

BOARD OF IMMIGRATION APPEALS SUMMARY OF PROPOSED REGULATORY CHANGES

OBJECTIVES:

This procedural reform of the Board of Immigration Appeals (BIA) is intended to accomplish five important objectives in the disposition of immigration case appeals:

- (1) eliminating the backlog of approximately 55,000 cases pending before the BIA;
- (2) eliminating unwarranted delays in the adjudication of administrative appeals;
- (3) utilizing the resources of EOIR more efficiently;
- (4) focusing BIA resources on those cases that present disputed legal questions; and
- (5) enhancing the quality of BIA decisions.

THE CURRENT SYSTEM:

The BIA has been unable to efficiently adjudicate immigration appeals for more than a decade. Until recently, three-member panels reviewed all cases, even cases that present no colorable basis for appeal. Unlike Article III courts of appeals, the BIA frequently revisits factual determinations made in the trials below de novo. Cases routinely languish before the BIA for more than two years, and some take more than five years to resolve. In 1995, faced with a backlog of approximately 40,000 cases (the "backlog" is the combination of pending cases carried over, plus additional cases received), the previous administration began a process of incrementally increasing the size of the BIA, which had only five members at the time. The number of BIA positions is currently 23, with 19 of the positions filled. However, the additional personnel have not appreciably increased the pace of case disposition. One change that has produced positive results in recent years has been the implementation of the streamlining initiative in 1999. That initiative, which allows certain categories of appeals to be adjudicated by a single member, was recently reviewed favorably by an external auditor. The procedural reforms described below build upon that success.

ELEMENTS OF THE REFORM PACKAGE:

(1) The proposed rule sends all appeals initially to a screening panel of the BIA, on which single members will decide the majority of cases. With each appeal, either a single member of the screening panel will decide the case, or the member will determine that the case is appropriate for three-member panel review. Five categories of cases will qualify for three-member panel review. To qualify, a case must present one of the following:

- the need to settle inconsistencies between different rulings of IJs;
- the need to clarify ambiguous laws, regulations, or procedures;
- the need to correct an IJ decision that is plainly not in conformity with the law;
- the need to resolve a case or controversy of major national import; or
- the need to correct a clearly erroneous factual determination by an IJ.

(2) The proposed rule eliminates the BIA's de novo review of factual issues. The BIA will accept the factual findings of the immigration judges (IJ), disturbing them only if they are "clearly erroneous." Accordingly, the proposed rule also prohibits the introduction and consideration of new evidence in proceedings before the BIA.

(3) The proposed rule restores a regulatory provision that allows the BIA to summarily dismiss an appeal that is filed for an improper purpose, such as to cause unnecessary delay.

(4) The proposed rule establishes a series of time limits to expedite the handling of cases by the BIA:

- Parties have 30 days to file a notice of appeal.
- IJs must complete their review of the decision transcripts within 14 days.
- Parties must simultaneously brief the case within 21 days.
- The screening panel of the BIA will have 90 days in which a single member must either decide the case or select the case for three-member panel review.
- Three-member panels must render their decisions and opinions within 180 days.

(5) If a member who is the author of an opinion is unable to complete the opinion within the 180-day period, the member may request an extension of up to 60 days from the Chairman of the BIA. If, at the end of the 60-day period, the opinion of the panel majority is still not completed, the Chairman must either decide the case himself/herself and render an opinion within 14 days or refer the case to the Attorney General for a decision. If a dissenting or concurring panel member fails to complete his/her opinion by the end of the 60-day extension period, the decision of the majority will be rendered without that dissent or concurrence attached. The Chairman must notify the Director of the EOIR and the Attorney General if any Board member repeatedly fails to meet assigned deadlines for the disposition of appeals. In addition, compliance with deadlines and the timely resolution of appeals by Board members will be reported each year in annual performance reviews. In rare circumstance, when an impending decision by the United States Supreme Court or a United States Court of Appeals will substantially determine the outcome of a case before the BIA, the Chairman may hold the case until such decision is rendered, temporarily suspending the time limits described above.

(6) The BIA is directed to assign priority to deciding cases involving detained persons. In addition, the Chairman of the BIA is directed to establish a case management system for the expeditious resolution of all appeals.

(7) Jurisdiction over appeals of INS decisions imposing administrative fines is transferred from the BIA to the Office of the Chief Administrative Hearing Officer (OCAHO). No additional resources will be required to effect this change; the OCAHO already has the capacity to accomplish this task.

(8) At the time the proposed rule takes effect, the BIA will immediately implement the procedural changes described above. During a transition period of 180 days, the members of the BIA are directed to apply these procedures to all cases already pending, as well as to all incoming cases, so that at the end of the transition period, no case has been pending for longer than ten months from the completion of the record on appeal. The Chairman of the BIA may allocate members to a screening panel and to three-member panels as he/she deems appropriate to accomplish this objective.

(9) After the conclusion of the 180-day transition period to eliminate the backlog, the Department of Justice proposes to reduce the number of BIA members to eleven, with the Attorney General designating the membership of the Board. The Chairman of the BIA will continue to have the authority to allocate members to a screening panel and to three-member panels as he/she deems appropriate to efficiently adjudicate appeals. It is expected that five members (including the Chairman) will serve on the screening panel, and the remaining six will either be divided into two three-member panels or three three-member panels with IJs rotating in to serve as the third members.