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Federation for American
Immigration Reform

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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.

March 20, 2002

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Reference: Notice of Proposed Rule Making: 'Board of Immigration Appeals; Procedural Reforms to Improve Case Management' 67 Federal Register 7309 (February 19, 2002).

Subject: Public Comment by the Federation for American Immigration Reform (FAIR)

The Federation for American Immigration Reform (FAIR) strongly supports the proposed rule. The changes in case management are a major step towards protecting the integrity of our immigration system. The Attorney General's reforms will dramatically reduce the use of abusive and obstructive delay tactics by deportable aliens, and restore fundamental public accountability to an agency that has been a major target for regulatory capture by special interests.

The proposed rule will sustain and build on the increases in agency productivity experienced in the Streamlining Pilot Program.

The goal of case management reform is to increase the productivity of the BIA to issue fair and legally correct decisions in an institutional program that is sustainable over an extended period of time. Streamlining Pilot Project Assessment Contract Exit Briefing (December 13, 2001).

FAIR agrees with EOIR that it "is now clear that the addition of new Board Members will not reduce the backlog of cases. *The problem is rooted in the structure and procedures of the Board* [emphasis added] ." 67 F.R. 7310.

The primary reform of the Pilot Project was to increase the authority of single Members to dispose of cases involving procedural or ministerial issues, and included the creation of a separate screening procedure to classify appeals based on the type and complexity of issues raised.

The use of single-member resolution of appeals has been indisputably successful. As noted by AILA representative Stephen Yale-Loehr in his

testimony before the House Subcommittee on Immigration and Claims on February 6, 2002, the outside management audit of the Streamlining Pilot Project by Andersen LLP concluded that "the overwhelming weight of both 'objective' and 'subjective' evidence... indicated that the ... Project has been an unqualified success." The Streamlining Pilot Project directly contributed to a 53 percent increase in the overall number of BIA cases completed during its initial implementation year (Sept. 2000 through Oct. 2001).

The effect over time is even more striking: The average number of cases completed in less than 90 days increased from 25 to 56 percent between 1997 and 2001. The number of cases remaining open for 181 days or more decreased dramatically from 42 to 13 percent over the same period. Ninety-one percent of EOR staff surveyed agreed that streamlining has improved BIA case productivity. Of the pending backlog of 56,000 case in September 2001, an estimated 35 percent would meet streamlining criteria under Pilot Program standards. Over 73 percent of staff surveyed agreed that streamlining improvements can be sustained over time. Streamlining Assessment Exit Briefing.

FAIR is confident that the proposed changes will continue to produce positive results. In particular:

- The wider use of initial screening authorized in 3.1(e)(1) will improve consistent and prompt screening for summary dismissal.
- Initial screening will also speed the disposition of unopposed motions and the remand of defective cases. 3.1(e)(2).
- Expansion of single member merits review at 3.1(e)(5) to include cases where a brief explanatory opinion is issued will both improve productivity and quality of these decisions.

FAIR endorses the language at 3.1(e)(6) designating five classes of cases retained for panel decisions. In particular, the inclusion of a "clearly erroneous" threshold for review of factual determinations by the Immigration Judge is a needed management reform. (The due process aspects are discussed below). The requirement at 3.3(b) that the appellant claiming a right to a panel review bear the burden of identifying the relevant ground in the Notice of Appeal is also an appropriate improvement in adjudicative economy.

EOIR also correctly notes (at 67 F.R. 7312) the deterrent effect of guidance to the immigration bar and the non-professional advocacy representatives as to what constitutes a frivolous appeal. EOIR is correct in its conclusion that failure to retain the reinstated rule at 3.1(d)(2)(i)(D) (implementing the statutory direction in INA §240(f) that the Attorney General define cases that are to be summarily dismissed as frivolous) could subject the regulation to challenge as improperly legislative in scope (i.e. contravening INA §240(b)(6)).

Finally, the stricter time limits of thirty days to file an appeal, 21 days to file briefs, 90 days for single member reviews, and 180 days for the more difficult 3-member cases at 3.1(e)(8), 3.3, and 3.5 will expedite the handling of all cases.

The proposed rule will have no adverse effect on the quality of the decisions rendered by the Board.

The available evidence from the Andersen management audit indicates that the interests of aliens in a fair and legal decision have not been adversely affected by single member reviews and screening procedures already in use in the Streamlining Pilot Project. The audit cites the finding that both the number of adverse decision rendered and the portion of "unrepresented alien" case decisions assigned for streamlining did not increase, indicating that the system does not place an unfair burden on aliens without lawyers. Seventy-eight percent of EOIR staff surveyed agreed that streamlining allowed the BIA to spend more time on substantive issues.

Fact-finding by immigration judges should be upheld unless the decision was "clearly erroneous". FAIR believes that the elimination at 3.1(d)(3) of *de novo* factual reviews, absent a demonstration of a clearly erroneous finding, is a critical reform that will obligate the immigration bar and advocacy community to improve their evidentiary preparation for Immigration Judge proceedings, and not rely on an automatic appeal process.

The new procedure of remand for further fact-finding where an appeal cannot otherwise be satisfactorily resolved will encourage the Immigration Judges themselves to improve the consistency of their own investigations, as well as protect appellants against hasty or incomplete proceedings at the primary adjudication level.

Since primary opposition to the proposed rule appears to center on the immigration bar and the advocacy organizations who are active users of the appeals process, FAIR would like to comment on some of the broad critiques of the proposed rule made by these special interests:

FAIR finds no indication that any "compromise of due process" has or will occur from the existing or proposed case management reforms. AILA and other advocacy and civil liberties organizations (like NALEO) have not and cannot document their rhetorical claims. Indeed, proposed rule 3.1(e) (requiring priority determination of cases involving detained aliens) is strong evidence that EOIR in practice makes every attempt to accommodate procedural challenges, even to the detriment of its own organizational goals.

FAIR finds AILA's continued public comparisons of immigration law and procedure to criminal law and procedure to attack the proposed rule to be a cynical demonstration of bad faith. See e.g. the February 11, 2002 letter to the Attorney General reproduced at 7 Bender's Imm. Bull. 296. The fundamental legal rationale for a separate body of law governing immigration is that it is distinct in substance and procedure from criminal law, and even most civil proceedings. A lawyer who argued as tendentiously that criminal standards of procedure had been violated in a bankruptcy proceeding would be subject to Rule 11 sanctions.

AILA (through Professor Yale-Loehr) claimed in its House testimony opposing the proposed rule that "Board Members often make decisions that will determine whether someone who has been persecuted or tortured will live or die..." This essentially demagogic statement

illustrates how AILA's objections to BIA reform are grounded in political and financial self-interest rather than legal principles: First, the mere demonstration that it is more likely than not that the alien would be threatened with torture or loss of life or freedom eliminates such a possibility in practical terms. 8 C.F.R. 208.16. Further, AILA and the open borders lobby have, to our knowledge, never demonstrated in a removal appeal that such a miscarriage of justice has actually occurred.

As retired BIA Board Member Michael Heilman stated in his testimony before the House Subcommittee, the current system instead encourages fraud and abuse. Due process concerns might be relevant were the alien's deportability at issue. However, deportability is almost never an issue, and the BIA focuses as a practical matter on whether a deportable alien (i.e. a proven violator of our laws) can claim some sort of administrative relief or waiver.

The image of BIA appellants as simple-minded, ignorant or bewildered victims is a false stereotype promoted by the immigration bar and communal organizations. In fact, appellants are typically a self-selected and resourceful group far more knowledgeable about our immigration system than most highly educated citizens, and have no scruples about gaming the system. They are fully aware that an appeal can be filed at no cost, and has the effect of automatically suspending an immigration judge's deportation order for months or often years.

The BIA is an administrative tribunal responsible for improving the consistent enforcement of immigration law, not an independent court of claims for aliens.

FAIR supports the final structural reform and backlog reduction plan as proposed in revised 3.1(a)(1), including the proposed reduction in the final number of authorized Board Members from 23 to 11 (although we have no fixed opinion on the exact number of Board Members needed to efficiently operate the appeals process.) This reform will improve the BIA's critical function of issuing precedent decisions on difficult issues of law. Currently, the 400% increase in members since 1995 has resulted in conflicting opinions, delays while personal disputes between members are resolved, and increased numbers of "dissenting" opinions that are often political attacks on Congress by radical members.

FAIR strongly supports what we call the "Lory Rosenberg" rule at 3.1(e)(8)(ii). Requiring a dissenting member to request a time extension beyond the 180-day deadline on a separate opinion will help prevent Board members from using their position as an advocacy forum for the immigration rights movement. The annual performance review added to the regulation at 3.1(e)(8)(iv) will add an important objective yardstick to EOIR's case management system.

FAIR takes objection to the AILA claim in its February 6th House Subcommittee testimony in opposition to the proposed rule that "BIA is the court of last resort for the vast majority of people seeking review of IJ decisions." The overwhelming number of Immigration Judge decisions are upheld by the BIA as legally and factually correct. The BIA has never been recognized by statute, and is, in Professor Yale-Loehr's trenchant phrase, "entirely a creature of the Attorney General." For cases with arguable claims to merit, the federal courts are, and will continue to be the "court of last resort". BIA proceedings concern whether a deportable

alien – one who has violated our immigration laws, and typically, our criminal laws as well – can claim benefits from any statutorily provided loophole to trump the consequences of the alien's unlawful and or criminal acts.

The primary function of the BIA is to issue precedent decisions that assure consistency in the administration of federal immigration law on a nationwide basis. AILA's claim that a Congressional mandate exists to "facilitate immigrant's access to the BIA or to enhance due process" lacks any substance. The existing case management rules have damaged the precedent-issuing function in two ways: First, expanding numbers of routine appeals lacking arguable legal significance have clogged the adjudicative process. Second, the bloat in the numbers of Board Members appears to have increased the prolixity of decisions actually issued, in particular for dissenting and other separate decisions, a phenomenon completely at odds with the Board's duty of interpreting immigration law in a clear and definitive manner. The decline in overall decisionmaking has a further blow-back effect on the efficiency of the Immigration Judges.

AILA's concerns about its members facing the loss of plum civil service jobs in the proposed downsizing are real. But this complaint undercuts the equally unsupported claim that BIA is some sort of independent "judiciary". The Board is an administrative quasi-judiciary body, and it is entirely appropriate that such civil servants be managed, evaluated, and constrained by considerations of efficiency and productivity. The astonishing and disturbing record of Board Member Lory Rosenberg, who apparently has issued nearly a hundred vocal dissents from BIA precedent decisions in recent years, and despite her "judicial workload" manages to maintain a ubiquitous schedule of activism amongst her former comrades in advocacy circles and academia is a case in point. The scope of Ms. Rosenberg's dissent as a self-appointed critic of American immigration law and procedure would constitute a fatal conflict of interest in any other federal adjudicatory body.

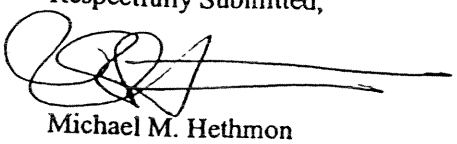
Two additional reforms would significantly improve BIA productivity.

FAIR supports other changes to EOIR procedure that were proposed by Mr. Heilman in his testimony before the House Subcommittee on Immigration and Claims on February 6, 2002. These two reforms would encourage aliens, their advocates, and the immigration judge cadre to focus on the quality of the initial proceeding, by discouraging "automatic" clock-stopping claims for relief, and without eliminating standard procedural safeguards:

First, charge the alien filing and transcript fees for the appeal. This is general practice in other federal civil and administrative proceedings. Paupers with meritorious cases would still receive assistance, but frivolous appeals will be deterred.

Second, the Attorney General should exercise his discretion to abolish *automatic* appeals of denial of asylum by INS asylum officers to immigration judges. Appeals should be available where the alien can point to factual or legal error. This is a very modest standard. Approvals of asylum cannot be appealed, and it makes no sense not to treat denials the same way.

Respectfully Submitted,



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