



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

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S-L 99-11

August 28, 2000

MEMORANDUM TO: Board Members

FROM: Paul W. Schmidt *by mmd*
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 affirmance 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 case 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 where 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
- j. Petitions barred by the bigamous nature of the marriage. *See Matter of H-*, 9 I&N Dec. 640 (1962).

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.
5. Appeals in which the alien seeks relief from deportation or removal under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. *See Matter of Medina*, 19 I&N Dec. 734 (BIA 1988); *Galo-Garcia v. INS*, 86 F.3d 916 (9th Cir. 1996).
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).
7. Appeals involving claims for withholding of deportation or removal that are statutorily barred under sections 243(h)(2)(B) (1994) or 241(b)(3)(B)(ii) (1996) of the Act, respectively. *See Matter of Q-T-M-T*, 21 I&N Dec. 639 (BIA 1996); *Matter of S-S-*, Interim Decision 3374 (BIA 1999). Note that this does not include those cases where relief is barred only after application of the rebuttable presumption test set forth in *Q-T-M-T*- (deportation cases) or the *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), analysis employed in *S-S-* (removal cases).
8. Appeals involving claims for waivers of smuggling grounds where the required family relationship is not present. *See Matter of Farias*, 21 I&N Dec. 269 (BIA 1996; A.G. 1997; BIA 1997).
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.
10. Appeals in which a claim for cancellation of removal is time-barred under section 240A(d)(1) of the Act due to commission of an offense. *See Matter of Perez*, Interim Decision 3389 (BIA 1999).
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.

14. Appeals from an Immigration Judge's denial of a motion on the basis of *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996).
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.
4. Cases in which the alien has filed an appeal from Immigration Judge's entry of an in absentia order in deportation or removal proceedings. *See Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993); *Matter of Guzman*, Interim Decision 3392 (BIA 1999).
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(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.
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.
20. Petitions where 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).
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/widowers 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.
24. Petitions barred by the bigamous nature of the marriage. *See Matter of H-*, 9 I&N Dec. 640 (BIA 1962).

Procedural & Ministerial: Fine Cases.

25. Fine appeals where the disposition of the appeal is controlled by *Matter of United Airlines Flight UA802*, Interim Decision 3396 (BIA 1999).
26. Fine appeals where the disposition of the appeal is controlled by *Matter of Air India Airlines Flight AI 101*, Interim Decision 3388 (BIA 1999).
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

28. Cases involving a claim for relief under the Convention Against Torture which must be remanded pursuant to 8 CFR 208.18(b)(3)(ii)(A). *See* 64 Fed. Reg. 8491 (February 19, 1999).
29. Certain routine cases remanded to the Board from U.S. Circuit and District Courts.

30. Cases falling within the parameters of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No 105-100, tit.II, 111 Stat. 2193, amended by Pub. L. No. 105-139, 111 Stat. 2544 (1997) ("NACARA") involving a defective notice to the alien where the appropriate relief is a remand to the Immigration Court.
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 recalendared.
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):

Noel A. Brennan

Philemina M. Jones

Patricia A. Cole

Lauren R. Mathon

Mary Maguire Dunne

Neil P. Miller

Cecelia M. Espenosa

Anthony C. Moscato

Lauri S. Filppu

Juan P. Osuna*

Edward R. Grant

Lory D. Rosenberg

John W. Gundelsberger

Paul W. Schmidt

Michael J. Heilman

Lori L. Scialabba

David B. Holmes

Gustavo D. Villageliu

Gerald S. Hurwitz

*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	Philemina M. Jones
Patricia A. Cole	Lauren R. Mathon
Mary Maguire Dunne	Neil P. Miller
Cecelia M. Espenoza	Anthony C. Moscato
Lauri S. Filppu	Juan P. Osuna*
Edward R. Grant	Lory D. Rosenberg
John W. Gundelsberger	Paul W. Schmidt
Michael J. Heilman	Lori L. Scialabba
David B. Holmes	Gustavo D. Villageliu
Gerald S. Hurwitz	

*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.