



U.S. Department of Justice
Executive Office for Immigration Review
Office of the Director
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

FACT SHEET

Contact: Office of Legislative and Public Affairs
(703)305-0289 Fax: (703) 605-0365
Internet: www.usdoj.gov/eoir

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BIA Restructuring and Streamlining Procedures

The Attorney General issued a final regulation on Aug. 23, 2002, that restructured the organization and procedures of the Board of Immigration Appeals (BIA or Board) to improve timeliness while continuing to ensure the quality of adjudications. The regulation was designed to address extensive backlogs and lengthy delays, which encouraged abuse of the system and delayed decisions to all aliens, a particular burden on those who merited relief from deportation. The new procedures enabled the BIA to reduce delays in the administrative review process, eliminate the existing backlog of cases, and focus more attention and resources on those cases presenting significant issues for resolution.

Background

The regulation expanded on the first streamlining procedures, which had been implemented in late 1999, and allowed the BIA to make greater use of single Board member adjudications. Under the new regulation, all cases are thoroughly reviewed by a BIA staff attorney and then reviewed and adjudicated by a single Board member unless they fall into one of six specified categories, which are handled by a panel of three Board members.

Each appeal or motion before the BIA – whether adjudicated by a single Board member or by three Board members – is handled on a case-by-case basis and is afforded the necessary time and consideration to ensure fairness. The quality of review remains standard. Consequently, depending on the intricacies of individual cases, single Board member decisions can be quite detailed, while three Board member decisions can be short and straightforward.

As in the 1999 streamlining procedures, the restructuring regulation calls for the use of “summary affirmances” – authorizing a single Board member to affirm the result of an immigration judge’s decision without writing an opinion. These orders also are referred to as “affirmances without opinion” (AWOs). The language in such orders is established by regulation and may not be changed. In Fiscal Year 2005, fewer than 20 percent of the BIA’s total decisions were AWOs.

Additionally, the new streamlining procedures replaced previous standards of BIA review, which included *de novo* review, with a “clearly erroneous” standard in questions of immigration judges’ factual findings. The new procedures retained BIA *de novo* review in questions of law or discretion.

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More information regarding the regulation is available in a Department of Justice (DOJ) news release <http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf> and fact sheet <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf>.

Implementation Results

The BIA has successfully implemented the restructuring regulation. The expanded streamlining procedures have allowed the BIA to allocate its limited resources to adjudicate more than 40,000 new appeals and other matters filed annually, and to steadily reduce its pending caseload from 56,000 in August 2002 to approximately 28,000 by January 2006.

Moreover, feedback on case processing from a number of federal courts and DOJ's Office of Immigration Litigation – the office that handles immigration case appeals to the federal courts – indicates that the affirmance and reversal (or remand) rates of BIA decisions have not changed significantly in the wake of the restructuring regulation. The vast majority of BIA decisions – more than 90 percent – continue to be affirmed in federal court.

Also, federal courts have rejected every challenge brought against the restructuring regulation. Each federal circuit court has issued a decision holding that the regulation is permissible and does not violate due process. In fact, most, if not all, of the federal courts in which challenges were filed employ similar summary affirmance mechanisms in the interest of efficient and effective jurisprudence.

Appeals to the Federal Circuit Courts

If an alien disagrees with a BIA ruling, the alien may file a petition for review of that decision to the appropriate federal circuit court. However, the Department of Homeland Security, the other party to the case, may not. Because only an alien may appeal an adverse BIA decision, the federal courts never see cases in which an alien has been granted relief.

Following implementation of the restructuring regulation, more aliens are appealing BIA decisions to the federal circuit courts than ever before. The rate of new petitions – the number of BIA decisions appealed to the federal courts compared to the total number of BIA decisions – has increased from an historical 5 percent (before 2002) to a current level of approximately 30 percent. Prior to the new regulation, federal courts were receiving about 125 BIA case appeals per month – currently they are receiving more than 1,000 per month. If the rate of appeal had remained the same as before 2002, this number would have been only about 200 per month.

It is also noteworthy that most of the numeric increase is limited to two circuits, the Second and Ninth, which also are the two jurisdictions with the largest number of appeals at the Board. The number of immigration appeals filed monthly with the Second and the Ninth Circuits grew respectively from 533 and 2,670 in the fiscal year preceding the implementation of the reform regulation, to 2,550 and 6,583 for FY 2005. The next largest circuit in terms of the Board's case load is the Eleventh, which rose from 229 appeals to 572 for the same time period.

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In considering possible reasons for this upsurge in new petitions for federal court review, it is reasonable to conclude that the initial increase may have been largely attributable to challenges to the new regulation. However, new petitions for review have continued to increase despite the federal courts' uniform rejection of these challenges. It is possible that eliminating BIA adjudication delays has increased the incentive to file petitions for review in the federal courts in order to postpone deportation and remain in the United States for as long as possible.

The Department and the Board continue to work closely with the courts and other concerned parties to study this issue.

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