LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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PRACTICING BEFORE THE BIA UNDER THE NEW "PROCEDURAL REFORMS" RULE

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On August 26, 2002, the final Board of Immigration Appeals (BIA or Board) restructuring rule was published in the Federal Register. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54878 (August 26, 2002). **This rule went into effect on September 25, 2002.** The most significant change to the BIA's procedures is that under the new rule, most cases are decided by a single member of the BIA, as opposed to three-member panels. In addition, the length of time that cases are pending at the BIA likely will be reduced.

This practice advisory highlights some of the changes that the final rule implements. For cases pending on August 26, 2002, the rule allows you to file an optional supplemental brief or statement explaining why three-member review is appropriate. The rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review. The rule states that the supplements may be filed until September 25, 2002 or the expiration of any briefing schedule set by the Board, whichever is later.

Case Management System

A. Summary Dismissals

After the Notice of Appeal (NOA) is filed, the case is assigned to a single Board member. The regulations allow this Board member to summarily dismiss the appeal, even prior to the preparation of the transcript, if the appeal falls within one of the categories for dismissal in 8 C.F.R. § 3.1(d)(2)(i).

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The rule retains all of the summary dismissal grounds under the current regulations[2] and adds a new category of cases that may be summarily dismissed: frivolous appeals. Under this new ground, a Board member may dismiss a case where "the appeal is filed for an improper purpose, such as to cause unnecessary delay" or where "the appeal lacks an arguable basis in fact or in law." 8 C.F.R. § 3.1(d)(2)(i)(D). The Board member may not summarily dismiss the case if the appeal "is supported by a good faith argument for extension, modification, or reversal of existing law." *Id.*

In the proposed rule, summary dismissal was mandatory. However, the final rule deleted the mandatory language and authorized the Board member to exercise his or her discretion in summarily dismissing a case under 8 C.F.R. § 3.1(d)(2)(i). The new rule says, however, the filing of an appeal that is summarily dismissed may constitute frivolous behavior warranting disciplinary actions. 8 C.F.R. § 3.1(d)(2)(iii).

- ***Practice Tip***: If you believe that a BIA member may dismiss your case under the frivolous appeal ground, 8 C.F.R § 3.1(d)(2)(i)(D), you may explain why your case should not be summarily dismissed in both the NOA and the brief.

  For example, this situation may arise where there is adverse precedent on point, but you intend to argue for modification or reversal of the existing law. You may want to state this in the NOA and brief. Since the regulations allow single members to summarily dismiss a case prior to preparing the transcript and setting a briefing schedule, it is important to state why your appeal is not frivolous in the NOA as well as the brief.

B. Adjudication on the Merits

Under the new regulations, the majority of cases are decided by a single member rather than three-member panels. Three-member panels are reserved for six categories of cases, which are described below. All cases are assigned to a single BIA member initially. After reviewing the record, the member has three options: affirm the underlying decision without opinion, issue a brief order, or refer the case for three-member review. In addition, the Board member may summarily dismiss the case at any time.

1. Affirmance Without Opinion (AWO)

An AWO is a three-sentence decision by a single Board member that affirms, without explanation, the results of the decision reached below. Before affirming the decision without opinion, the Board member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy

[2]These grounds include: failure to specify reasons for appeal in Notice of Appeal; appeal concerns only a finding of fact or legal conclusion conceded by the appealing party; appeal is from an order granting the relief the appellant requested; no brief is filed after indicating on the Notice of Appeal that a brief would be filed; BIA lacks jurisdiction; appeal is untimely or waived; and appeal fails to meet essential statutory or regulation requirements or is excluded by statute or regulation. *See* 8 C.F.R. § 3.1(d)(2)(i).

both of the requirements listed in sections (a) and (b) below, *and* one of the two alternate requirements listed in section (c):

a. the result reached below must be correct; *and*

b. any errors in the decision below must be harmless or nonmaterial; *and* either

c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent *and* cannot involve the application of precedent to a novel fact situation; *or*

(ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."

The regulations are clear that an AWO is an affirmance of the results of the underlying decision but not necessarily an affirmance of the reasons for the decision. The AWO decision issued by the Board member must contain *only* the following three sentences: "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)."

- ***Practice Tip***: Even before the BIA's new rule was issued, the Board had accelerated its use of the AWO procedure under former 8 C.F.R. § 3.1(a)(7). Thousands of these decisions already have been issued in all types of cases, including asylum appeals. Because Board members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing *every* appeal to ensure that it meets all of the requirements for an AWO decision.

  If your client already has received an AWO decision, you may want to challenge the AWO in a petition for review or petition for habeas corpus. AILF has prepared a practice advisory discussing arguments that challenge a BIA member's use of the AWO procedure to deny an appeal. *See* AILF's Practice advisory entitled, "How to Challenge an Affirmance Without Opinion By A BIA Member" (http://www.ailf.org/lac/2002/082602.pdf) (August 26, 2002).

2. Brief Order

If the single BIA member does not conclude that the appeal is appropriate for an AWO decision and that the case should not be referred for three-member panel review, he or she may issue a brief order. 8 C.F.R. § 3.1(e)(5); *see also* 67 FR at 54886-87. A single member has authority to do the following with a brief order:

- *affirm* the underlying decision
- *modify* the underlying decision

- *remand* the case for further factfinding

- *reverse* the case, but only "if such a 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." *Id.*

In the preamble to this rule, DOJ provided examples of how Board members will use brief orders. *See* 67 FR at 54866. Brief orders will be used to provide additional explanation where the Board member believes that the underlying decision was correct, but that the immigration judge's explanation was insufficient. *Id.* Brief orders also will be used where an intervening precedent needs to be addressed, but where it would not change the outcome of the case. *Id.* In some situations, the brief order will state, "the immigration judge's opinion is affirmed for the reasons set forth therein and as set forth in this opinion." *Id.* The BIA member may issue a brief order to remand the record for specific fact finding where new evidence is presented on appeal. 67 FR at 54866.

3. Three-Member Panel Decisions

The Board member who initially reviews the case may assign the case to a three-member panel only if the case presents one of the following circumstances:

(1) The need to settle inconsistencies among the rulings of different immigration judges.

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

(3) 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.

(4) The need to resolve a case or controversy of major national import.

(5) The need to review a clearly erroneous factual determination by an immigration judge.

(6) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 3.1(e)(5) (where a single member can reverse if an intervening precedent, law, or regulation requires reversal).

8 C.F.R. § 3.1(e)(6).

The EOIR-26 (NOA form) (revised September 2002) states that the appellant may specify the reasons why the appeal warrants review by a three-member panel. *See also* 67 FR at 54897.

- ***Practice Tip***: In most cases, your client will want three-member panel review, particularly since single BIA members can reverse the underlying IJ decision only under narrow circumstances (when reversal is required by intervening law). You should argue why three-member panel review is appropriate in both your NOA and brief.

  If your case was pending on August 26, 2002 (the date on which DOJ published this rule), you may file a **supplemental brief or statement** explaining why your case is appropriate for three-member review. 8 C.F.R. § 3.3(f). The rule states that the supplements may be filed until **September 25, 2002 or the expiration of any briefing schedule** set by the Board, whichever is later. The preamble to the new rule says that this supplement is "entirely optional" and that the BIA "in its discretion, will determine how these briefs will be considered and what procedures will be used in determining whether to apply a single-member or three-member panel review." 67 FR at 54898. The rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review.

  If your client's case was filed after August 26, 2002, you do not need a supplement, but you may explain why three-member panel review is needed in the brief.

Motions to Reopen and Motions to Reconsider

The BIA refers motions to reopen and motions to reconsider to a single Board member for review. 8 C.F.R § 3.2(i). Unless the Board member determines that the motion should be assigned to a three-member panel under the standards in 8 C.F.R. § 3.1(e)(6), the motion is adjudicated by a single member. *Id.*

- ***Practice Tip***: If you want your client's motion to be adjudicated by a three-member panel, be sure to explain why three-member panel adjudication is appropriate in the motion and any memorandum of law in support of the motion. Like appeals that were pending on August 26, 2002, motions pending on that date may be supplemented with a brief or statement explaining why your motion is appropriate for three-member adjudication. 8 C.F.R. § 3.3(f). Again, this optional supplement is due on September 25, 2002 or the expiration of the briefing schedule, whichever is later.

Briefing Schedules

The briefing schedule for the main brief is set after the transcript is available. 8 C.F.R § 3.3(c)(1). For cases where the respondent is detained, both parties are provided 21 days to file simultaneous briefs. *Id.* For non-detained cases, the appellant is provided 21 days to file a brief; the appellee has 21 days from the date that the appellant's brief was due to

file a brief. *Id.* This is a change from the proposed rule, which included simultaneous briefing in both detained and non-detained cases.

The rule retains the authority for the BIA, upon written motion, to extend the period for filing a brief for up to 90 days for good cause shown. 8 C.F.R. § 3.3(c)(1).

Standards of Review

The BIA applies the "clearly erroneous" standard to review all factual determination by the immigration judges, including findings as to credibility of testimony. 8 C.F.R. § 3.1(d)(3); *see Matter of S-H-*, 23 I&N Dec. 462, 464 (BIA 2002). However, the BIA has retained the "de novo" standard of review for: (1) all questions of law, discretion, and judgment and all other issues in appeals from decision of immigration judges, and (2) all questions arising in appeals from decisions issued by Service officers. *Id.*

The new "clearly erroneous" standard of review for Immigration Judges' factual determinations applies only to appeals filed on or after the effective date of the new rule (September 25, 2002). 8 C.F.R. § 3.3(f).

New Evidence

The new rule precludes the BIA from considering new evidence on appeal. 8 C.F.R. § 3.1(d)(3)(iv). Either party may file a motion for remand if additional factfinding is necessary.

- ***Practice Tip***: If it becomes necessary to file a motion for remand after the briefs were filed, be sure to file the motion as soon as possible. Otherwise, the case may be decided before you file your brief and then you will have to file a motion to reopen, rather than a motion for remand. As discussed below, this new rule sets timeframes for the adjudication of appeals. Most likely, cases no longer will be pending at the BIA for several months or years. Most cases are decided within 90 days of the completion of the record.

Timeframes for Adjudications

The new rule sets timeframes for the adjudications of all appeals. In cases where a single Board member is making the decision, he or she must adjudicate cases within 90 days of the completion of the record. 8 C.F.R. § 3.1(e)(8). Cases that are assigned to a three-member panel must be decided within 180 days. *Id.* The chair of the BIA may extend these deadlines up to 60 days. *Id.*

In addition, the BIA intends to reduce the amount of time it takes to transcribe the proceedings. 67 FR at 54895. The BIA hopes to implement a 60-day timeframe for preparing the transcript. *Id.* IJs have only 14 days to review the transcript and approve

the decision. 8 C.F.R. § 3.5(a). Together, these new timeframes likely will reduce the amount time between the filing of the NOA and the decision.

Reduction of the Board Membership

The BIA will be reduced from 23 members to 11 members. 8 C.F.R. § 3.1(a)(1). Currently, only 17 of the 23 positions are filled. This reduction of the membership will occur 180 days from the effective date of the regulations (September 25, 2002). *Id.* After the reduction, the BIA will operate with two three-member panels and five members acting individually. *See* 67 FR at 54893.

Application of New Rule to Pending Cases

The new rule went into effect on September 25, 2002. 8 C.F.R. § 3.3(f). The rule applies to all cases pending at the BIA on that date except that the new standard of review for IJs' factual findings (clearly erroneous) applies only to cases filed on and after September 25, 2002. *Id.* Because the new rule applies to pending cases, you may want to file the supplemental brief or statement explaining why three-member panel review is appropriate in you case prior to or with your brief. However, the rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review.