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## Getting It Right on Appeal

When an Immigration Court makes a bad decision, immigrants rely on the BIA to get it right. Unfortunately, many of our interviewees believe that the BIA is falling short, agreeing with federal circuit Judge Richard Posner's damning statement from 2005 that the work of the BIA has "fallen below the minimum standards of legal justice." Most pointed to the 2002 "streamlining reforms" — in particular, slashing the size of the BIA, review by only a single member and the emphasis on affirming the decisions of Immigration Judges without explaining why — as the reason why the BIA has fallen into disrepute. In short, the 2002 streamlining replaced careful review with expediency.

When justifying the decision to slice the BIA in half, then-Attorney General John Ashcroft claimed that previous expansions of the Board "had no appreciable impact on the completion of cases" and that the Board had "grown too large to reach a consensus" for resolving complex legal questions. Most interviewees disagree. Instead, they believe the real motivation was to rid the BIA of judges perceived as pro-immigrant.

With this downsize, the 2002 streamlining dramatically changed the way the BIA handles its cases. Prior to 1999, three-member panels considered every appeal. After DOJ introduced review by just one member, the 2002 streamlining "expand[ed] the single-member process to be the dominant method of adjudication for the large majority of cases before the Board." Indeed, according to BIA Chairman Osuna, only about seven to eight percent of cases are decided by three-member panels. Our interviewees routinely singled out this near-elimination of the use of three-member panels as a leading cause of the BIA's diminished credibility. One interviewee called it a "disaster," while another pointed out that there is no "guarantee of . . . logical reasoning or acceptable or appropriate decision making."

This streamlining combined single-member review of cases with the practice of affirming Immigration Judge orders with no explanation,

known as an "affirmance without opinion" or "AWO." While these policies substantially reduced the BIA's backlog, they also fueled criticism from practitioners and federal appellate judges alike that the Board was no longer an appellate body at all, but merely a "rubber stamp" for Immigration Judge decisions. The perception was manifest among many of our interviewees that there were individual BIA members who would issue "50 cases in one day, and each of them was a denial." Decisions without explanation provide no comfort to immigrants that their cases received any review at all, let alone a thorough consideration.

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The "streamlining reforms" thus led to a rash of decisions with little or no analysis, which, in turn, has led to a flood of appeals to the federal courts. According to the *Refugee Roulette* study, "In February 2002, the month before Attorney General Ashcroft changed the procedures, 200 cases were appealed to the circuit courts each month. One year later, 900 cases a month were appealed, and by April 2004, more than 1,000 cases per month were being appealed." Thus, the reforms merely shifted the backlog upward to the federal appellate courts.

The BIA has recently tried to address many of these concerns. First and foremost, as the BIA reports, it has reduced the number of affirmances without opinion from 36 percent of all decisions in FY 2003 to 10 percent in FY 2007, and BIA Chairman Osuna has stated that the percentage has further decreased to approximately five percent of decisions for the first six months of FY 2009. As the number of affirmances without opinion has declined, however, the number of single-member opinions has increased. For many of our interviewees, these single-member opinions

are no better than affirmances without opinion. One interviewee noted that she “sees many one- or two-paragraph decisions where it is clear that the [member] has not reviewed the record and there has been no meaningful review.” Another noted an “opinion that was one paragraph long, [with] three case citations and ... no explanation of how the cited cases relate to the issue at hand.” Here, too, the BIA has made a concerted effort to improve by issuing longer, more substantive opinions that better address the issues in the case. Today, many, if not most, single-member opinions range from one to three pages, with some even longer. As a result of these improvements, the BIA’s reversal rate in the federal courts of appeals has dropped substantially, from 17.5 percent in 2006 to 12.6 percent in 2008.

It is clear from our interviews, however, that the reputation of the BIA does not reflect its recent progress. Profound cynicism and distrust toward the BIA arising from the “streamlining reforms” persists. Much more needs to be done.

In order to strengthen the reputation of the BIA as a legitimate appellate body and to ensure that immigrant appeals receive the level of consideration they are due, Appleseed recommends the following action items.

### **Mandate the use of three-member panels except for purely procedural issues or motions that do not decide the outcome of a case.**

Almost universally, our interviewees felt that returning to three-member panels would help revive the BIA’s credibility. Interviewees widely believed that three-member panels provide a more robust review process, ensuring a comprehensive examination of each appeal. Even DOJ, in rules it proposed in 2008 to update the BIA’s procedures, acknowledges the superiority of three-member review, stating that it “enhance[s] the review and analysis” and “may provide more authoritative guidance.”

The proposed rules, which would “expand the criteria for three-member decisions by allowing

a Board member, in the exercise of discretion, to refer a case to a three-member panel when the case presents a complex, novel, or unusual legal or factual issue,” are a step in the right direction. We agree with the American Bar Association, however, that the proposed rules leave “little incentive for Board members to take advantage” of their discretion, making it “unlikely that this new flexibility will be widely utilized.” A truly effective rule must ensure that three-member review becomes the norm, not the exception, for BIA decision-making.

Accordingly, the new rules should mandate that three-member panels review every appeal, except for purely procedural issues or motions that do not decide the outcome of a case, consistent with the practice of many federal appellate courts. We understand that the return to three-member panel review may cause an undesired backlog of cases unless DOJ adds new members to the Board. Consistent use of three-member panels, however, will enable the Board to serve as a true arbiter of justice, which is worth any risk of short-term backlogs.

### **Eliminate the use of affirmances without opinion and require reasoned opinions.**

While the BIA’s reduction in AWOs is a laudable improvement, the necessary mechanisms are not in place to prevent a reversion back to their more frequent use. Current rules require a Board member to use an AWO to dispose of an appeal in certain specified cases (essentially, correctly decided cases with only immaterial error and lacking novel or substantial issues). DOJ’s proposed rules would give Board members the discretion to choose either to write a decision or to affirm by AWO. Although AWOs would no longer be mandatory, the proposed rules do not require the use of written decisions any more frequently than the current rules, and they contain no incentive for a Board member to elect to write a decision rather than affirm by AWO. As the American Bar Association stated, “[T]he proposed rule does not go far enough to provide adequate safeguards to ensure quality decision-making and

adjudication, and therefore may result in little improvement in practice.”

Instead, the new regulation should require that the Board issue full written opinions in all matters. A full written opinion need not be lengthy. In many cases, a few paragraphs will be sufficient to address the issues. But every opinion—three-member opinions and single-member opinions—should provide the immigrant with the basis for the Board’s decision and sufficiently address the parties’ contentions.

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Eliminating the current AWO practice to mandate more fully reasoned decisions serves several goals. First, immigrants and Trial Attorneys alike will know that their arguments have been given their due and have been fully and fairly considered. Second, if an appeal of the BIA decision is taken, the Court of Appeals will have a reasoned opinion to review and will not be forced to reach down to the Immigration Judge’s decision (often rendered orally at the hearing) and the case file without any guidance from the BIA. Moreover, written decisions will help the immigrant determine the strength of an appeal, which, together with the assurance that the case had been fairly and thoroughly considered, may help stem the flood of immigration cases currently overwhelming the federal courts.

## **Increase the number of BIA members and staff attorneys.**

A return to three-member panels combined with full written opinions will significantly increase the BIA’s workload, even though the number of appeals to the BIA has declined in recent years. This greater workload will require additional BIA members and staff attorneys to support them. In June 2008, DOJ increased the size of the Board from 11 to 15 members. We applaud this increase,

but it will not be enough. When asked, Chairman Osuna estimated that the BIA will need at least 25 members if the BIA were to return to three-member review. This appears to be a reasonable starting point, considering that a larger BIA might be too unwieldy to function effectively when meeting as a single body, or “en banc.”

If necessary, DOJ should use temporary board members to fill out additional three-member panels to handle any excess caseload. Immigration Judges could perhaps serve as temporary board members in a regular rotation, which would not only provide a broader variety of expertise and experience to the BIA but could also be a training mechanism for Immigration Judges. It might also identify which Immigration Judges qualify for permanent appointment to the BIA. The use of temporary board members will ensure that the BIA can handle its caseload, and it will not interfere with en banc decision-making because current regulations do not allow temporary board members to vote on cases decided en banc.

Similarly, DOJ should significantly increase the number of staff attorneys to help members review cases and prepare well-reasoned decisions. When asked, Chairman Osuna estimated that the BIA will need at least 250 staff attorneys if it is to return to three-member review. Based on his estimate and the current headcount, the BIA will need about 110 new staff attorneys.

The BIA chairman and EOIR director should periodically evaluate the BIA’s workload to make any necessary adjustments to the BIA’s size, the use of temporary board members and the number of staff attorneys.

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