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ABA Commission on Immigration Policy, Practice & Pro Bono

Seeking Meaningful Review:
Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms

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With the expressed intent to eliminate a backlog of cases, the Department of Justice proposed a series of "Procedural Reforms" for the Board of Immigration Appeals in the early 2002. Even before those reforms were formally adopted, the Board altered its practices and issued thousands of single-member decisions, most of them affirmances without opinion. A study conducted at the ABA's request by the law firm of Dorsey & Whitney reveals that the quality, as well as the quantity, of the decisions was affected. Before these changes were instituted, 1 in 4 appeals were granted: now only 1 in 10 are, with profound consequences for immigrants and their families. The number of BIA decisions being appealed to the federal courts also has increased from 5% in 2001 to 15% in 2002. Rather than truly eliminating the backlog of cases, the reforms appear to have instead shifted the burden to the federal courts. Having an efficient system is important, but it must not be at the cost of transparent, meaningful review. The Procedural Reforms should be eliminated, or, at a minimum, modified to ensure that quantity is not valued over quality.

Background

The Board of Immigration Appeals has a unique role and mission. The purposes of the Board's administrative review are to provide guidance to immigration judges below through the interpretation of the law, to achieve uniformity and consistency of decisions rendered by the 200-plus immigration judge corps, and to assure fair and correct results in individual cases.

Immigration decisions can profoundly affect human lives. The cases before the Board often involve individuals who are not familiar with the intricacies of U.S. immigration law or the U.S. judicial system and who do not speak, read or write the English language. While the government is represented by experienced trial lawyers, a significant portion of these cases involve indigent individuals with little education who are detained in isolated facilities and do not have legal assistance. At the same time, the interests at stake for these individuals are great – the potential separation of family and loss of all that makes life worth living.

***** The materials contained in the study from Dorsey & Whitney represent the opinions of the authors and editors and have not been adopted by the ABA House of Delegates, and as such should not be construed as the policy of the American Bar Association or its Commission on Immigration Policy, Practice & Pro Bono.

In an overwhelming majority of appeals, the Board is the court of last resort. Some of the parties simply do not know how to access the federal courts; others are prevented from doing so by language barriers. Often, the parties cannot afford to seek judicial review. The federal courts, moreover, are not permitted to review many types of immigration decisions. In this context, the quality of the administrative appeal is crucial.

In recent years, the Board had experienced a surge in appeals, leading to backlogs and delays. To address these, the Board instituted "Streamlining Rules" in 1999. Independent auditors concluded that these rules were an "unqualified success" in December 2001. Only two months later, the Attorney General announced his intention to implement more extensive reforms.

New Rules

The Department of Justice proposed sweeping procedural reforms in February 2002. The final rule was published with few changes on August 26, 2002, and officially took effect on September 25, 2002.

Since its inception, the Board performed its critical appellate functions sitting in three member panels. The 1999 rule permitted a single Board member to issue decisions in a limited range of cases. The 2002 rule allows in most cases a single Board member to decide the merits of an appeal with only a brief order and no written opinion. Three-member panel review is now limited to cases where a single Board member perceives a need to settle inconsistencies among immigration judges, establish precedent, correct a decision plainly not in conformity with the law or precedent, or correct an immigration judge's "clearly erroneous" factual determination. Even in those types of cases, three-member review is only permissible, not mandatory, and single members can, and have, reversed decisions of immigration judges.

The rule also established strict time limits and briefing schedules: Parties have to brief the case within 21 days and the parties have to brief the case simultaneously when the respondent is detained. In addition, the final rule eliminated *de novo* review of the facts and prohibits the introduction and consideration of new evidence in proceedings before the Board. An appeal that is summarily dismissed on the basis that it "lacks an arguable basis in fact or in law" may subject an attorney or accredited representative to disciplinary action for frivolous conduct.

Finally, the rule reduced the number of Board members from 23 to11.

Findings

The Board instituted many of the proposed procedural reforms in Spring 2002 *before* the final rule was published or officially took effect. During this time, the proportion of "affirmances without opinion" decided by a single Board member increased from 10% to over 50%. Coinciding with this shift, decisions in favor of the appellant dropped from 1 in 4 to 1 in 10. These results indicate that the procedural reforms may also produced substantive changes in the quality and reliability of the decisions being made.

The burden on the federal courts as a result of the changed practices at the agency has increased dramatically, indicating declining confidence in the Board's decisionmaking. The rate at which BIA decisions are being appealed to the federal courts *tripled* between October 2001 and

October 2002: about 15% of BIA decisions were appealed in October 2002 as compared to 5% a year earlier. In March 2003, 844 BIA decisions were appealed to the federal circuit courts as compared to 183 in February 2002, the month that the reforms were proposed.

Massive changes in immigration law, not lack of diligence or efficiency by individual Board members, played a large part in the increase in backlog between 1996 and 2002. The changes required review of many questions of first impression and development of case law to resolve complex statutory interpretation questions. Thus, the rationale underlying the procedural reforms is questionable.

Single-member Review

- The proportion of "affirmances without opinion" decided by a single Board member had increased from 10% to over 50% of all Board decisions, beginning immediately after the new rules were proposed. At the same time, the proportion of cases that are favorable to the alien decreased. Prior to proposing the "Procedural Reforms", one in *four* cases was decided in favor of the alien. Since then, only one appeal in *ten* is decided in favor of the alien.

- Single-member review creates an incentive to rubber stamp immigration judges' decisions. Affirmance without written decision is much faster and easier than writing a decision and creates an incentive (whether conscious or unconscious) for Board members to meet case processing guidelines by affirming removal orders notwithstanding the merits of the appeal. Moreover, intellectual rigor in decisionmaking may be diminished because Board members no longer need to articulate the basis for their decisions. They need only decide whether they agree with the result ultimately reached by the immigration judge.

- A panel of three Board members is far more likely to catch an error below than a single Board member. In the immigration context, there is only one administrative hearing before the case reaches the Board. Other administrative agencies that employ single-Member review have several layers of administrative process (i.e., interview, hearing, and reconsideration) prior to reaching the administrative appeals level as well as the option of a later *de novo* hearing in federal district court and court of appeals review.

- Single-member review makes it difficult for the Board itself to determine whether its members are making errors. The courts of appeal, when such review is available, similarly lack guidance in reviewing the decisions of the immigration judges and the Board.

- Reducing the BIA backlog and delays are laudable objectives. But the 2002 "Procedural Reforms" will achieve these objectives, if at all, by sacrificing accuracy and consistency in order to achieve quicker decisions. This type of "swift justice" is often no justice at all.

Elimination of *de novo* Review

- **Elimination of *de novo* review will not achieve efficiency** because it requires remand to the immigration judge in lieu of the Board's consideration of new evidence. Because many of the foreign nationals who appear before immigration judges are not represented by attorneys, are faced with language barriers and lack understanding of the law, eliminating *de novo* review may create further delays and inefficiencies. Moreover, *de novo* consideration of

evidence by the Board could also prevent unnecessary appeals to the federal courts where the judge below made fact-finding errors.

- **The elimination of *de novo* review will also burden the federal courts,** who will be required to scrutinize the findings and conclusions of more than 220 immigration judges, and who may remand cases back to the Board for analysis. This is likely to create delays and conflicting decisions from each circuit and district court in the country, resulting in more confusion as to how to best interpret the law.

Decrease in the Number of Board Members

- The immigration courts have experienced a sharp increase in caseloads over the past several years. This increased caseload coupled with the complexity of the legal issues presented to the Board has helped create a 55,000 case backlog. It would be illogical to suggest that the increasing number and complexity of cases before the immigration courts should be handled by a reduced number of immigration judges or Board members.

- Reducing the number of Board members to eliminate the backlog and decide nearly 35,000 new appeals annually, while also imposing strict time periods for decisionmaking, is a recipe for disaster. As each Board member's workload increases, his or her ability to consider carefully the facts and legal arguments of each case within the prescribed time period is diminished. This has resulted in vague and erroneous decisions as well as both a dramatic decline in the percentage of decisions that are favorable to noncitizens and increase in appeals to the federal courts.

- The Department of Justice's announcement also may have had a chilling effect on Board members whose jobs were at stake and created an incentive to "play it safe." It is undisputed that the Board members ultimately reassigned to other positions within the government were those with a history of being more favorable to noncitizens' claims than those who remain on the Board. This change in composition of the Board detracts from a public perception of fair and impartial decisionmaking and also deprives the Board of a variety of viewpoints that is valuable in the appellate process.

Summary Dismissal and Sanctions for Frivolous Appeals

- There is a fine line between appeals that present "no legal or factual basis for reversal" and those that raise an issue of first impression. The regulation's failure to distinguish between the two creates more confusion and may have a chilling effect on attorneys seeking to assert their clients' appellate rights. The Board's definition of behavior which may constitute "frivolous conduct" should conform with prevailing law, regulations, case law, the Federal Rules of Civil Procedure and the Canons of Professional Responsibility, particularly with regard to the attorney's duty of zealous advocacy.

Recommendations

The BIA reforms should not be evaluated in isolation. The question is not only whether the rulemaking itself withstands constitutional scrutiny or review under the Administrative Procedures Act. The question is whether the administrative process as a whole provides fair and meaningful review. In light of the rapid backlog reduction that has occurred and the numerous concerns about whether the reforms have compromised the quality of decisionmaking and are shifting the caseload to the federal courts, the Department should discard the procedural reforms and reinstitute the prior procedures.

If the reforms are not rejected, the following modifications are necessary:

- **At a minimum, each case should have a written decision that addresses the errors raised by the appellant**, the basis for determining that the case was correctly decided below, the specific legal precedents on which the decision is based, and the reason that the case was assigned to a single Board member. This will ensure that the members give more than cursory review of the record and decision below and provide serious considerations to the issues raised by the appellant. It also will ensure meaningful judicial review in the courts of appeals and avoid a cycle of remands. Affirmances without opinion should only be allowed where the Board agrees completely with the decision and the reasoning of the immigration judge.

- **Single-member review should not be allowed in cases where judicial review would be foreclosed**, such as a finding of deportability on certain criminal grounds, ineligibility to apply for asylum for filing after the one-year filing deadline, or the denial of a suspension/cancellation of removal application under the Nicaraguan Adjustment and Cuban American Relief Act.

- **Single-Member review should be prohibited for reversing an order of an immigration judge terminating proceedings or granting relief to a noncitizen**. Referral to a three member panel should be mandatory in all of the categories where it is now only permitted.

- **Mechanisms are needed to ensure correct results in individual cases.** Ensuring the correctness of results in individual cases is a critical function of BIA review. This can best be achieved with a traditional three-member panel. Reconsideration of whether or not a case was appropriately decided by a single Board Member (rather than referred to a three-Member panel) should be available whenever a removal order is affirmed by a single Member. This would enable the Board to determine if the summary affirmance procedure is being used improperly in cases that require 3-member review.

- ***De novo* review is a valuable and time-proven tool**: It allows the Board to re-examine the facts, clear up any factual errors, mistakes or confusion and decide a case on its true facts. *De novo* review also would reduce the pressures on the federal courts.

- **Time-frames for preparation of appellate briefs should be more generous** and take into account the practical impediments many respondents face in preparing appellate briefs or finding counsel to assist them on appeal. At a minimum, if the government appeals an

immigration judge's grant of relief to a respondent, the appellee's brief should not be due until after the department's brief, even in detained cases. Respondents cannot be expected to adequately address the department's legal arguments or distinguish cases relied on before reading the government's brief. Alternatively, respondents in this situation should be permitted the automatic right to file a reply brief if desired with no need for a formal motion.

- **The increasing number and complexity of cases before the immigration courts suggests the need to expand the Board membership**, rather than reduce it.

- **The judicial independence of Board members from political officers and pressures must be ensured**. Appointments to the BIA should be made with a view toward achieving balance, diversity and impartiality. The ABA supports administrative review to an independent body.

- **Judicial review of immigration decisions is paramount and must be preserved,** but the federal courts should not be burdened with cases that can be resolved by meaningful administrative review.

Conclusion

Although the Board's 1999 "Streamlining Rules" were pronounced an "unqualified success" in December 2001, the Department of Justice proposed sweeping "Procedural Reforms" in February 2002. These reforms were unnecessary, and they are proving to be counterproductive. Important functions traditionally performed by the Board: setting precedents; providing fair and reasoned review of the sometimes life-or-death decisions made by the agency; and catching mistakes before innocent people get hurt, are undercut by the "Procedural Reforms."

The goal to alleviate the work pressures of the individual Board members without diminishing the quality of review has not been achieved. Speed in decisionmaking has also resulted in a change in substantive outcomes: decisions in favor of respondents have decreased alarmingly from 1 in 4 to 1 in 10. Because of a lack of confidence in the Board's decisions, the reforms are increasing the load on federal courts. Federal court appeals have quadrupled since the "Procedural Reforms" were implemented and the federal courts are now developing a substantial backlog. The net effect of the "Procedural Reforms," it appears, is not to eliminate the backlog, but rather to shift it from the BIA to the federal courts. Moreover, many cases now on appeal in federal court may end up back at the Board on remand, thus defeating the purpose of reducing the backlog and decreasing processing times.

To ensure meaningful administrative review of immigration judge decisions and address legitimate concerns about growing caseloads and the need to increase efficiency, interested constituencies should convene to examine more appropriate models for administrative review.

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