the public; and instituted the first Pro Bono Appeals Pilot Program.

http://www.usdoj.gov/eoir/press/01/pwsatbia.htm

6/9/2003
The Board is also now piloting a Streamlined Appeals System, resulting from several years of study and regulatory changes addressing the fair and timely adjudication of the Board's large appellate case load. The preliminary results of the streamlining pilot, which also integrates new technology into case processing, shows more than a 20 percent increase in case completions.

In a message to Board employees announcing his decision to step down as Chairman, he thanked them for their hard work and support, saying, "We have been guided at all times by our shared principles of fairness, scholarship, timeliness, respect, and teamwork."

Vice Chairman Lori L. Scialabba will serve as the Acting Chairman until a new Chairman is appointed.

- EOIR -

http://www.usdoj.gov/eoir/press/01/pwsatbia.htm

6/9/2003
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Chairman
SIRI Leesburg Pike, Suite 2600
Fairfax, Virginia 22041

S-L 99-14

April 10, 2001

MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba Acting Chairman

SUBJECT: Additional Streamlining Categories - Phase III

In addition to the authority already provided in 8 C.F.R. § 3.1 (a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me in 8 C.F.R. § 3.1(a)(1), I hereby designate the following category of cases to be cases involving "other procedural or ministerial issues" which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural & Ministerial: Fine Cases.

MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba
Acting Chairman

SUBJECT: Additional Streamlining Categories - Phase III

In addition to the authority already provided in 8 C.F.R. § 3.1 (a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me in 8 C.F.R. § 3.1 (a)(1), I hereby designate the following category of cases to be cases involving “other procedural or ministerial issues” which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural & Ministerial.

Terminations in cases arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit in which the basis of removability is a conviction for an aggravated felony based on a conviction for the crime of driving while intoxicated under section 49.04 of the Texas Penal Code. United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); see also United States v. Hernandez-Avalos, 2001 WL 502383 (5th Cir. May 11, 2001).
MEMORANDUM TO: Board Members
FROM: Lori L. Scialabba Acting Chairman
SUBJECT: Additional Streamlining Categories • Phase III

In addition to the authority already provided in 8 C.F.R. § 3.1(a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me in 8 C.F.R. § 3.1(a)(1), I hereby designate the following category of cases to be cases involving "other procedural or ministerial issues" which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural & Ministerial: Fine Cases.

MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba
Acting Chairman

SUBJECT: Additional Streamlining Categories - Phase III

In addition to the authority already provided in 8 C.F.R. § 3.1(a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me. in 8 C.F.R. § 3.1 (a)(l), I hereby designate the following category of cases to be cases involving "other procedural or ministerial issues" which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural & Ministerial.

Cases involving a claim for relief under the Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, the disposition of which are controlled by the Board of Immigration Appeals decision in Matter of Artigus, 23 I&N Dec. 99 (BIA 2001), holding that an Immigration Judge has jurisdiction to adjudicate an application for adjustment of status in removal proceedings when the respondent is charged as an arriving alien without a valid visa or entry document.
MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba
   Acting Chairman

SUBJECT: Additional Streamlining Categories - Phase III

In addition to the authority already provided in 8 C.F.R. § 3.1 (a)(1) for single Board Members to exercise the authority of the Board of Immigration Appeals, and pursuant to the authority delegated to me in 8 C.F.R. § 3.1(a)(1), I hereby designate the following category of cases to be cases involving “other procedural or ministerial issues” which are appropriate for review and disposition by a single Board Member exercising the authority of the Board of Immigration Appeals:

Procedural & Ministerial.

Appeal and Motion cases involving a claim for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), in which the disposition is controlled by the United States Supreme Court’s decision INS v. St. Cyr, ___ U.S. __, 121 S.Ct. 2271 (June 25, 2001) as follows.

A. Remands of cases on direct appeal in which 212(c) relief was pretermitted.
B. Reopening of cases with administratively final orders in which 212(c) relief was pretermitted provided the respondent has not departed/removed from the United States. We will reopen such cases under the Matter of X-G-W, Interim Decision 3352 (BIA 1998) exception for significant changes in the law if the motion is timely.
C. Denials of motions to reopen in which the respondent pled guilty to an aggravated felony or felonies prior to April 24, 1996, and has served more than five years for such felony or felonies and who would be barred by the terms of §212(c) in effect prior to AEDPA.
Appendix 20

Total BIA Cases Received and Completed, 1998 - 2002

Source: 2002 Yearbook of Immigration Statistics, Figure 22
U.S. Department of Justice
Executive Office for Immigration Review (EOIR)

Board of Immigration Appeals (BIA)
Streamlining Pilot Project Assessment Report
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Executive Summary

The Executive Office for Immigration Review (EOIR), Board of Immigration Appeals (BIA) contracted with Anderson LLP to conduct an independent assessment of the Streamlining Pilot Project to evaluate its effectiveness, and to make recommendations regarding the development of a performance-based program for Streamlining Phase IV. The assessment included analysis to compare and contrast changes that have occurred as a result of Streamlining, and the impacts it has imposed on the process and productivity of the non-Streamlined aspects of the Board.

On October 18, 1999, EOIR published a final rule in the Federal Register to establish for the Board a streamlined appellate review procedure for certain categories of cases. This Streamlining procedure was adopted by the Board to address the unprecedented, continual growth in the number of annual appeals being filed. Streamlining permits a single Board Member to dispose of certain motions, withdrawals of appeal, summary remands, summary dismissals, other procedural or ministerial issues as determined by the Chairman, and affirmances without opinion under certain conditions. Streamlining is being implemented in four developmental phases. The first two phases involved converting certain categories of cases to single Board Member review. Building upon the first two phases, Phase III (Streamlining Pilot Project) officially began on September 5, 2000. It was designed to test the effectiveness of concentrating Streamlining cases to a small number of personnel dedicated to do the cases full time, or nearly full time in a central location using more office automation. Phase IV will be the permanent implementation of the Streamlining program and will incorporate the findings, observations, and recommendations of the independent evaluation of the Pilot Project as described in this assessment report. This report assesses the performance of the Streamlining Pilot Project to date, and provides recommendations regarding the establishment of specific performance measures and standards that can be executed to effectively implement and evaluate Streamlining on a permanent basis.

The Andersen team implemented a five-step methodology to support the assessment of the Streamlining Pilot Project. This methodology included:

- Defining the Streamlining performance goal and identifying its primary, measurable components ("increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time");
- Developing questions to identify the data deemed pertinent to measurement of the goal;
- Collecting and analyzing the data as an "objective" measurement of the Streamlining Pilot Project;
- Conducting a survey of BIA staff employees; and
- Conducting focused interviews.

The data, survey responses, and interview observations jointly formed the basis of the findings detailed in this report.

As a direct result of applying the aforementioned methodology, the Andersen team concluded that the overwhelming weight of both "objective" and "subjective" evidence gathered and analyzed indicated that the Streamlining Pilot Project has been an unqualified success. BIA case
productivity both in terms of the number of cases completed and the average number of days it takes for a case to be processed from "Intake" to "Completed at BIA" has been significantly improved by Streamlining. The quality of decisions rendered by the Streamlining Panel has been equal to that currently experienced by the other Board Panels. The alien has also not been adversely affected by Streamlining. This is evidenced both in the number of adverse decisions rendered and by not falling disproportionately on "unrepresented" respondents. Although the efficiency of Streamlining is anticipated to eliminate the remainder of Streamlining eligible pending cases within 20 months, the program should remain viable and can be sustained based solely upon the incoming stream of cases. For instance, in FY 2001 the Board received an average of 2,350 new cases per month which approximately 35% were completed by Streamlining. Assuming this trend continues, Streamlining should complete approximately 825 cases per month plus any additional cases made appropriate for Streamlining by changes in the statutes, regulations, case law, or expansion of Streamlining categories.
1. Introduction

The developmental approach implemented to design, establish, and launch the Streamlining Pilot Project did not readily lend itself to the identification and establishment of performance measures against which to effectively evaluate the achievement of the Streamlining program goal. However, it appeared that with sufficient data collected and available, analysis could be performed to compare and contrast changes that have occurred as a direct result of Streamlining, and the impacts it has imposed on the process and productivity of the non-Streamlining aspects of the Board. Conducting an assessment of the Streamlining Pilot Project based upon data analysis could also form a basis for designing an evaluation program that could be implemented to evaluate the effectiveness of the Streamlining program during Phase IV implementation. In response to these specific needs, the Executive Office for Immigration Review (EOIR), Board of Immigration Appeals (BIA) contracted with Anderson LLP to conduct an independent assessment of the Streamlining Pilot Project to evaluate its effectiveness, and to make recommendations regarding the development of a performance-based evaluation program for Streamlining Phase IV.

1.1 Background

On October 18, 1999, EOIR published a final rule in the Federal Register to establish for the Board a streamlined appellate review procedure for certain categories of cases. This Streamlining procedure was adopted by the Board to address the unprecedented, continual growth in the number of annual appeals being filed. Streamlining permits a single Board Member to dispose of certain motions, withdrawals of appeal, summary remands, summary dismissals, other procedural or ministerial issues as determined by the Chairman, and affirmances without opinion where the Board Member finds:

- The result reached in the decision under review was correct;
- Any errors in the decision under review were harmless or nonmaterial; and
- Either (a) the issue on appeal was squarely controlled by existing Board or federal court precedent and did not involve the application of such precedent to a novel fact situation, or (b) the factual and legal questions raised on appeal were so insubstantial that a three Board Member review was not warranted.

Streamlining is being implemented in four developmental phases. Phase I began on November 22, 1999 and involved converting seven categories of cases to single Board Member review. Phase II began on January 24, 2000 and involved the conversion of an additional nine categories of cases to single Board Member review. Building on the first two phases, Phase III (Streamlining Pilot Project) began on September 5, 2000 to test the effectiveness of concentrating Streamlining cases to a small number of personnel dedicated to do the cases full time, or nearly full time in a central location using more office automation. Phase IV will be the permanent implementation of the Streamlining program and will incorporate the findings, observations, and recommendations of the independent evaluation of the Pilot Project as described in this assessment report.
1.2 Purpose

This report specifically addresses the following Streamlining Pilot Project evaluation objectives:

- Develop a number of different perspectives based on data and trend analysis to draw sound program conclusions comparing results before Streamlining with those of the Streamlining Pilot Project;
- Establish performance standards (or measures) for evaluating Streamlining Phase IV;
- Recommend improvements based on data analysis, surveys, and interviews; and
- Develop a performance-based program for evaluating Streamlining Phase IV.

In summary, this report assesses the performance of the Streamlining Pilot Project to date, and provides recommendations regarding the establishment of specific performance measures that can be executed to effectively evaluate Streamlining on a permanent basis.

1.3 Assessment Methodology

The Andersen team implemented a five-step methodology to support the assessment of the Streamlining Pilot Project. First, the Streamlining program performance goal was clearly defined and its primary, measurable components identified. The performance goal was defined as follows: “Increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time”. The primary measurement components of this goal were identified as productivity, fair and legally correct decisions, and program sustainability. Second, based upon the Streamlining performance goal, specific questions were developed to identify the data deemed pertinent to measurement of the goal. Third, the data was collected and analyzed as an “objective” measure of the performance of the appeals process as it related to the Streamlining initiative. Fourth, the findings derived from the data analysis were then used to formulate survey questions. Responses to the survey supported obtaining a “subjective” perspective regarding the performance of the Streamlining Pilot Project. Fifth, based upon the analysis of the data in conjunction with the survey results, interview questions were developed to resolve any inconsistencies discovered while analyzing the “objective” and “subjective” findings as well as further explore observations and findings extracted from the survey responses. The data analysis, survey responses, and interviews jointly formed the basis of the findings detailed in this report. The detailed methodology implemented is described in Appendix A of this report.

2. Study Findings

Information contained within the following subsections provide a synopsis of the key findings and observations derived from this study. These findings are based upon the analysis performed on the collected data, survey responses, and interviews.
2.1 Data Derived Findings

Analysis of collected data revealed the following key findings:

- **Workload (Fiscal year 2001)**

<table>
<thead>
<tr>
<th>Workload Statistics</th>
<th>Number of Cases</th>
<th>% of Total Cases Screened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases Screened</td>
<td>42,875</td>
<td>100%</td>
</tr>
<tr>
<td>Total Cases Referred for Thorough Streamlining Review</td>
<td>24,597</td>
<td>57%</td>
</tr>
<tr>
<td>Total Cases Completed by Single Board Member</td>
<td>11,346</td>
<td>26%</td>
</tr>
<tr>
<td>Total Cases Completed by Three Streamlining Board Members</td>
<td>3,897</td>
<td>9%</td>
</tr>
<tr>
<td>Total Cases Completed by Streamlining Panel</td>
<td>15,243</td>
<td>35%</td>
</tr>
</tbody>
</table>

- **Most Frequent Type of Streamlining Dispositions:**
  - Dismissal of appeal: 35%
  - Remand for further proceedings: 13%
  - Affirm without opinion: 12.9%
  - No jurisdiction: 8%
  - Withdrawal of appeal or motion: 6%
  - Grant of motion to reopen: 4%

- The Streamlining Pilot Project directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period from September 2000 through August 2001. The chart on the following page depicts this key production-related finding.
BIA Case Completions by Board Panel

* September - August

* Fiscal year is offset by one month.

<table>
<thead>
<tr>
<th>Panels</th>
<th>98-99*</th>
<th>99-00**</th>
<th>00-01***</th>
</tr>
</thead>
<tbody>
<tr>
<td>6: Streamlining</td>
<td>0</td>
<td>0</td>
<td>15,025</td>
</tr>
<tr>
<td>Other</td>
<td>1,560</td>
<td>1,636</td>
<td>2,751</td>
</tr>
<tr>
<td>5: Jurisdiction / Merit</td>
<td>3,000</td>
<td>2,639</td>
<td>1,851</td>
</tr>
<tr>
<td>4: Merit</td>
<td>5,614</td>
<td>5,569</td>
<td>5,438</td>
</tr>
<tr>
<td>3: Backlog</td>
<td>3,701</td>
<td>4,366</td>
<td>3,392</td>
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<tr>
<td>2: Merit</td>
<td>4,199</td>
<td>3,763</td>
<td>2,495</td>
</tr>
<tr>
<td>1: Merit</td>
<td>4,726</td>
<td>5,044</td>
<td>3,375</td>
</tr>
<tr>
<td>Total cases adjudicated</td>
<td>22,950</td>
<td>20,912</td>
<td>19,915</td>
</tr>
</tbody>
</table>

Percent change from previous year: 10%

* Fiscal year is offset by one month.
Streamlining has helped reduce the average number of days it takes for a BIA case to be processed from "intake" to "Completed at BIA" as follows:

- Between 1997 and 2001, the average number of BIA cases completed in less than 90 days increased from 25% to 56%;
- Between 1997 and 2001, the average number of BIA cases that remained open 181 days or greater dramatically decreased from 42% to 13%;

- Between 1997 and 2001, the average number of RUSH cases completed in less than 90 days increased from 33% to 42%;
- Between 1997 and 2001, the average number of RUSH cases that remained open 181 days or greater decreased from 35% to 9%;
Between 1998 and 2001, the average number of days that all IJ and DD cases took to move from 1st Attorney Assignment to 1st Circulation decreased an average of 31%, while the time from Intake to 1st Attorney Assignment increased an average of 286%. The increase was a result of processing a large number of cases which were waiting to be screened when the Streamlining Pilot Project began and a change in the Board case assignment practice. In order to better manage pending cases, the Board no longer assigns all cases to attorneys immediately after screening. Rather, it assigns only the number of cases it believes they can complete within a reasonable period of time.

- Streamlining has not been implemented long enough to provide a sufficient amount of historical data to provide an "objective" evaluation of its effect upon the quality of decisions rendered. The data elements required to support this objective evaluation have been identified and we recommend that it be used as part of the Streamlining Phase IV evaluation program.

- As of September 2001, there are approximately 57,000 cases pending before the Board. Some of these cases are in the Clerk's office while others are in the Attorneys' offices. Of the approximately 19,600 pending cases in the Clerk's Office, it is estimated that approximately 35% of cases not screened may meet Streamlining criteria. It is also estimated that approximately 6% of the pending cases not screened for Streamlining that are located in the Attorneys' offices may meet Streamlining criteria. Based upon this information and the Streamlining Panel's trend to complete approximately 4,500 pending cases from storage each year, it is estimated that the number of pending Streamlining eligible cases could be eliminated in approximately 20 months. At the point in time when this is achieved, Streamlining will primarily adjudicate new cases only. The chart on the following page depicts the trend of BIA pending cases since 1997. It must be noted that during the Streamlining Pilot Project, there was an approximate 7% reduction in the total amount of pending cases remaining before the Board.
- Approximately 25,000 cases were referred to Streamlining between September 1, 2000 and October 1, 2001. Due to the nature of the Streamlining program, approximately 45% of the cases were rejected either by the Attorney/PL or Board Members. The Attorney/PL rejected the overwhelming majority. Only one percent of the cases rejected were by Board Members.

- The Streamlining Center completed 15,798 cases between September 1, 2000 and October 1, 2001 which 11,820 were 1 Board Member vote cases. The remaining 3,978 cases were short order cases requiring 3 Board Member votes.
• The alien has not been adversely affected by Streamlining. This is evidenced both in the number of adverse decisions rendered and by not falling disproportionately on “unrepresented” respondents. There is only a 6% difference in alien representation between Streamlining and all other Board Panels. Approximately 28% of the total number of Streamlining case decisions rendered were “favorable” to appellants. Favorable decisions included Remands, Grants of Motions, Sustained Appeals, Withdrawal of Appeals, and Administrative Closures.

The data findings identified above are described in more detail in Appendix B of this report.

2.2 Survey Results

• The overall survey results indicated that the Streamlining Pilot Project has benefited BIA. The results of surveying 48 EOIR staff members indicated that over 77% “agreed” or “strongly agreed” that Streamlining has benefited BIA case processing.
• Over 91% of those surveyed "agreed" or "strongly agreed" that Streamlining has improved BIA case productivity (the number of cases completed). Over 75% of those surveyed "agreed" or "strongly agreed" that Streamlining has reduced the number of BIA pending cases and improved case processing time (the number of days it takes for a case to move from "Intake" to "Completed at BIA"). Consequently, both data and survey results confirm the finding that Streamlining has improved overall BIA case productivity.

- The survey also indicated that the Streamlining Pilot Project has not adversely affected the quality of decisions rendered. Survey responses indicated that over 61% of the EOIR staff "agreed" or "strongly agreed" that Streamlining has produced fair and legally correct decisions with only 6% disagreeing (the large number of "neutral" responses were provided by non-Streamlining associated staff members). Over 78% of those surveyed "agreed" or "strongly agreed" that Streamlining has allowed the Board Panels to spend more time on substantive issues.
Lastly, the survey results indicated that the Streamlining program can be sustained over an extended period of time. Over 73% of the staff "agreed" or "strongly agreed" that the Streamlining program can be sustained with only 4% either "disagreeing" or "strongly disagreeing". Over 79% of those surveyed "agreed" or "strongly agreed" that the Streamlining Pilot Project has been a success and the program should be maintained.

The survey findings identified above are described in greater detail in Appendix C of this report.

2.3 Interviews

Based upon the results of the survey in conjunction with the analysis of collected data, interview questions were developed to resolve any inconsistencies discovered while analyzing the "objective" and "subjective" findings as well as further explore observations and findings extracted from the survey responses. These questions revolved around the following areas: case production goals; morale; pending cases reduction; quality of decisions; Streamlining case screening; Streamlining communications; resources; training; organizational changes, and Streamlining case categories. A total of 12 interviews were conducted which included two Streamlining Board Members, two non-Streamlining Board Members, one non-Streamlining Senior Panel Attorney, one Team Leader, one Clerk's Office Manager, two Streamlining Attorneys, one non-Streamlining Attorney, one Paralegal, and one Legal Assistant. Key observations from the interviews include the following with more detail provided in Appendix D of this report.
Interviewees said:

- "Streamlining production goals are realistic, while non-Streamlining production goals need reevaluation";
- "Morale is very high inside Streamlining, but needs improvement outside Streamlining";
- "Streamlining has had a very positive effect on reducing the number of pending cases";
- "There is no difference in quality of decisions between Streamlining and non-Streamlining";
- "Screening of cases for Streamlining is pretty good";
- "Communication inside Streamlining is excellent";
- "Non-Streamlining employee base is down";
- "Streamlining training is good, but on the job training is best";
- "Quality of mentoring is very good";
- "Streamlining personnel who are producing and motivated should remain in place"; and
- "Streamlining case categories should be expanded".

3. Streamlining Phase IV Evaluation Program Recommendations

One of the objectives for conducting this study was to develop a performance-based program for evaluating the effectiveness of Streamlining Phase IV. The evaluation program detailed in Appendix C of this report and implemented to conduct this study is a performance-based evaluation design. This design lends itself well as a recommended framework for evaluating Streamlining Phase IV. This framework used in conjunction with comments received in response to survey questions and interviews outline a program that can be implemented to effectively evaluate the performance of Streamlining during Phase IV. This program design is detailed in Appendix C of this report.

4. Summary

The overwhelming weight of both "objective" and "subjective" evidence gathered during the conduct of this study indicates that the Streamlining Pilot Project has been an unqualified success. BIA case productivity both in terms of the number of cases completed and the number of days cases take to move from "Intake" to "Completed at BIA" has been improved by the Streamlining Pilot Project to date. The quality of decisions rendered by the Streamlining Panel is equal to those rendered by the other Board Panels. Also, the alien has not been adversely affected by Streamlining. This is evidenced both in the number of adverse decisions rendered and by not falling disproportionately on "unrepresented" appellants. Although the efficiency of Streamlining is anticipated to eliminate the remainder of Streamlining eligible pending cases within 20 months, the program should remain viable and can be sustained based solely upon the stream of incoming cases. For instance, in FY 2001 the Board received an average of 2,350 new cases per month of which approximately 35% were completed by Streamlining. Assuming this trend continues, Streamlining should complete approximately 825 cases per month plus any additional cases made appropriate for Streamlining by changes in the statutes, regulations, case law, or expansion of Streamlining categories.
Board of Immigration Appeals (BIA)
Streamlining Pilot Project Assessment Report

Appendix A - Assessment Methodology
Appendix A - Assessment Methodology

This report provides a performance assessment of the Streamlining Pilot Project to date, and includes recommendations regarding the establishment of specific performance measures and standards that can be executed to effectively implement and evaluate the Streamlining program on a permanent basis.

Assessment Methodology

In order to effectively evaluate the Streamlining Pilot Project, the Andersen team developed a high-level process model that provided the framework for understanding how the Streamlining Pilot Project could be evaluated. This process model, as depicted below, illustrates that case appeals which satisfy a common set of criteria could progress through either the legacy process or the Streamlining process to result in an adjudication decision.

Measuring the results of both processes and comparing them could result in a fair evaluation of the Streamlining Pilot Project. With a basic understanding of how the Streamlining Pilot Project could be effectively evaluated, the Andersen team developed and proposed the following Project assessment methodology to BIA:

- Define the Streamlining performance goal and identify its primary components;
- Develop specific questions that when answered would identify data pertinent to measuring the attainment of the Streamlining performance goal;
- Identify a set of data that when collected and analyzed would provide an “objective” measure of the performance of the appeals process as it related to the Streamlining initiative;
- Collect the data, analyze, and develop initial findings;
- Develop survey questions to support obtainment of a “subjective” perspective regarding the performance of the Streamlining Pilot Project, and discover additional issues not discernable from data;
- Collect the survey responses, tabulate, and analyze results;
• Compare and contrast the “objective” data with the “subjective” survey results to develop interview questions to resolve any inconsistencies discovered while analyzing the “objective” and “subjective” findings as well as further explore observations/findings extracted from the survey responses;
• Conduct focused interviews; and
• Review the data and survey/interview responses to jointly form the basis of the findings discussed and published in the assessment report.

This proposed methodology was approved by BIA and implemented by the Andersen team. Each aspect of this methodology is described in the subsequent paragraphs.

Define the Streamlining Performance Goal

In order to effectively evaluate the Streamlining Pilot program, it was critical that the Andersen team gain a clear understanding of the Streamlining performance goal. The performance goal as provided by BIA was defined as follow: “Increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time.” The primary measurement components of this goal were identified as productivity, fair and legally correct decisions, and program sustainability.

Productivity was defined as throughput (the number of cases completed in a specified period) and processing time (the total number of days it takes to complete a case). Since identification of cases that potentially would meet Streamlining criteria prior to its implementation was difficult to ascertain, the assessment of productivity must be based upon comparing and contrasting the overall BIA appeals process both before and after commencement of the Streamlining Pilot program. Throughput could be determined by comparing the total number of cases (by case source, type, priority, and Board Panel) completed during a twelve-month period since commencement of Streamlining Phase III with the total number of cases (by case source, type, priority, and Board Panel) adjudicated during a twelve-month period prior to commencement of Streamlining Phase I. Processing Time could be determined by comparing the date a case is received at “Intake” against the date the case was “Completed at BIA”.

Fair and legally correct decisions result from the uniform and consistent application of the law to all parties regardless of the individuals submitting, processing or ruling on the appeal or motion. The number of stayed, modified, rescinded, or overruled decisions could illuminate the degree of fairness and legal correctness of decisions. Objective evaluation of this aspect of the Streamlining performance goal would rest upon comparing and contrasting the data associated with the following:

• Total number of cases completed over a specified period of time;
• Number of Board decisions appealed over a specified period of time; and the
• Number of Board decisions modified or rescinded over a specified period of time.

Program sustainability could be objectively evaluated by analyzing and applying the trend of the number of cases received compared with the number of cases that are completed over a specified period of time projected against the future. Program sustainability analysis could also require the examination of pending cases over time as well.
Based upon the aforementioned Streamlining performance goal definition, a set of questions could then be developed to identify the data that would be required to objectively evaluate the effectiveness of the Streamlining Pilot program.

**Develop Data Collection Questions**

The measurement questions developed and identified in the following paragraphs use terms such as sources, types, priority, and Board Panel. The table below identifies the specific components associated with each term.

<table>
<thead>
<tr>
<th>Sources</th>
<th>Types</th>
<th>Priority</th>
<th>Panels</th>
</tr>
</thead>
<tbody>
<tr>
<td>IJ</td>
<td>IJ Case Appeal</td>
<td>Rush</td>
<td>Panel 1 (Merit)</td>
</tr>
<tr>
<td></td>
<td>IJ Appeal of IJ</td>
<td></td>
<td>Panel 2 (Merit)</td>
</tr>
<tr>
<td></td>
<td>MTR</td>
<td></td>
<td>Panel 3 (Backlog)</td>
</tr>
<tr>
<td></td>
<td>IJ MTR BIA</td>
<td></td>
<td>Panel 4 (Merit)</td>
</tr>
<tr>
<td></td>
<td>IJ Other</td>
<td>Non-Rush</td>
<td>Panel 5 (Jurisdiction/Merit)</td>
</tr>
<tr>
<td>INS (DD)</td>
<td>DD Visa</td>
<td></td>
<td>Panel 6 (Streamlining)</td>
</tr>
<tr>
<td></td>
<td>DD Fines</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>DD 212</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The following sets of questions were designed to identify the data required to compare the productivity of the case appeal adjudication process before and after implementation of the Streamlining Pilot Project.

**Productivity Related Questions Before Streamlining**

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months prior to commencement of Streamlining Phase I?

B. How long did it take prior to commencement of Streamlining Phase I (by case source, type, and priority) for a case to be completed from date of receipt at “Intake” in the Clerk’s Office – to – date the case was “Completed at BIA”?

**Productivity Related Questions After Streamlining**

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months after commencement of Streamlining Phase III?

B. How long did it take after commencement of Streamlining Phase III (by case source, type, and priority) for a case to be completed from date of receipt at “Intake” in the Clerk’s Office – to – date the case was “Completed at BIA”?

**Fair and Legally Correct Decisions Related Questions Before Streamlining**

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months prior to commencement of Streamlining Phase I?
B. How many Board decisions (by case source, type, priority, and Board Panel) were appealed in the twelve months prior to commencement of Streamlining Phase I?

C. How many Board decisions (by case source, type, priority, and Board Panel) were modified or rescinded in the twelve months prior to commencement of Streamlining Phase I?

Fair and Legally Correct Decisions Related Questions After Streamlining

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months since commencement of Streamlining Phase III?

B. How many Board decisions (by case source, type, priority, and Board Panel) were appealed in the twelve months since commencement of Streamlining Phase III?

C. How many Board decisions (by case source, type, priority, and Board Panel) were modified or rescinded in the twelve months since commencement of Streamlining Phase III?

Program Sustainability Related Questions

A. How many cases were received (by case source, type, and priority) from September 1 to August 31 for each year dating back to 1998?

B. How many cases were completed (by case source, type, and priority) from September 1 to August 31 for each year dating back to 1998?

C. For each of the years dating back to 1998, how many cases (by case source, type, and priority) were open for:

- 60 to 90 days
- 90 to 180 days
- 180 days to 1 year
- 1-2 years
- Greater than 2 years

Collect the Data

The Andersen team developed and submitted a template that BIA could use to identify the data elements required to be extracted from available databases in order to answer the above questions. Based upon this template, BIA developed database reports to extract the requisite data. Perseverance prevailed and the data was extracted from both the Streamlining database and BIA Processing using OPA reports and made available to the Andersen team. This data was used to develop the “objective” perspective regarding the evaluation of the Streamlining Pilot Project. Specific findings resulting from the analysis of this data is provided in Appendix B of this report. Please refer to Appendix D of this report to view the template.

Develop and Conduct Surveys

Based upon the analysis of the data collected, a set of survey statements was developed and approved to develop a “subjective” perspective of the performance of the Streamlining Pilot...
Project. These statements were developed by the Andersen team and approved by BIA. Survey respondents were asked to indicate whether they “strongly agreed”, “agreed”, were “neutral”, “disagreed”, or “strongly disagreed” to the following statements:

- Streamlining has increased BIA case flow production;
- Streamlining has reduced BIA case flow backlogs;
- Streamlining has reduced BIA case flow processing time;
- Streamlining has produced fair and legally correct BIA decisions;
- Streamlining has allowed the regular panels to focus more time and attention on substantive issues;
- Streamlining can be sustained on a permanent basis; and
- Streamlining has been a success.

Respondents were also asked to comment on the following questions:

- How should the effectiveness of Streamlining be measured in the future (i.e., case production, case processing time, etc.)?
- How can Streamlining be improved?
- Is Streamlining doing anything that is counter-productive?

The results of this survey are contained in Appendix B of this report.

Develop and Conduct Interviews

Based upon the results of the survey in conjunction with the analysis of the data, interview questions were developed to resolve any inconsistencies discovered while analyzing the “objective” and “subjective” findings as well as further explore observations/findings extracted from the survey responses. These questions revolved around the following areas: case production goals; morale; pending cases reduction; quality of decisions; Streamlining case screening; Streamlining communications; resources; training; organizational changes, and Streamlining case categories. A total of 12 interviews were conducted which included two Streamlining Board Members, two non-Streamlining Board Members, one non-Streamlining Senior Panel Attorney, one Team Leader, one Clerks Office Manager, two Streamlining Attorneys, one Non-Streamlining Attorney, one Paralegal, and one Legal Assistant. Specific results and observations of the interviews are contained in Appendix B of this report.
Board of Immigration Appeals (BLA)
Streamlining Pilot Project Assessment Report

Appendix B - Assessment Results
Appendix B - Assessment Results

Key findings from implementing the methodology described in Appendix A are detailed in the following paragraphs. These findings have been partitioned into the areas of data analysis, surveys, and interviews.

Data Analysis

Analysis of the data extracted and provided to the Andersen team provides an objective evaluation of the Streamlining Pilot Project and its affect on the overall BIA case adjudication process.

Productivity-Related Findings

Throughput

As of September 5, 2000, cases that met Streamlining criteria were directed to Board Panel six (Streamlining) for adjudication. Consequently, Board Panel six, which adjudicated no cases prior to commencement of the Streamlining Pilot Project showed a dramatic increase in the number of cases completed from 0 to over 15,000 cases. The other Board Panels were left to complete the remaining more complex cases. This appears to have resulted in diminished case productivity of the other Board Panels by approximately 32%. However, the increased productivity of Board Panel six, when combined with the reduced productivity of the other Board Panels, resulted in a 53% increase in the number of overall BIA case completed. The graphic below depicts BIA case completion levels by Board panel for the years prior to and after commencement of the Streamlining Pilot Project. Based upon the analysis of the supporting data, it is extremely obvious that the Streamlining Pilot Project has significantly improved overall BIA case productivity.
BIA Case Completions by Board Panel

* September - August

* Fiscal year is offset by one month.

<table>
<thead>
<tr>
<th>6: Streamlining</th>
<th>0</th>
<th>0</th>
<th>15,025</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other</td>
<td>1,567</td>
<td>68</td>
<td>2,731</td>
</tr>
<tr>
<td>5: Jurisdiction / Merit</td>
<td>3,000</td>
<td>2,639</td>
<td>1,851</td>
</tr>
<tr>
<td>4: Merit</td>
<td>5,817</td>
<td>5,042</td>
<td>3,213</td>
</tr>
<tr>
<td>3: Backlog</td>
<td>3,701</td>
<td>4,366</td>
<td>3,392</td>
</tr>
<tr>
<td>2: Merit</td>
<td>4,139</td>
<td>3,753</td>
<td>2,334</td>
</tr>
<tr>
<td>1: Merit</td>
<td>4,726</td>
<td>5,044</td>
<td>3,375</td>
</tr>
</tbody>
</table>

* Fiscal year is offset by one month.

Processing Time

Processing time can be determined by comparing the date a case is received at "Intake" against the date the case was "Completed at BIA". Based upon the availability of data, objective determination of processing time was associated by determining and comparing
the average number of days it took a case to process from receipt at “Intake” to “Completed at BIA”. Based upon the analysis of the data associated with examining cases that were completed prior to Streamlining compared to after Streamlining, we see the following results:

- The Streamlining Pilot Project has had a positive impact on overall BIA case processing time as follows:
  
  - Between 1997 and 2001, the average number of BIA cases completed in less than 90 days increased from 25% to 56%;
  - Between 1997 and 2001, the average number of BIA cases that remained open 181 days or greater dramatically decreased from 42% to 13%;
  - Between 1997 and 2001, the average number of RUSH cases completed in less than 90 days increased from 33% to 42%; and
  - Between 1997 and 2001, the average number of RUSH cases that remained open 181 days or greater decreased from 35% to 9%;

The following charts display the above BIA case completion information:

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### 1997 to 1998 Average BIA Case Completion Time

- **25%** in **<90 Days**
- **42%** in **91 - 180 Days**
- **33%** in **181 Days or Greater**

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Impact on RUSH Cases

The trend observed from time before Streamlining compared with since Streamlining showed a significant improvement in the average case processing time for RUSH cases. Since 1997-1998, a greater number of RUSH cases were processed in less than 90 days while fewer cases were processed in 181 to 365 days. Specifically, RUSH cases that were completed in less than 90 days increased from 33% to 42% while RUSH cases that were open 181 days to a year dramatically decreased from 35% to 9%. The following charts display this information graphically:
An additional key finding identified from conducting analysis of data associated with processing time deals with the effect that Streamlining had on the average number of days that it takes for BIA cases (DD and IJ) to move from Intake to 1st Attorney Assignment, from 1st Attorney Assignment to 1st Circulation, and 1st Circulation to BIA Decision. For both types of cases, the trend over time for cases to move from 1st Circulation to BIA Decision has decreased. Since initiation of the Streamlining Pilot Project, the average time it takes cases to move from 1st Attorney Assignment to 1st Circulation has decreased an average of 31%, while the time from Intake to 1st Attorney Assignment has increased an average of 286%. The increase was a result of processing a large number of cases which were waiting to be screened when the Streamlining Pilot Project began and a change in the Board case assignment practice. In order to better manage pending cases, the Board no longer assigns all cases to attorneys immediately after screening. Rather, it assigns only the number of cases it believes they can complete within a reasonable period of time. The following charts display this information graphically:
Fair and Legally Correct Decisions

*Fair and legally correct decisions* result from the uniform and consistent application of the law to all parties regardless of the individuals submitting, processing, or ruling on the appeal or motion. The number of stayed, modified, rescinded, or overruled decisions could illuminate the degree of fairness and legal correctness of decisions. Objective evaluation of this aspect of the Streamlining performance goal must rest upon comparing and contrasting the metric data associated with the following: total number of cases adjudicated over a specified period of time; number of Board decisions appealed over a specified period of time; and the number of Board decisions modified or rescinded over a specified period of time. When the Andersen team conducted analysis of the aforementioned data, it became apparent that the Streamlining program has not been implemented long enough to provide a sufficient amount of historical data to objectively evaluate its affect upon quality of decisions rendered. A key finding observed from analysis of available data indicated that Streamlining has not adversely affected the "unrepresented" alien. Also, of the total number of Streamlining case decisions rendered, there is not an overly disproportionate difference between the number of decisions favorable or unfavorable to the alien. In other words, the alien gets benefit from Streamlining. The following charts display this information graphically:
Program Sustainability

Program sustainability can be objectively evaluated by analyzing and applying the trend of the number of cases received compared with the number of cases that are completed over a specified period of time projected against the future. Program sustainability analysis can also require the examination of pending cases over time as well. Pending cases is defined as cases awaiting decision. Storage can include both current year and prior year pending cases.

Currently, there are approximately 57,000 cases pending before the Board. Some of these cases are in the Clerk’s Office while other cases are in the Attorney’s offices. Of the approximately 19,600 pending cases in the Clerk’s Office, it is estimated that approximately 35% of cases not screened may meet Streamlining criteria. It is also estimated that approximately 6% of the pending cases not screened for Streamlining that are located in the Attorneys’ offices may meet Streamlining criteria. Based upon this information and the Streamlining Panel’s trend to complete approximately 4,500 pending cases from storage each year, it is estimated that the number of pending Streamlining eligible cases could be eliminated in approximately 20 months. At the point in time when this is achieved, Streamlining will primarily adjudicate new cases only. The chart on the following page depicts the trend of BIA pending cases since 1997. It must be noted that during the Streamlining Pilot Project, there was an approximate 7% reduction in the total amount of pending cases remaining before the Board.
Other Streamlining Data Snapshots

Imbedded within the following paragraphs are additional data derived high-level graphic snapshots of Streamlining from Phase I inception through October 1, 2001. Each graphic will be accompanied with a textual explanation of the information that the snapshot is attempting to convey. These snapshots were derived from the objective data obtained from available databases and the tabulation of responses provided to the survey questions.

Streamlining Case Flow

Approximately 25,000 cases were referred to Streamlining between 01 September 2000 and 01 October 2001. Due to the nature of the streamlining program, approximately 45% of the cases were rejected either by the Attorney/PL or Board Members. The Attorney/PL rejected the overwhelming majority. Only one percent of the cases rejected were by Board Members.

Short Order (3 vote) Cases

The Streamlining Center completed 15,798 cases between 01 September 2000 and October 1, 2001 which 11,820 (76%) were 1 Board Member vote cases. The remaining 3,978 (24%) cases were short order cases requiring 3 Board Member votes.

Single Vote vs Three Vote Completions

- Cases Signed By 3 Board Members panel: 24%
- Cases Signed By Single Bd Member: 76%

B-10
Survey Results

Based upon the analysis of the data collected, a set of survey statements were developed and approved to provide a “subjective” perspective of the effectiveness of the Streamlining Pilot Project. Survey respondents were asked to indicate whether they “strongly agreed”, “agreed”, were “neutral”, “disagreed”, or “strongly disagreed” to the following statements:

- Streamlining has increased BIA case flow production;
- Streamlining has reduced BIA case flow backlogs;
- Streamlining has reduced BIA case flow processing time;
- Streamlining has produced fair and legally correct BIA decisions;
- Streamlining has allowed the regular panels to focus more time and attention on substantive issues;
- Streamlining can be sustained on a permanent basis; and
- Streamlining has been a success.

Respondents were also asked to comment on the following questions:

- How should the effectiveness of Streamlining be measured in the future (i.e., case production, case processing time, etc.)?
- How can Streamlining be improved?
- Is Streamlining doing anything that is counter-productive?

The results of this survey were tabulated and are contained in the paragraphs that follow. The following chart provides the BIA staff’s perspective of the Streamlining Pilot Project’s benefit to BIA.

Survey Results: Streamlining Has Benefited BIA

![Pie chart showing distribution of responses]

- 47% Strongly Agree
- 30% Agree
- 20% Neutral
- 3% Disagree
Each survey statement identified above has been slotted into one of the following Streamlining program goal categories: productivity; fair and legally correct decisions; and program sustainability. The results of each of these survey statements are graphically depicted in the corresponding paragraphs below.

**Productivity**

Responses to the following survey statements provided the BIA staff's perspective regarding the affect that Streamlining has had on BIA case productivity:

- Streamlining has increased BIA case flow production;
- Streamlining has reduced BIA case flow backlogs;
- Streamlining has reduced BIA case flow processing time.

Over 91% of those surveyed “agreed” or “strongly agreed” that Streamlining has improved BIA case productivity (the number of cases completed). Over 75% of those surveyed “agreed” or “strongly agreed” that Streamlining has reduced the number of BIA pending cases and improved case processing time (the amount of time it takes for a case to move from “Intake” to “Completed at BIA”). Consequently, both data and survey results confirm the finding that Streamlining has improved overall BIA case productivity.

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**SL Has Increased BIA Case Productivity**

9% Strongly Agree

32% Agree

59% Neutral
Fair and Legally Correct Decisions

Responses to the following survey statements provided BIA staff’s perspective regarding the affect that Streamlining had on producing fair and legally correct decisions:

- Streamlining has produced fair and legally correct BIA decisions;
- Streamlining has allowed the regular panels to focus more time and attention on substantive issues.
Survey responses indicated that over 61% of the BIA staff "agreed" or "strongly agreed" that Streamlining has produced fair and legally correct decisions with only 6% disagreeing (the large number of "neutral" responses were provided by non-Streamlining associated staff members). Over 78% of those surveyed "agreed" or "strongly agreed" that Streamlining has allowed the Board Panels to spend more time on substantive issues.

Since there was not sufficient historical data available to objectively evaluate the quality of decisions aspect of the Streamlining performance goal, the survey results in collaboration with the interview observations indicated that Streamlining produces fair and legally correct decisions. The survey results associated with the above statements are graphically depicted below.
Program Sustainability

Responses to the following survey statements provided BIA staff's perspective regarding sustainability of the Streamlining program:

- Streamlining can be sustained on a permanent basis; and
- Streamlining has been a success.

The survey results indicated that the Streamlining program can be sustained over an extended period of time. Over 73% of the staff "agreed" or "strongly agreed" that the Streamlining program can be sustained with only 4% either "disagreeing" or "strongly disagreeing". Over 79% of those surveyed "agreed" or "strongly agreed" that the Streamlining Pilot Project has been a success and the program should be maintained. The survey results associated with the above statements are graphically depicted below:
Streamlining Phase IV Effectiveness Measurements

The BIA staff was asked to comment on the following question related to measuring Streamlining during full program implementation:

How should the effectiveness of Streamlining be measured in the future (i.e., case production, case processing time, etc.)?

Analysis of the survey results for responses provided to this question indicated that metric data in the following areas should be collected to support measuring the effectiveness of Streamlining during Phase IV:

- Production;
- Processing Time;
- Pending Cases Reduction;
- Quality (Number of motions to reopen, remands, and reversals from circuit/federal courts regarding Streamlining decisions);
- Production Goal Achievement

Staff members were also asked to comment on the following questions related to improvement of the Streamlining program:

How can Streamlining be improved?
Is Streamlining doing anything that is counter-productive?

Analysis of the survey results for responses provided to these questions indicated the following:

- Continue to look for new categories of cases to be designated for Streamlining;
- Categories of SL should be clarified and expanded. The Board should develop a standard order for fact-based appeals (weighing of evidence) where there is no substantial argument that the Immigration Judge erred in initially weighing the factual evidence and no issue of law is presented;
- Allow staff attorneys on flexi-place to take home Streamlining cases, at least short-order (3-Member) cases, in order to enhance productivity;
- Have Streamlining done by regular panels, using S/L Board Members as designated. Provide all attorneys with training and automated orders;
- Need to have a mechanism by which all Board Members remain "in tune" with the decisions being made on important procedural and substantive issues at Streamlining;
- Consider, for long term, a second Streamlining panel to do certain classes of 3-Member cases that can move relatively quickly;
- Consider adding slightly more attorney and Board personnel (up to 5 Board Members assigned at any given time); and
- Consider surveying the public, INS legal unit, Immigration judges, and OIL for perceptions of Streamlining.

The following noteworthy responses were also provided regarding Streamlining program improvements and program counter-productivity:

"Morale for non-S/L attys is low. Case production "goals" remain the same for us, but cases for non-S/L'ers are harder on the whole. It is difficult to work quickly on hard cases when there is no end in sight and no possibility of any easier cases to make up the production difference. I finish one difficult decision only to move on to the next. It is human nature to function at a slower pace under these circumstances. There are times when cases are retrieved by correspondence to be sent to S/L for withdrawal orders, etc. When I could do withdrawal easier than shipping the case out. There is less specialization (along with the increased efficiency in terms of production it brings) among non-S/L attys now that S/L is in effect."

"The increase in SL numbers and overall numbers have certainly reduced the number of "short" cases handled by attorneys. Mgmt has not yet formally recognized this in the case-per-month goals. Accordingly, the attorneys are working against a false performance appraisal element."

"The en banc Board is starting to get distant from the process. That's not good. We never discuss Streamlining as a group any more. It has been many months since some Board Members served as volunteers, and they don't have a real handle on what's happening today. S-L has generally improved life on the panels and allowed us to meet or exceed production goals. So, it's easy for those not currently serving to just put S-L out of mind. The apparent move away from a system of rotating volunteers to one of longer term assignments might increase productivity in the short-term, but eventually will endanger the program. Witness what happened to the relationship between the "J-Panel" and en banc. The feeling that J-Panel was acting "for the group" was dissipated by overspecialization and allowing/encouraging a minority of Board Members to assume a "proprietary" interest."
“Streamlining attorneys and Board Members need to be careful not to go beyond the categories of cases identified as Streamlining cases and to be very careful that any precedents applied as controlling are clearly on point and applicable to the case at hand.”

“Streamlining has taken all of the easier cases from the other panels, leaving only complex and difficult cases for us to work on. Consequently, I believe that production on non-SL panels may actually decrease because of what I would call "hard case fatigue". When the only cases available to work on are difficult and complex, mental exhaustion and lower morale set in much more quickly. This, coupled with the fact that we are still required to produce at Pre-Streamlining levels, makes the work a lot more stressful for those of us not on the Streamlining panel.”

A complete listing of survey responses is provided for review in Appendix E of this report.

Interview Comments

Based upon the results of the survey in conjunction with the analysis of the data, interview questions were developed to resolve any inconsistencies discovered while analyzing the “objective” and “subjective” findings as well as further explore observations/findings extracted from the survey responses. These questions revolved around the following areas: production goals; morale; case backlog reduction; quality of decisions; Streamlining case screening; Streamlining communications; resources; training; organizational changes, and Streamlining case categories. A total of 12 interviews were conducted to include two Streamlining Board Members, two Non-Streamlining Board Members, one Senior Panel Attorney, one Team Leader, one Clerks Office Manager, two Streamlining Attorneys, one Non-Streamlining Attorney, one Paralegal, and one Legal Assistant. Both BIA and the Union agreed to the interview questions and interviewee composition. Observations from the interviews are provided in the following paragraphs and have been categorized in the areas identified above.

Production Goals

- Although Streamlining production goals are realistic, the production goals for non-Streamlining attorneys need to be reevaluated in light of the Streamlining program;
- Upper management should formally recognize that Streamlining affects production goals for Non-Streamlining;
- There is an unfair mix of cases for non-streamliners;
- Production goals are too objective in nature and not enough subjective.

Morale

- Very high inside Streamlining Center (directly attributed to Streamlining manager);
- Needs improvement outside Streamlining (unfair mix of cases for non-streamliners);
- Skill set may erode for streamliners if assigned for extended periods.
Pending Cases Reduction

- Streamlining has had a very positive affect on reducing the number of pending cases;
- Streamlining helps focus time to adjudicate pending cases;
- Panel 3 is making a significant dent in the pending case backlog;
- If and when the number of pending cases is reduced, Streamlining may need to be reduced in scope but never eliminated.

Quality

- Less than 1% of decisions may be wrong;
- No difference in quality between Streamlining and Non-Streamlining;
- Single Board Member decision on substantive issues may lend to incorrect decisions;
- The data elements required to objectively evaluate quality are not being collected in BIA databases.

Screening

- Paralegals need to do a better job in screening cases, especially short orders;
- All things considered, it's pretty good.

Communication

- Inside Streamlining, it's great! (directly attributed to Streamlining manager)

Resources

- Not enough legal assistants to support increased numbers of attorneys;
- Non-Streamlining employee base is down.

Training

- Basic training is adequate, OJT is the best;
- Quality of mentoring is pretty good;
- Training is very good;
- Paralegals need to receive timely training on changes to law when they occur.

Organization

- Keep the Streamlining people who are producing and motivated in place;
- Doing Streamlining while on Flexi-Place may be logistically too hard to accomplish since attorneys need remote access to BIA (does not exist today);
- Longer assignments to Streamlining helps to maintain continuity;
- Stagger the influx of new personnel into Streamlining;
- Board Member rotation to Streamlining should mirror attorneys;
- Recommend 7 permanent with 3 rotating attorneys and 3 permanent Board Members to Streamlining.
Adding Categories

- Categories need to be reevaluated;
- Process is in place to add categories, but consensus and authority is hard to achieve.
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Appendix C - Phase IV Implementation Recommendations
Appendix C - Phase IV Implementation Recommendations

One of the objectives for conducting this study was to develop a performance-based evaluation program for measuring Streamlining Phase IV implementation. Since the evaluation program implemented to conduct this study is a performance-based evaluation design, it lends itself well as a framework for designing the evaluation program for Streamlining Phase IV. The approach and methodology identified in Appendix A of this report provides the basis for the design that is recommended for evaluating Streamlining Phase IV.

Evaluation Program

The evaluation program designed and implemented to measure the effectiveness of the Streamlining Pilot Project provides a baseline from which to evaluate the Streamlining program during its full implementation. The Andersen team recommends that all Phase IV Streamlining measurement activity focus upon evaluation of the Phase IV Streamlining performance goal and its primary components. Also, in order to achieve accurate evaluations of the Streamlining Phase IV program, it is extremely important that the data extracted and reported from BIA databases is consistent and available.

Methodology

The following key aspects of the methodology implemented to support the evaluation of the Streamlining Pilot Project that have application to the program evaluation design for Streamlining Phase IV include:

- Defining the Streamlining Phase IV performance goal and decomposing the goal into its primary components;
- Developing specific questions that when answered would identify the required data pertinent to the objective measurement of the Streamlining Phase IV performance goal;
- Identifying a set of data that when collected and analyzed would provide an “objective” measurement of the performance of the appeals process as it relates to the Streamlining Phase IV program;
- Collect the data, analyze, and develop key findings;
- Develop survey questions that support obtainment of a “subjective” perspective regarding the performance of the Streamlining Phase IV program, and discover additional issues not discernable from the data;
- Collect the survey responses, tabulate, and analyze results;
- Compare and contrast the “objective” data with the “subjective” survey results to develop interview questions designed to resolve any inconsistencies discovered while analyzing the “objective” and “subjective” findings as well as further explore observations/findings extracted from the survey responses;
- Conduct focused interviews; and
- Review the data, survey, and interview responses to jointly form the basis of the findings to be reported.
Methodology Implementation

Define the Streamlining Phase IV Performance Goal

In order to effectively evaluate the Streamlining Phase IV program, it is critical that EOIR/BIA obtain a clear understanding of the Streamlining Phase IV performance goal. The performance goal as provided by BIA for the Streamlining Pilot Project was defined as follows: "**Increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time.**" The primary measurement components of this goal were identified as productivity, fair and legally correct decisions, and program sustainability. If this performance goal continues to apply to Streamlining Phase IV, then conducting an accurate measurement of its primary components will permit effective evaluations of the Streamlining program. These performance goal components are defined as follows:

**Productivity** is defined as *throughput* (the number of cases completed in a specified period) and *processing time* (the total amount of time it takes to complete a case from "Intake" to "Completed at BIA"). During Streamlining Phase IV, the assessment of productivity must be based upon comparing and contrasting the overall BIA appeals process after commencement of the Streamlining Pilot Project (it becomes the baseline). *Throughput* should be determined by comparing the total number of cases (by case source, type, priority, and Board Panel) completed during a twelve-month period since commencement of Streamlining Phase IV with the total number of cases (by case source, type, priority, and Board panel) adjudicated during the twelve-month period associated with the Streamlining Pilot Project. *Processing Time* should be determined by comparing the date a case is received at "Intake" against the date the case was "Completed at BIA".

**Fair and legally correct decisions** result from the uniform and consistent application of the law to all parties regardless of the individuals submitting, processing or ruling on the appeal or motion. The number of stayed, modified, rescinded, or overruled decisions should illuminate the degree of fairness and legal correctness of decisions. Objective evaluation of this aspect of the Streamlining Phase IV performance goal should rest upon comparing and contrasting the data associated with the following: the total number of Streamlining cases adjudicated over a specified period of time; the number of Streamlining Board decisions appealed over a specified period of time; and the number of Streamlining Board decisions modified or rescinded over a specified period of time.

**Program sustainability** should be objectively evaluated by analyzing and applying the trend of the number of Streamlining cases received compared with the number of Streamlining cases that are completed over a specified period of time projected against the future. Program sustainability analysis could also require the examination of pending cases over time as well.

Based upon the aforementioned Streamlining Phase IV performance goal definition, a set of questions can be developed to identify the data that would be required to objectively evaluate the effectiveness of the Streamlining Phase IV program.
Develop Data Collection Questions

Once the Streamlining Phase IV performance goal is defined and its measurable components identified, measurement questions should be developed to identify the data elements that must be collected and analyzed to provide the “objective” evaluation of the effectiveness of Streamlining after commencement of Phase IV. The set of measurement questions identified in the following paragraphs use terms such as sources, types, priority, and Board Panel. The table below identifies the specific components associated with each term.

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<tr>
<th>Sources</th>
<th>Types</th>
<th>Priority</th>
<th>Panels</th>
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<tr>
<td>IJ</td>
<td>IJ Case Appeal</td>
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<td>Panel 1 (Merit)</td>
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<td>IJ Appeal of IJ MTR</td>
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<td>Panel 2 (Merit)</td>
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<td>IJ MTR BIA</td>
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<td>Panel 3 (Backlog)</td>
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<td>IJ Other</td>
<td>Rush</td>
<td>Panel 4 (Merit)</td>
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<td>INS (DD)</td>
<td>DD Visa</td>
<td>Non-Rush</td>
<td>Panel 5 (Jurisdiction/Merit)</td>
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<td>DD Fines</td>
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<td>Panel 6 (Streamlining)</td>
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The following sets of questions are designed and recommended to identify the data required to compare the productivity of the BIA case appeal adjudication process before and after implementation of the Streamlining Phase IV program.

Productivity Related Questions Before Streamlining Phase IV

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months prior to commencement of Streamlining Phase IV?

B. How long did it take prior to commencement of Streamlining Phase IV (by case source, type, and priority) for a case to be completed from date of receipt at “Intake” in the Clerk’s Office – to – date the case was “Completed at BIA”?

Productivity Related Questions After Streamlining Phase IV

A. How many cases (by case source, type, priority, and Board Panel) have been received and completed in the twelve months after commencement of Streamlining Phase IV?

B. How long did it take after commencement of Streamlining Phase IV (by case source, type, and priority) for a case to be completed from date of receipt at “Intake” in the Clerk’s Office – to – date the case was “Completed at BIA”?

Fair and Legally Correct Decisions Related Questions Before Streamlining Phase IV

A. How many cases (by case source, type, priority, and Board panel) have been received and completed in the twelve months prior to commencement of Streamlining Phase IV?

B. How many Board decisions (by case source, type, priority, and Board Panel) were appealed in the twelve months prior to commencement of Streamlining Phase IV?
C. How many Board decisions (by case source, type, priority, and panel) were modified or rescinded in the twelve months prior to commencement of Streamlining Phase IV?

Fair and Legally Correct Decisions Related Questions After Streamlining Phase IV

A. How many cases (by case source, type, priority, and Board panel) have been received and completed in the twelve months since commencement of Streamlining Phase IV?

B. How many Board decisions (by case source, type, priority, and Board panel) were appealed in the twelve months since commencement of Streamlining Phase IV?

C. How many Board decisions (by case source, type, priority, and panel) were modified or rescinded in the twelve months since commencement of Streamlining Phase IV?

Program Sustainability Related Questions

A. How many cases were received (by case source, type, and priority) from September 1 to August 31 for each year dating back to 1999?

B. How many cases were completed (by case source, type, and priority) from September 1 to August 31 for each year dating back to 1999?

C. For each of the years dating back to 1998, how many cases (by case source, type, and priority) were open for:

- 60 to 90 days
- 90 to 180 days
- 180 days to 1 year
- 1-2 years
- Greater than 2 years

Collect the Data

The Andersen team developed and submitted a template that BIA could use to identify the data elements required to be extracted from available databases in order to answer the questions developed to support evaluation of the Streamlining Pilot Project. This template is provided for review as Appendix E. This template could be modified for use to identify the requisite data elements that must be extracted from available databases to objectively evaluate the effectiveness of the Streamlining Phase IV program. Based upon this template, BIA can develop standardized database reports to extract the data. These reports should be developed as standard reports and the data extracted quality checked. In order to obtain an accurate evaluation of the Streamlining Phase IV program, it is critical that there are no inconsistencies identified with the data extracted from the databases and that all requisite data elements are being captured in the database.

Develop and Conduct Surveys

Based upon the analysis of the data collected, a set of survey statements should be developed and approved to provide the “subjective” perspective of the effectiveness of the Streamlining
Phase IV program. A survey should be conducted each time the Streamlining Phase IV program is evaluated. The following survey statements were crafted by the Andersen team and approved by BIA for subjective evaluation of the Streamlining Pilot Project. They are provided as a baseline for use or modification to support surveying employees regarding Streamlining Phase IV program effectiveness. Survey respondents were asked to indicate whether they "strongly agreed", "agreed", were "neutral", "disagreed", or "strongly disagreed" to the following statements:

- Streamlining has increased BIA case flow production;
- Streamlining has reduced the number of BIA pending cases;
- Streamlining has reduced BIA case flow processing time;
- Streamlining has produced fair and legally correct BIA decisions;
- Streamlining has allowed the regular panels to focus more time and attention on substantive issues;
- Streamlining can be sustained on a permanent basis; and
- Streamlining continues to be a success.

Respondents were also asked to comment on the following questions:

- How should the effectiveness of Streamlining be measured in the future (i.e., case production, case processing time, etc.)?
- How can Streamlining be improved?
- Is Streamlining doing anything that is counter-productive?

The responses to the survey statements can be tabulated and analyzed in a similar fashion as those identified in Appendix B of this report.

Develop and Conduct Interviews

Based upon the results of the survey in conjunction with the analysis of the collected data, interview questions can be developed to resolve any inconsistencies discovered while analyzing the "objective" and "subjective" findings as well as further explore observations/findings extracted from the survey responses. These questions could revolve around the following areas: production goals; morale; case backlog reduction; quality of decisions; Streamlining case screening; communications; resources; training; organizational changes, and Streamlining case categories. An appropriate number of focused interviews should be conducted to provide adequate representation across the functional roles found within BIA. These should include: Streamlining Board Members, non-Streamlining Board Members, senior panel attorneys, team leaders, Streamlining attorneys, non-Streamlining attorneys, paralegals, and legal assistants. The specific interview questions and the composition of interviewees should be approved by BIA.

Program Implementation

We recommended that a Streamlining Phase IV evaluation program be formally established, individual roles and responsibilities assigned, standardized database reports be developed, and a program evaluation conducted at least on an annual basis.
Board of Immigration Appeals (BIA)
Streamlining Pilot Project Assessment Report

Appendix D – Data
Streamlining Process Goal

"Increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time."

<table>
<thead>
<tr>
<th>Measurement Questions</th>
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<tbody>
<tr>
<td><strong>INCREASE PRODUCTIVITY</strong></td>
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<tr>
<td>Before Streamlining</td>
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<tr>
<td>How many cases (by source, type, priority, and panel) have been received and adjudicated in the twelve months prior to commencement of Phase I?</td>
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<tr>
<td>How long did it take prior to commencement of Phase I (by source, type &amp; priority) for a case to be adjudicated end-to-end from Date of Receipt at Intake – to – Date Case Completed at BIA?</td>
</tr>
<tr>
<td>How long did it take in the twelve months prior to commencement of Phase I for each Clerk’s Office Unit and Attorney Team to process cases by case source, type, and priority?</td>
</tr>
<tr>
<td>After Streamlining</td>
</tr>
<tr>
<td>How many cases (by source, type, priority, and panel) have been received and adjudicated in the twelve months after commencement of Phase III?</td>
</tr>
<tr>
<td>How long did it take after commencement of Phase III (by source, type &amp; priority) for a case to be adjudicated end-to-end from Date of Receipt at Intake at Clerk’s Office – to – Date Case Completed at BIA?</td>
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<tr>
<td>How long did it take in the twelve months after commencement of Phase III for each Clerk’s Office Unit and Attorney Team to process cases by case source, type, and priority?</td>
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<tr>
<td>FAIR &amp; LEGALLY CORRECT DECISIONS</td>
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<td>Defined as the number of cases</td>
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<td>modified or rescinded by a higher authority.</td>
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<td><strong>Program Sustainment</strong></td>
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<td>Defined as the application of trends of cases received compared to cases adjudicated.</td>
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## Data Collection Template

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<th>Type</th>
<th>Priority</th>
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<tr>
<td>1A</td>
<td>How many cases have been received?</td>
<td>INS (DD)</td>
<td>UJ Case Appeal</td>
<td>Rush</td>
<td>1 (Merit)</td>
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<td>UJ Appeal of UJ MTR</td>
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<td>2 (Merit)</td>
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<td>Other</td>
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<td>DD Visa</td>
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<td>5 (Jurisdiction/Merit)</td>
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<td>DD Fines</td>
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<td>DD 212</td>
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| 1B | How many cases have been adjudicated? | INS (DD) | UJ Case Appeal | Rush            | 1 (Merit)         |
|    |                                      |         | UJ Appeal of UJ MTR |                | 2 (Merit)         |
|    |                                      |         | UJ MTR BIA          |                | 3 (Backlog)       |
|    |                                      |         | Other                |                | 4 (Merit)         |
|    |                                      |         | DD Visa              |                | 5 (Jurisdiction/Merit)|
|    |                                      |         | DD Fines             |                | 6 (Streamlining)  |
|    |                                      |         | DD 212               |                |                      |

<p>| 2  | How long did it take for a case to be adjudicated end-to-end from Date of Receipt at Intake at Clerk's Office - to - Date Case Completed at BIA? | INS (DD) | UJ Case Appeal | Rush            | 1 (Merit)         |
|    |                                                                                                                      |         | UJ Appeal of UJ MTR |                | 2 (Merit)         |
|    |                                                                                                                      |         | UJ MTR BIA          |                | 3 (Backlog)       |</p>
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<th>ID</th>
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<th>Type</th>
<th>Priority</th>
<th>Panel</th>
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<td>How long did it take for the Docket Unit to process cases?</td>
<td>INS (DD)</td>
<td>IJ Case Appeal</td>
<td>Rush</td>
<td>1 (Merit)</td>
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<td>IJ Appeal of IJ MTR</td>
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<td>IJ MTR BIA</td>
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<td>6 (Streamlining)</td>
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<td>How long did it take for the attorney to process cases?</td>
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<td>4A</td>
<td>How many non-rush cases were open for less than 90 days?</td>
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<td>IJ Case Appeal</td>
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<td>ID</td>
<td>Question</td>
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<td>DD 212</td>
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<tr>
<td>4B</td>
<td>How many non-rush cases were open for 91 days to 180 days?</td>
<td>INS (DD)</td>
<td>IJ Case Appeal</td>
<td>1 (Merit)</td>
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<td>1 -2 years</td>
<td>3</td>
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Board of Immigration Appeals (BIA)
Streamlining Pilot Project Assessment Report

Appendix E – Survey Results
## Appendix E – Survey Results

<table>
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<tr>
<th>ID</th>
<th>Statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
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<td>Streamlining has increased BIA case production.</td>
<td>28</td>
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<td>Streamlining has reduced BIA case backlogs.</td>
<td>21</td>
<td>15</td>
<td>8</td>
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<td>3</td>
<td>Streamlining has reduced BIA case processing time.</td>
<td>22</td>
<td>14</td>
<td>11</td>
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<tr>
<td>4</td>
<td>Streamlining has produced fair and legally correct BIA decisions.</td>
<td>17</td>
<td>12</td>
<td>16</td>
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<td>5</td>
<td>Streamlining has allowed the regular panels to focus more time and attention on substantive issues.</td>
<td>20</td>
<td>15</td>
<td>8</td>
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<td>6</td>
<td>Streamlining can be sustained on a permanent basis.</td>
<td>22</td>
<td>13</td>
<td>11</td>
<td>1</td>
<td>1</td>
<td>48</td>
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<tr>
<td>7</td>
<td>Streamlining has been a success.</td>
<td>24</td>
<td>14</td>
<td>10</td>
<td>0</td>
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* Some of the 48 individuals did not respond to all of the questions.

### Additional Comments

How can streamlining be improved?

8. Add Categories

- Continue to look for new categories of cases to be designed for streamlining. Go back to originally proposed list of categories and consider those categories that were rejected.
- Adding more categories - 3 Bd member vote orders that could be entered / modified in BIAP
- More summary affirmance - expand to include more categories
- Perhaps attorneys on other panels should also be encouraged to use streamline orders for cases amenable to those orders.
- Categories of SL should be clarified and expanded. The Board should develop a standard order for fact-based appeals (weighing of evidence) where there is no substantial argument that the Immigration Judge erred in initially weighing the factual evidence and no issue of law is presented.
- Changes to the SL categories need to be proposed by the Chair and
### How can streamlining be improved?

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| **Office Policies/Organization** | • Allow staff attorneys on flexi-place to take home streamlining cases, at least short-order (3-Member) cases, in order to enhance productivity.  
• Attorneys should be allowed to rotate in and out periodically.  
• Maybe allow all attorneys to do some streamlining cases in their offices.  
• Non-streamlining attorneys who come across a case that fits within the streamlining parameters should be able to draft the order, send it to the SL panel, and get credit for its completion. As it is now, after having spent time reviewing the case, we are to have it reassigned to a SL attorney. In these circumstances, the non-streamlining attorney has wasted time on a case for which credit is not given, and the streamlining attorney then wastes more time by reviewing the case again.  
• Have streamlining done by regular panels, using S/L Board members as designated. Provide all attorneys with training and automated orders. |
| **Communication** | • Severely limit the amount of directives - streamline information so information in an expedited process like streamlining does not become a hindrance. Information on SL is current and there is more of it because the Board members have changes that have to take effect rather quickly. Problem now on SL is that no one can keep up with the flow of info and you're fast reaching a point of no return - too easy to forget - too easy to make mistakes - attorneys can't afford to check everything but must, so production goes down. This project has been put together and run by an extremely capable manager who has excellent personal skills. Some more infrastructure is needed I believe because so much of the Board's production is being carried by streamlining. We do not need more managers - simply a better system for information dispersal, someone to keep up a library of SL orders for example.  
• We need to have a mechanism by which all Board Members remain "in tune" with the decisions being made on important procedural and substantive issues at Streamlining. Need to avoid isolating streamlining unit. Part of the problem is that it is located apart from other Board Members. It might be helpful to have regular reports to en banc on the number of cases of various categories completed - i.e. - the one sentence streamlined orders per regulation, other one member orders with formatted language, and three - member orders, # of cases rejected. This report might also highlight any significant new group of cases being streamlined. |
| **More Resources** | • Consider adding slightly more attorney and Board personnel (up to 5 Board Members assigned at any given time)  
• Consider, for long term, a second streamlining panel to do certain classes of 3-Member cases that can move relatively quickly. |
| **Unknown** | • More attention to "3-member short order" component. Some are not very analytical, and the Board didn't give this component as much thought.  
• Implement Pilot Briefing Project. This would improve the incoming advocacy materials and assist unrepresented aliens.  
• Continue to work aggressively with Pro Bono Project to get every alien on |
### How can streamlining be improved?

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<th>Standardize</th>
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<tr>
<td>2</td>
<td>Make S-L attorneys use checklists, to improve accuracy of decisions.</td>
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<td>Divide attorneys into specialists who have the expertise to churn out classes of cases.</td>
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<td>1</td>
<td>Enhance case screening processes. This is a matter of space and personnel resources, but it is critical to the continued success of streamlining, and ability of streamlining to function as intake panel for the Board</td>
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<th>Goals</th>
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<td>Develop a formal case weighed system, rather than the de facto system.</td>
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<th>Leave it alone</th>
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<td>1</td>
<td>Monitor staff for morale and job satisfaction. My feeling is that those are quite high, but let’s ensure it stays that way.</td>
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<th>Training</th>
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<td>1</td>
<td>Continue to look for ways for attorney-supervised paralegals to complete orders for streamlining review. Enhance training of paralegals in areas that require closer judgment calls, such as summary dismissals.</td>
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<td>- The Chair/Vice Chair need to start viewing streamlining as one of many essential and important parts of the Board, not as a better, more important, more valuable piece of the whole. They need to emphasize this approach with their staff and expect their managers to adopt it (all of them, including the streamlining coordinator). Decision-making needs to be based on the concept that the Board is a team and that streamlining is but one integral part of that team, not more or less important than all the other parts. Doing this will enhance the work of the Board as a whole and will substantially raise morale among staff and managers.</td>
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<td>- Following from #1, above, there should be a consistent approach throughout the Board with respect to performance appraisals and the granting of awards. Outstanding appraisals and the granting of awards should be based on actual demonstrated performance, not on attitude or for simply volunteering to work in the streamlining center. Doing this will insure a more equitable performance appraisal/recognition process and correspondingly restore staff and manager trust in the process and enhance morale. - And, quit heaping one impressive award after another on those involved in the streamlining project (while essentially ignoring those who put substantial effort into work on the regular panels and those who picked up the slack on the regular panels while their colleagues served in streamlining).</td>
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<td>- Now that the technical aspects of streamlining have been implemented (form orders, computer changes, office set up, etc.), place greater emphasis on enhancing and maintaining legal knowledge among the streamlining volunteers. This can be accomplished by designating a streamlining coordinator with stronger lawyering skills, as opposed to the strong technical and detail organizational skills that characterize the current streamlining coordinator. However, I know there is not a chance that this will happen. Therefore, an alternative would be to give the Team Leaders who rotate into streamlining, and who are stronger on the legal aspects of things than the current streamlining coordinator, greater responsibility and control over monitoring and implementing necessary changes and training re: the legal</td>
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</table>
How can streamlining be improved?

- Quality of the work. Attorneys keeping abreast of current law is essential to the success of streamlining.

- Reduce the number of attorneys in the streamlining center. It is my understanding that this is currently envisioned by the panel staffing plan prepared by the Vice Chair. However, it will be difficult as it will result in a smaller staff for the streamlining coordinator than for the Senior Panel. Attorneys on other panels and, as a consequence, give the perception that his authority and value to the organization have diminished. On the plus side, a reduction of staff in the streamlining center also will relieve non-streamlining staff and managers of the perpetual directive to “find cases for Wayne and his people.”

- Except for detained alien cases, which must be given priority, adopt a first in/first out approach in date-stamping and mailing out signed orders that arrive in the Clerk’s Office. The current policy of doing streamlining orders first, with orders from other panels constantly being pushed to the bottom of the stack (where they have been known to stay sometimes for 2-3 weeks after they are signed) makes no organizational sense. Its only purpose is to make streamlining appear more successful on the production front than it really is.

- Adopt a plan for staffing streamlining that casts the net broader within the organization and avoids (a) unduly robbing other panels of their highest producers for an extended period of time, or (b) unduly packing the streamlining center with the laziest members of the staff who, because of the form/short orders drafted in the streamlining center, think they’ll be getting something of a free ride if they go there.

- Draft a new performance work plan for streamlining work that emphasizes (a) productivity, and in doing so takes into account the value of doing both short and form order decisions, not just form orders; (b) a broad, current knowledge of the law (as opposed to general legal research skills); and, (c) the quality of the legal judgment involved.

- Allow, even encourage, criticism and ideas for improvement from all sectors of the Board. Quit treating staff and managers who offer such as “traitors to the cause” and understand that their loyalty to the Board is just as great as those who conceived and have implemented streamlining and that an infusion of new, fresh ideas may in fact serve to improve streamlining. For this reason, I think the rotation of Team Leaders into streamlining, as proposed by the Acting Chair/Vice Chair, is a good idea. The question is: Will the streamlining coordinator be open to their views?

- Disassociate streamlining from the personality of its coordinator, Wayne Stogner, who in the implementation of this process has stepped on many toes and has insulted, denigrated, and angered many of his colleagues, including colleagues who were making significant sacrifices on their own panels (putting in extra time, covering for volunteers to streamlining, doing the more difficult casework, forgoing necessary furniture purchases and office upgrades, adapting to computer system changes that benefited only streamlining, etc.) to insure the success of streamlining. As long as
<table>
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<th>How can streamlining be improved?</th>
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<td>streamlining = Wayne Stogner and Wayne Stogner = streamlining in the minds of managers and staff, you are going to have a significant number of people who will not fully support the project.</td>
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|   | Yes. While the concept and many of the actual results of streamlining are good and necessary for the future of the organization, the entire
Is streamlining doing anything that is counter productive? Explain

Streamlining project has been a huge morale buster for a significant number of people not directly associated with it or not 1,000% behind the project as envisioned and implemented by former chairman Paul Schmidt, streamlining coordinator Wayne Stogner, and to a certain extent Acting Chairman Lori Scialabba. The project has been ineptly “sold” to staff and managers and has to a great extent been an in-house public relations disaster, leaving many people (staff and managers) with a very bad taste in their mouths. As a result, numerous people who ordinarily would be supportive of the project either want nothing to do with it, are unwilling to voluntarily assist it, or have become actively opposed to its very existence. Many believe that the resources of the organization (with respect to staff, money, furniture, supplies, office space, attention from upper levels of the organization, awards, clerk’s office time, computer changes, etc.) have been so stacked in favor of streamlining and against the regular panels that there was no way streamlining could be anything but a rousing success. Upper level management has sent a strong message to the staff that it values the staff and managers of streamlining substantially more than others and have failed adequately to recognize the supportive efforts that non-streamliners were making to the organization that kept things running and actually allowed streamlining to exist and function. This has been alleviated to a great extent during the tenure of Lori Scialabba as Vice Chair/Acting Chair, but still exists. The “sacrifice for streamlining” mantra that has permeated the organization for the past year or so is wearing thin with a substantial number of people (although they’ve learned to keep quiet about it). Moreover, the streamlining coordinator’s unwillingness to allow disagreement or dissent and his frequent and unchecked labeling of those who disagree with him and his views as “disloyal to the organization and disloyal to the Chair/Vice Chair” have created a chilling effect that is unhealthy for the Board in general and cannot be good for streamlining. A free exchange of ideas and a team spirit is essential to the long-term success of any project.

How should the effectiveness of streamlining be measured in the future (i.e. case production, case processing time, etc.)

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<tr>
<td>11</td>
<td>Processing time</td>
</tr>
<tr>
<td>8</td>
<td>Quality - # of Motions to reopen from streamlining &amp; # of remands from courts / Reversal rate from circuit courts / federal courts</td>
</tr>
<tr>
<td>4</td>
<td>Backlog Reduction</td>
</tr>
<tr>
<td>3</td>
<td>Goals, Meeting</td>
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<td>3</td>
<td>Non S-L Impact</td>
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<td>2</td>
<td>Scope - Ability to generate orders in a wider range of cases, both single-Member and three-Member. / Ability to serve as an “intake” panel for virtually every case that comes to the Board. First question Board as an institution should examine once any case is ready for adjudication is: Can the case be streamlined?</td>
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</table>
Other comments:

Question 2 (Streamlining has reduced BIA case backlogs) continued:
The backlog primarily has been reduced by the FY 93, 94 and 95 projects embarked upon by the regular panels, i.e., Panels 1-4, and the FY 96 and 97 work of Panel 3, which now is the backlog panel. Streamlining has helped in that it has diverted current cases away from the other panels, thereby giving them greater freedom to work on backlog cases. However, most of the actual backlog case resolution has been done by non-streamlining panels, including, most recently, Panel 3.

Question 4 (SL has produced fair and legally correct BIA decisions) continued:
My agreement with this statement must be qualified. "Streamlining for the most part has produced fair and legally correct BIA decisions." There are repeated reports, particularly from some Board members who have served in streamlining as well as from some streamlining attorneys, of incorrect orders that were signed and sent out in an effort to simply move cases and boost streamlining numbers. My impression is that there is not a large percentage of these, but enough cases to make some queasy with the process and question the legal sufficiency of the review.

Question 6 (Streamlining can be sustained on a permanent basis) continued:
I don't think that current levels of case production in streamlining can be sustained over a long period of time.
US Department of Justice
Executive Office for Immigration Review (EOIR)

Board of Immigration Appeals (BIA)
Streamlining Pilot Project Assessment Report

Exit Briefing
13 December, 2001
Background

- The Executive Office for Immigration Review (EOIR), Board of Immigration Appeals (BIA) contracted with Anderson LLP to conduct an independent assessment of the Streamlining Pilot Project to evaluate its effectiveness, and to make recommendations regarding the development of a performance-based program for Streamlining Phase IV.

- The assessment included analysis to compare and contrast changes that have occurred as a result of Streamlining, and the impacts it has imposed on the process and productivity of the non-Streamlined aspects of the Board.
Background (Cont)

- Streamlining adopted to address the unprecedented, continual growth in the number of annual appeals filed. Streamlining adopted to address the unprecedented, continual growth in the number of annual appeals filed.

- Streamlining appellate review procedure published by the Board in the federal register (October 1999).

- Streamlining procedure permits a single Board Member to dispose
  - certain motions;
  - withdrawals of appeal;
  - summary remands;
  - summary dismissals;
  - other procedural or ministerial issues as determined by the Chairman;
  - affirmances without opinion under certain conditions.
Background (Cont)

- Streamlining is being implemented in four developmental phases.

  - Phases I – II involved converting certain categories of cases to single Board Member review.

  - Phase III (Streamlining Pilot Project) officially began on September 5, 2000. Designed to test the effectiveness of concentrating Streamlining cases to a small number of personnel dedicated to do the cases full time, or nearly full time in a central location using more office automation.

  - Phase IV will be the permanent implementation of the Streamlining program.
Assessment Study Objectives

- Study specifically addressed the following Streamlining Pilot Project evaluation objectives:
  - Develop a number of different perspectives based on data and trend analysis to draw sound program conclusions comparing results before Streamlining with those of the Streamlining Pilot Project;
  - Establish performance standards (or measures) for evaluating Streamlining Phase IV;
  - Recommend improvements that result from data analysis, surveys, and interviews; and
  - Develop a performance-based program for evaluating Streamlining Phase IV.
Assessment Methodology

The Andersen team implemented a five-step methodology to support assessment of the Streamlining Pilot Project.

- Step 1 - Defined the Streamlining performance goal and identified its primary, measurable components;
- Step 2 - Developed questions to identify the data deemed pertinent to measurement of the goal;
- Step 3 - Collected and analyzed the data as an "objective" measurement of the Streamlining Pilot Project;
- Step 4 - Conducted a survey of BIA staff employees to obtain a "subjective" perspective; and
- Step 5 - Conducted focused interviews.

Increase productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time.
Study Findings - Data Related

- The Streamlining Pilot Project directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period from September 2000 through August 2001.
The Streamlining Pilot Project directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period from September 2000 through August 2001 (13 months).

Note: the fiscal year is offset by 1 month
Study Findings - Data Related (Cont)

- Streamlining has **reduced the average number of days it takes for a BIA case to be processed from “Intake” to “Completed at BIA”** as follows:
  - Between 1997 and 2001, the average number of BIA cases completed in less than 90 days increased from 25% to 56%;
  - Between 1997 and 2001, the average number of BIA cases that remained open 181 days or greater dramatically decreased from 42% to 13%;

---

**1997 to 1998 Average BIA Case Completion Time**

- 42% <90 Days
- 25% 91 - 180 Days
- 33% 181 Days or Greater

**2000 to 2001 Average BIA Case Completion Time**

- 13% <90 Days
- 31% 91 - 180 Days
- 56% 181 Days or Greater
Study Findings - Data Related (Cont)

- Between 1997 and 2001, the average number of RUSH cases completed in less than 90 days increased from 33% to 42%;
- Between 1997 and 2001, the average number of RUSH cases that remained open 181 days or greater decreased from 35% to 9%;

1997 to 1998 Average BIA RUSH Case Completion Time

- 35% <90 Days
- 33% 91 - 180 Days
- 32% 181 Days or Greater

2000 to 2001 Average BIA RUSH Case Completion Time

- 9% <90 Days
- 49% 91 - 180 Days
- 42% 181 Days or Greater
Between 1998 and 2001, the average number of days that all IJ and DD cases took to move from 1st Attorney Assignment to 1st Circulation decreased an average of 31%, while the time from Intake to 1st Attorney Assignment increased an average of 286%. The increase was a result of processing a large number of cases which were waiting to be screened when the Streamlining Pilot Project began and a change in the Board case assignment practice. In order to better manage pending cases, the Board no longer assigns all cases to attorneys immediately after screening. Rather, it assigns only the number of cases it believes they can complete within a reasonable period of time.
Study Findings - Data Related (Cont)

- Streamlining has not been implemented long enough to provide a sufficient amount of historical data to objectively evaluate its effect upon the quality of decisions rendered.

- Survey results indicated that the Streamlining Pilot Project has not adversely affected the quality of decisions rendered. Survey responses indicated that over 61% of the EOIR staff "agreed" or "strongly agreed" that Streamlining has produced fair and legally correct decisions with only 6% disagreeing (the large number of "neutral" responses were provided by non-Streamlining associated staff members).
Study Findings - Data Related (Cont)

- As of September 2001, there are approximately 57,000 cases pending before the Board. Some of these cases are in the Clerk's office while others are in the Attorneys' offices. Of the approximately 19,600 pending cases in the Clerk's Office, it is estimated that approximately 35% of cases not screened may meet Streamlining criteria. It is also estimated that approximately 6% of the pending cases not screened for Streamlining that are located in the Attorneys' offices may meet Streamlining criteria. Based upon this information and the Streamlining Panel's trend to complete approximately 4,500 pending cases from storage each year, it is estimated that the number of pending Streamlining eligible cases could be eliminated in approximately 20 months. At the point in time when this is achieved, Streamlining will primarily adjudicate new cases only. It must be noted that during the Streamlining Pilot Project, there was an approximate 7% reduction in the total amount of pending cases remaining before the Board.
Study Findings - Data Related (Cont)

Pending Cases Trend

- Number of pending cases over time.
Other Data Related Findings

- The Streamlining Center completed 15,798 cases between September 1, 2000 and October 1, 2001 which 11,820 were 1 Board Member vote cases. The remaining 3,978 cases were short order cases requiring 3 Board Member votes.

**Single Vote vs Three Vote Completions**

- Cases Signed By 3 Board Member SL Panel: 26%
- Cases Signed By Single Board Member: 74%
Other Data Related Findings

- The alien has not been adversely affected by Streamlining.
  - This is evidenced both in the number of adverse decisions rendered and by not falling disproportionately on "unrepresented" respondents.
  - There is only a 6% difference in alien representation between Streamlining and all other Board Panels.
  - Approximately 28% of the total number of Streamlining case decisions rendered were "favorable" to appellants. Favorable decisions included Remands, Grants of Motions, Sustained Appeals, Withdrawal of Appeals, and Administrative Closures.
Survey Derived Findings

- The results of surveying 48 EOIR staff members indicated that over 77% "agreed" or "strongly agreed" that Streamlining has benefited BIA case processing.
Survey Derived Findings (Cont)

Over 91% of those surveyed "agreed" or "strongly agreed" that **streamlining has improved BIA case productivity** (the number of cases completed). Over 75% of those surveyed "agreed" or "strongly agreed" that streamlining has reduced the number of BIA pending cases and improved case processing time (the number of days it takes for a case to move from "intake" to "completed at BIA"). Consequently, both data and survey results confirm the finding that streamlining has improved overall BIA case productivity.
Survey Derived Findings (Cont)

- The survey also indicated that the Streamlining Pilot Project has not adversely affected the quality of decisions rendered. Survey responses indicated that over 61% of the EOIR staff "agreed" or "strongly agreed" that Streamlining has produced fair and legally correct decisions with only 6% disagreeing (the large number of "neutral" responses were provided by non-Streamlining associated staff members). Over 78% of those surveyed "agreed" or "strongly agreed" that Streamlining has allowed the Board Panels to spend more time on substantive issues.
Survey Derived Findings (Cont)

- Lastly, the survey results indicated that the Streamlining program can be sustained over an extended period of time. Over 73% of the staff "agreed" or "strongly agreed" that the Streamlining program can be sustained with only 4% either "disagreeing" or "strongly disagreeing." Over 79% of those surveyed "agreed" or "strongly agreed" that the Streamlining Pilot Project has been a success and the program should be maintained.
Selected Interview Observations

Interviewees said:

- "Streamlining production goals are realistic, while Non-Streamlining production goals need reevaluation";
- "Streamlining has had a very positive effect on reducing the number of pending cases";
- "There is no difference in quality of decisions between Streamlining and Non-Streamlining";
- "Screening of cases for Streamlining is pretty good";
- "Communication inside Streamlining is excellent";
- "Quality of mentoring is very good";
- "Streamlining personnel who are producing and motivated should remain in place"; and
- "Streamlining case categories should be expanded".
Phase IV Evaluation Recommendations

- The evaluation program designed and implemented to measure the effectiveness of the Streamlining Pilot Project provides a baseline from which to evaluate the Streamlining program during its full implementation.

- We recommend that all Phase IV Streamlining measurement activity focus upon evaluation of the Phase IV Streamlining performance goal and its primary components.

- Evaluation recommendations are detailed in Appendix C of the report.

- Formalize the evaluation program
- Assign roles and responsibilities
- Develop standardized data reports
- Implement the program
Summary

- The overwhelming weight of both "objective" and "subjective" evidence gathered during the conduct of this study indicates that the Streamlining Pilot Project has been an unqualified success.

- BIA case productivity both in terms of the number of cases completed and the number of days cases take to move from "Intake" to "Completed at BIA" has been improved by the Streamlining Pilot Project.

- The quality of decisions rendered by the Streamlining Panel is equal to those rendered by the other Board Panels

- The alien has not been adversely affected by Streamlining.
  - Evidenced both in the number of adverse decisions rendered and by not falling disproportionately on "unrepresented" appellants

- The program should remain viable and can be sustained based solely upon the stream of incoming cases.
Questions?
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Chairman
5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

S-L 99-25
March 15, 2002

MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba
Acting Chairman

SUBJECT: Use of Summary Affirmance Orders in Asylum and Cancellation Cases

Pursuant to the authority provided in 8 C.F.R. § 3.1(a)(7)(i), I hereby designate the following categories of cases to be appropriate for affirmance without opinion by a single Board Member exercising the authority of the Board of Immigration Appeals in accordance with 8 C.F.R. § 3.1(a)(7)(ii):

A. Cases involving claims for Asylum, Withholding of Deportation and Convention against Torture.

B. Cases involving claims for suspension of deportation or cancellation of removal.
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Chairman
5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

S-L 99-27
May 3, 2002

MEMORANDUM TO: Board Members

FROM: Lori L. Scialabba
Acting Chairman

SUBJECT: Expanded Use of Summary Affirmance for Immigration Judge and Immigration and Naturalization Service Decisions

The regulatory criteria for affirmance without opinion is set forth at 8 C.F.R. § 3.1(a)(7)(ii), which provides:

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) The factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

Pursuant to the authority provided in 8 C.F.R. § 3.1(a)(7)(i), I hereby designate the following categories of cases to be appropriate for affirmance without opinion by a single Board Member exercising the authority of the Board of Immigration Appeals in accordance with 8 C.F.R. § 3.1(a)(7)(ii):

A. All cases involving appeals of Immigration Judge decisions over which the Board of Immigration Appeals has jurisdiction and which meet the criteria set forth above.

B. All cases involving appeals of Immigration and Naturalization Service decisions over which the Board of Immigration Appeals has jurisdiction and which meet the criteria set forth above.
Appendix 24

BIA Decisions, June 2000 - October 2002

Appendix 25

BIA Summary Decisions, June 2000 - October 2002

% of Total Cases Decided by Summary Decision

Appendix 26

Number of BIA Decisions Appealed to Federal Circuits
October 2001 - March 2003

Source: Administrative Office of the United States Courts
## Appendix 27

### Number of Appeals of BIA Decisions, by Circuit, October 2001 – March 2003

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Source: Administrative Office of the United States Courts
Appendix 28

Average Number of Requests per Month for Administrative Record

1998-2001: 166
2002-2003: 693

Source: AILA - EOIR Liaison Agenda Questions
Appendix 29

Number of Immigration Service (BIA) Administrative Agency Appeals Terminated by Federal Circuits, October 2001 - March 2003

Source: Administrative Office for the Federal Circuit, as reported to the American Bar Association
## Appendix 30

Number of Immigration Service (BIA) Administrative Agency Appeals Terminated, by Circuit, October 2001 – March 2003

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<td>-</td>
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<td>92</td>
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</tr>
</tbody>
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Appendix 31

Rise in Backlog at Federal Courts from Immigration Service (BIA) Appeals
(Assumption: no backlog in October 2001)

Source: Administrative Office of the United States Courts