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**SUMMARY OF INTERNATIONAL LAW SECTION'S COMMENTS ON
THE PROPOSED REGULATIONS ON "BOARD OF IMMIGRATION
APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE
MANAGEMENT"**

The Executive Office for Immigration Review of the Department of Justice is seeking comments on its proposed regulations entitled "Board of Immigration Appeals: Procedural Reforms to Improve Case Management." (67 Federal Register 7,309-7,318, Feb. 19, 2002). The proposed regulations aim to eliminate the current backlog of cases pending before the Board of Immigration Appeals ("BIA") and enhance the efficiency with which the BIA processes cases by altering the administrative structure and procedures of the BIA and providing a new case management procedure.

The comments that the International Law Section¹ proposes to file are intended to accomplish the government's goals of greater efficiency without compromising the BIA's deliberative process or increasing the potential for incorrect or unfair decisions. Specifically, the comments suggest that the government (1) extend the time proposed for eliminating the backlog or increase staff resources so that the Board can complete its decision-making in an efficient and timely manner; (2) retain the size of the Board at its current level or adopt an objective standard for dismissal, such as seniority or attrition, if the size of the Board is reduced; (3) continue to abide by the summary affirmance rule adopted in October of 1999, which allows for single member affirmances without opinion in a limited category or cases, or specify certain cases, such as asylum, withholding and Convention Against Torture cases, that may not be resolved without written decisions; (4) retain its authority to conduct *de novo* review or, in the alternative, retain such authority in asylum, withholding and Convention Against Torture cases; and (5) provide an exception to the retroactive application of the rule for cases appealed before the adoption of the rule and determine whether these cases are appropriate for three-member review under the standards of the proposed rule.

¹ The views expressed herein represent only those of the International Law Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors. Comments prepared by Susana SáCouto and Stephanie Robinson, members of the Immigration and Human Rights Committee of the D.C. Bar International Law Section, and approved by the Section's Steering Committee on behalf of its members.

March 21, 2002

Mr. Charles K. Adkins-Blanch
General Counsel
Executive Office for Immigration Review
Suite 2400
5107 Leesburg Pike
Falls Church, VA 22401

Re: AG Order No. 2559-2002

Dear Mr. Adkins-Blanch:

The International Law Section of the D.C. Bar¹ submits the following comments on the proposed regulations regarding the “Board of Immigration Appeals: Procedural Reforms to Improve Case Management.”²

We support and applaud the government’s goals of eliminating the current backlog of cases pending before the Board of Immigration Appeals (“BIA”), eliminating unwarranted delays in their adjudication, and enhancing the efficiency with which the BIA processes them. In particular, we commend the procedural reforms aimed at eliminating unwarranted delays, such as the adoption of time limits on decision-making. We believe these measures will help expedite case adjudication, particularly if the BIA is granted adequate staff resources to enable members to process the cases within these time limits.

We are concerned, however, that reducing the number of Board members would run counter to the stated objectives of the proposed rule. Additionally, we believe that summarily affirming cases without opinion reduces the deliberative nature of the BIA’s process, weakening the role of the BIA as a separate reviewing body. We are also concerned that replacing the *de novo* standard of review for factual issues with a clearly erroneous standard and applying the proposed rule retroactively may result in incorrect or fundamentally unfair decisions, particularly in cases involving applications for asylum, withholding of removal or relief under the Convention Against Torture.

Following our comments below, we propose alternatives that would accomplish the government’s goals without compromising the BIA’s deliberative process or increasing the potential for incorrect or unfair decisions.

1. Proposal to Eliminate Backlog of Cases and to Reduce Size of Board

¹ The views expressed herein represent only those of the International Law Section of the District of Columbia and not those of the D.C. Bar or its Board of Governors.

² 67 Fed. Reg. 7,309-18 (February 19, 2002).

Under the proposed rule, the Board is expected to eliminate the backlog of pending cases within 180 days. After this six month transition period, the size of the Board will be reduced to eleven members. Proposed 8 C.F.R. § 3.1.(a)(1). We are concerned that the proposed timeline for the elimination of backlogged cases and the reduction in the number of Board members will defeat the interests of fairness and efficiency.

The BIA has twenty-three permanent positions, with nineteen positions currently filled. Under the proposed rule, the current Board is expected to adjudicate the backlog of approximately 55,000 cases within a six-month period while continuing to adjudicate new cases. With the proposed reduction in the Board, each of the eleven members would be required to complete an average of 50 cases each week.³ The workload proposed is staggering and threatens to compromise each member's ability to conduct a thorough analysis of relevant law and facts. We are deeply concerned that meritorious cases would be sacrificed under this hurried review system and that the fairness of the adjudicatory process would, therefore, suffer.

We are further troubled by the potential impact of the proposed case management system on the due process rights of aliens. U.S. courts have held that aliens, even those who are undocumented or in removal proceedings, are entitled to due process guarantees. See Zadvydas v. Davis, 121 S.Ct. 2491, 2501 (2001); Marincas v. Lewis 92 F.3d 195 (3d Cir. 1996).⁴ The Ninth and Third circuits have affirmed detained aliens' right to due process, holding "that mandatory detention of aliens after they have been found subject to removal but who have not yet been ordered removed violates their due process rights unless they have the opportunity for an individualized bail hearing." Ojogwu v. Ashcroft, 2002 WL 273157 (D. Minn. 2002) (discussing Kim Ziglar, 276 F.3d 523 (9th Cir. 2002) and Patel v. Zemski, 275 F.3d 299, 314 (3d Cir. 2001)). The Patel court elaborated on the procedures that should be afforded a detained alien by stating that "due process requires an adequate and proportionate justification for detention, noting that the process due even to excludable aliens requires an individual evaluation of flight risk and dangerousness." Patel, 275 F. 3d at 311. The sheer speed with which the BIA is to review cases on appeal threatens to hamper each member's ability to conduct an individualized evaluation of the alien's case and, thereby, compromise the process due to aliens.

³ *Executive Office for Immigration Review: Oversight Hearings on The Operations of the Executive Office for Immigration Review (EOIR) Before the House Judiciary Subcommittee on Immigration and Claims*, 107th Cong., 2d Sess. (2002) (hereinafter *Yale-Loehr Testimony*) (Statement of Stephen Yale-Loehr).

⁴ See also, Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE LAW & POLICY REVIEW 303 (2001).

Additionally, the government's proposal to reduce the number of Board members does not specify the standard by which the remaining Board members are to be selected. If the dismissal of individual members of the Board is not based on an objective standard, such as seniority or attrition, the government risks the perception that certain Board members will be dismissed for other than merit-based reasons. We are concerned that if an objective standard is not specified, the credibility of the BIA, particularly in the eyes of the Courts of Appeal, would suffer.

We are also concerned that the proposed timeline for eliminating the backlog and reduction in the number of Board members will undermine the government's stated objectives of: (1) eliminating the current backlog of cases pending before the Board; (2) eliminating unwarranted delays in the adjudication of administrative appeals; (3) utilizing the resources of the Board more efficiently; and (4) allowing more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions. Supplementary Information, 67 Fed. Reg. at 7,310.

In his testimony before the House Judiciary Committee, Steven Yale-Loehr noted that eliminating the Board's power of *de novo* review will likely increase the number of cases remanded to the Board as well as the number of appeals taken to the federal courts.⁵ Rather than eliminating the backlog, the Board's hurried review of the 55,000 cases may, therefore, actually increase the Board's caseload. If this occurs, the goals of eliminating the backlog and unwarranted delays, and increasing efficiency, will all be compromised. Further, reducing the size of the Board will only hinder the efforts of the remaining members to keep current with incoming appeals. Finally, without the ability to conduct *de novo* review, the Board's capacity to identify those cases that present difficult or controversial questions will also be greatly hampered.

The Supreme Court has identified three distinct factors that must be considered when assessing a new administrative procedure such as the proposed case management system: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Mathews v. Eldridge, 424 U.S. 319 (1976). Consideration of each of these factors indicates that the proposed rule is unwarranted.

The private interest at risk for *pro se* litigants will vary depending on the nature of the immigration benefit they seek. At the very least, they will seek temporary permission to remain in the United States; many seek permanent residence or citizenship. The private interest at risk

⁵*Yale-Loehr Testimony, supra* note 3.

for asylum-seekers is even greater. If returned to their home countries, asylum-seekers risk losing their lives or freedom.⁶ For the reasons explained above, the hurried review of the many *pro se*, asylum and other deserving cases that are undoubtedly included in the 55,000 case backlog, is likely to result in erroneous deprivations of these interests. Such deprivations will inflict serious harm on individuals. More significantly, in light of the potential for increased remands, these reforms threaten to undermine the purported purpose of the proposed rule itself: increased efficiency. We believe, therefore, that the government's proposal falls short of satisfying the Mathews test.

Accordingly, we urge the government to extend the timeline proposed for eliminating the backlog. In the alternative, we recommend that staff resources be increased so that the Board can complete their decision-making in an efficient and timely manner. Additionally, we suggest that the size of the Board remain at its current level. Alternatively, we recommend that if the size of the Board is reduced, that the government adopt an objective standard for dismissal, such as seniority or attrition.

2. Summary Affirmances

The proposal states that in cases not appropriate for three-member panel review, individual Board members can either summarily affirm the decisions of immigration judges without opinion or issue brief orders affirming, reversing, modifying or remanding the decisions. Proposed 8 C.F.R. § 3.1(e)(4) and (5). Although the proposed rule indicates that summary affirmances without opinion should be limited to cases where the "factual and legal issues raised on appeal are not so substantial," the phrase "not so substantial" remains undefined.

Many, if not most of, the appeals before the BIA involve appellants who have conceded that they are subject to removal, but who believe they have a defense to removal, such as a well-founded fear of persecution in the alien's home country.⁷ Given the vast changes in immigration law since 1996, immigration judges are likely to differ in their analyses of the law. Indeed, judges have vastly different rates of approval for claims for relief from removal, even in cases involving similar types of claims. For example, a recent statistical analysis of asylum decisions over a five-year period indicated an extraordinary variance among the nation's immigration

⁶ The Board's summary review of immigration judges' decisions has already resulted in the erroneous deprivation of some asylum applicants' interests even under the current framework. See Salazar-Paucar v. INS, Nos. 99-71306, 00-7081, at 3342 (9th Cir. June 15, 2001) (reversing, rather than merely remanding, asylum case because "[d]espite the compelling evidence of past persecution, the BIA, without any factual or legal analysis, concluded that Petitioner had not suffered past persecution.").

⁷ *Yale-Loehr Testimony*, *supra* note 3.

judges in granting asylum.⁸ Thus, many of the cases before the BIA are likely to involve complex questions of law or legal interpretation. Encouraging the speedy disposition of cases by removing the requirement that Board members state their reasoning may result in a more cursory study of the record below and less careful legal analysis, thereby increasing the potential for error. Because in many of these cases, an error can result in harm or death to the appellant, this proposal threatens to place the United States in the position of inadvertently violating its obligation not to return a person to a country where he or she may be seriously harmed, tortured or killed.⁹

We are deeply concerned about the risk of error in cases where judicial review is limited¹⁰ or where the alien does not have the resources to pursue his or her case in federal appellate courts.¹¹ In these cases, the BIA effectively serves as the court of last resort. Procedural reforms should guard against, not increase, the possibility of error, particularly in cases where the respondent faces removal and possible life-threatening circumstances in their home country.

Additionally, requiring appellate judges to justify their decisions with a reasoned explanation is critical to ensuring the efficiency of the review process. When judges explicitly

⁸See *Requests for Asylum: Grants and Denials by Immigration Judges*, SAN JOSE MERCURY NEWS, Oct. 17, 2000.

⁹ Article 33 of the 1951 Convention relating to the Status of Refugees, incorporated into U.S. law after the U.S. became a party to the United Nations Protocol relating to the Status of Refugees in 1968, prohibits the return of an alien to a country "where life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 1951 Convention Relating to the Status of Refugees, July 28, 1951, art. 33, T.I.A.S., 189 U.N.T.S. 137. Similarly, Article 3 of the United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, prohibits the removal of an alien to a country where an individual is likely to be tortured.

¹⁰ In 1996, Congress placed significant restrictions on judicial review of many immigration cases, particularly those involving discretionary decisions regarding relief from deportation and underlying criminal convictions. See Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245 (Feb. 10, 1997) (analyzing judicial review provisions of Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

¹¹ Approximately 34 percent of BIA cases are brought *pro se*. In most of these cases, the alien does not have the resources to pursue his or her case beyond the BIA. Thus, the BIA serves as the court of last instance for most *pro se* respondents. *Yale-Loehr Testimony*, *supra* note 3.

state their reasoning, the losing party is encouraged to accept the legitimacy of the appellate review, decision-makers are forced to carefully consider the parties' contentions, and higher courts of appeal are given an understanding of the basis for the lower court's decisions.¹² Removing the requirement that Board members state their reasoning compromises the role of the BIA as a separate reviewing body. *See, e.g., Panrit v. INS*, 19 F. 3d 544, 546 (10th Cir. 1994) (stating "we do not grant unrestricted license to the Board automatically to summarily adopt Immigration Judges' decisions without examining those decisions to ensure that all of the factors urged by the alien were in fact fully considered by the immigration judge. To do so would effectively remove the Board as a separate reviewing body . . .").

Compromising the BIA's role is likely to reduce overall efficiency in the review process. To the extent that Board members issue summary affirmances without opinion, they will likely shift the burden of genuine review to the federal appellate courts, at least in cases where judicial review is permitted by law. Not only will this shift the task of issuing reasoned opinions to the federal appellate courts, but the task may well prove more difficult because the federal courts will be required to review the decisions of immigration judges without the benefit of the Board's thinking. In contrast, requiring Board members to issue reasoned decisions promotes efficiency by making it less likely that a federal court will overturn or remand a decision for failure to properly consider all relevant facts and law. *See, e.g., Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998) (remanding BIA's summary affirmance of IJ decision because record did not reflect an inquiry into whether petitioner had well-founded fear of future persecution on account of membership in particular social group).

Accordingly, we urge that the BIA continue to abide by the summary affirmance rule adopted in October of 1999, which limits single member affirmances without opinion in cases where: (1) the result below was correct; (2) any errors in the decision were harmless or immaterial; and (3) either the issue on appeal is squarely controlled by existing BIA or federal precedent or the factual or legal issues raised are so insubstantial that three-member panel review is not warranted. 64 Fed. Reg. 56135 (October 18, 1999)¹³. Alternatively, we recommend that

¹² Phil Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, GEO. IMMIGR. L.J. 531, 534-38 (1998).

¹³ The summary affirmance proposal is intended to build on the experience the BIA has had with the streamlining initiative adopted in October of 1999. We understand that the report of an independent auditor who reviewed this initiative revealed concerns regarding the effect of this initiative upon the quality of the Board's decisions. We believe, therefore, that it would be ill-advised to expand upon the existing streamlining authority without a closer examination of whether streamlining has resulted in incorrect or unfair decisions.

the new rule specify that certain cases, such as those where asylum, withholding of removal or relief under the Convention Against Torture is at issue, may not be resolved without explanation.

3. Elimination of *de novo* Review

Under the proposed rule, the Board “will not engage in *de novo* review but will accept the determination of factual issues by an immigration judge, including findings as to the credibility of testimony, unless the determination is clearly erroneous. Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in fact-finding in the course of deciding appeals.” Proposed 8 C.F.R. §3.1(d)(3). We are concerned that this proposal will increase the potential for incorrect or fundamentally unfair decisions.

The Board of Immigration Appeals is authorized to review a variety of decisions rendered by immigration judges. 8 C.F.R. §3.1(b). Implicit in that authority is the power to make new factual findings in cases in which a deficient record prevents the Board from rendering a just and logical decision. Indeed, the Board has reversed the decision of immigration judges in precedent-setting cases by exercising its power of *de novo* review. See In re Fauziya Kassinga, Int. Dec. 3278 (BIA, 1996). In reversing the immigration judge’s decision in Kassinga, for instance, the Board noted “We have conducted an independent review of the applicant’s credibility. We note that the Immigration Judge’s adverse credibility determination was based on a perceived lack of ‘rationality,’ ‘persuasiveness,’ and ‘consistency.’ The Immigration Judge did not rely on the applicant’s demeanor. We, like the Immigration Judge, can determine from the record whether the applicant’s testimony is rational, plausible, and consistent . . . We find that the applicant’s testimony in support of her asylum application is plausible, detailed, and internally consistent.” Kassinga, Int. Dec. 3278 at 364. By stripping the Board of its authority to conduct *de novo* review, the proposed rule threatens to deny the Board the power to prevent a deserving, precedent-setting case like Kassinga from erroneous dismissal or denial.

The need for *de novo* review of the factual findings of an immigration judge is particularly compelling in cases brought by *pro se* litigants. Fifty-six percent of litigants who appear before an immigration judge and thirty-four percent of those who appear before the BIA are unrepresented.¹⁴ Because *pro se* litigants lack expertise in preparing legal materials, more often than not, their representations fail to include key facts and legal arguments that are highly relevant to their claims. Because these key facts and arguments are often not presented before the immigration judge, it follows that they do not appear on the record of the reviewing body. Without *de novo* review, the Board runs the risk of erroneously dismissing or denying meritorious cases brought by these litigants.

¹⁴ *Yale-Loehr Testimony*, *supra* note 3.

This is particularly true for asylum seekers and applicants for relief under the Convention Against Torture, whose vulnerability is compounded by the trauma they may have suffered as a result of the persecution or torture they experienced. These applicants often suffer memory lapses, are unable to recall dates or details of traumatizing events, and are frequently unable to coherently narrate the bases of their fears. Their testimonies can often appear inherently inconsistent or not credible, not because they did not suffer the claimed persecution, but because the effects of their trauma prevent the coherent explanation of their fears. Frequently, the circumstances of their persecution also force asylum seekers to flee their home countries without the documentary evidence that supports their cases. Additionally, many of these applicants have no family ties to the United States, no knowledge of asylum laws and requirements, such as the one-year filing deadline, and no knowledge of the legal system. Language barriers may prevent them from identifying appropriate legal representation or from being able to recognize deficiencies in the representation they have found. Moreover, asylum seekers who are forced to flee their home countries without valid travel documents are detained while their cases are pending with both the Immigration Courts and the Board, except in unusual cases in which a U.S. citizen or permanent resident friend or family claims financial responsibility for the alien and assures the court that the alien will appear at all hearings.¹⁵ Conditions in detention, including the inability to access telephones, frequent transfers and placement in extremely remote facilities, make obtaining and participating in their legal representation extremely difficult.

In light of these circumstances, we believe that the BIA must retain the flexibility to review the facts and testimony of the underlying case as well as to consider changed circumstances and the development of new facts that can have a decisive effect on the outcome of a case. Indeed, the need to review all of the relevant facts and circumstances surrounding a case is critical in cases where an erroneous decision can result in the return of an alien to a country where he or she may be seriously harmed, tortured or killed.

Accordingly, we recommend that the Board retain its authority to conduct *de novo* review so that it may be allowed to clarify factual errors before such errors result in incorrect or fundamentally unfair decisions. Alternatively, we suggest that the Board retain such authority in cases where an alien seeks asylum, withholding of removal or relief under the Convention Against Torture.

4. Retroactive Application

¹⁵ See INS Parole Policy Memoranda, at <http://www.ins.usdoj.gov>.

The proposed rule states that appellants seeking three-member review of their cases must identify in the Notice of Appeal the specific factual or legal basis for that contention. Proposed 8 C.F.R. § 3.3(b). Further, the proposed rule applies to “all appeals pending before the Board at the time this rule takes effect.” Supplementary Information, 67 Fed. Reg. at 7,312.

Although apparently an oversight, the rule would deny three-member review to appellants who did not specify in their Notice of Appeal the reasons they believed three-member review to be appropriate because such justification was not required at the time they filed their Notice of Appeal.

Accordingly, we recommend that if the rule is adopted, it provide an exception for cases appealed before the adoption of the rule and that the Board member assigned to screen cases be required to make a written determination of whether three-member review is required under the standards of the proposed rule.

Respectfully submitted,

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