



Recommendation 85-4

Administrative Review in Immigration Proceedings

(Adopted December 12, 1985)

The Immigration and Nationality Act of 1952, as amended, requires the Justice Department to make two major types of decisions affecting aliens—whether to exclude aliens seeking to enter the United States and whether to deport those already in the country. The Act and the accompanying regulations also require a host of collateral decisions concerning visa petitions, waivers of grounds for exclusion or deportation, adjustment of status from non-immigrant to permanent resident, and many other immigration-related matters. Responsibility for making these decisions resides in two very different types of officials. Immigration judges, who are part of the Justice Department's Executive Office for Immigration Review, conduct formal evidentiary hearings in deportation, exclusion, and certain other proceedings. District directors and their subordinates are part of the Immigration and Naturalization Service (I.N.S.). They decide numerous other matters in far less formal proceedings. While the immigration judges have only adjudicative responsibilities, the district directors are principally responsible for the administration and enforcement of the immigration laws within their local geographic districts.

Similarly, there are two channels of administrative appeal for the Justice Department's immigration decisions. The Board of Immigration Appeals (B.I.A.), like the immigration judges, is located within the Executive Office for Immigration Review. The Board reviews almost all immigration judge decisions and some district director decisions. It is composed of five attorney members, all of whom normally participate in every case. It reviews cases *de novo* on the basis of the administrative record and publishes precedential opinions binding on the immigration judges and on the I.N.S.

Twenty-five other categories of district director decisions are appealable to the Associate Commissioner for Examinations, an I.N.S. policymaking official whose appellate jurisdiction has been sub-delegated to the Administrative Appeals Unit (A.A.U.) In that unit, cases are decided *de novo* by individual non-attorney staff members and reviewed by the unit chief. The A.A.U. does not ordinarily publish its decisions.



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The Justice Department's current regulations specify with a high degree of clarity which immigration decisions are administratively appealable and to which appellate body. However, reasons for the various assignments are not always evident.

The factors that should influence the choices of forum for administrative review of agency adjudication can be developed through a three-part methodology: (1) identify those attributes of the possible review forums that affect the accuracy, the efficiency, the acceptability, or the consistency of the administrative process; (2) identify the attributes of cases that favor the selection of a review forum with particular forum attributes; (3) determine the extent to which those case attributes tend to be present in the particular class of cases under consideration.

In Recommendation 75-3, the Administrative Conference set forth criteria to guide Congress in selecting the appropriate forum for judicial review of administrative agency action. Using the methodology described above, the present recommendation suggests some additional criteria and describes ways in which that expanded list of factors, with only slight modification, can be employed also to select a forum for administrative review. Applying those criteria, the recommendation then suggests forums for administrative review of various classes of immigration decisions.

Recommendation

A. Forum for Administrative Review

1. The Justice Department should undertake a comprehensive review of its regulations governing the assignment of forums for administrative review of immigration orders. In examining the categories of Board of Immigration Appeals (B.I.A.) and Administrative Appeals Unit (A.A.U.) jurisdiction, the Justice Department should consider the following factors to the extent applicable.

a. Factors favoring selection of the B.I.A. for a particular class of cases include (i) high likelihood of a substantial impact on the litigants; (ii) the prevalence of issues of law or discretion, particularly when the public impact of a decision will be widespread; (iii) the desirability of providing for judicial review of the class of cases in the courts of appeals.

b. Factors favoring selection of the A.A.U. for a particular class of cases include (i) a high volume of cases; (ii) the prevalence of questions of descriptive fact, rather than issues of law or



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discretion; (iii) high likelihood that administrative review will require the taking of additional evidence.

c. Once one class of cases is committed to a particular review forum, there is benefit in assigning to that same forum (i) other classes of cases tending to raise similar issues and (ii) other cases which, if sent elsewhere, would frequently result in the bifurcation of proceedings affecting the same individual.

d. With all else equal, the status quo should be preserved.

2. In revising its regulations, the Justice Department should make the following specific case assignments:

a. Appeals from orders of deportation and exclusion should continue to be heard by the B.I.A.

b. Appeals from orders rescinding adjustment of status should continue to be heard by the B.I.A.

3. The Justice Department should also, subject to the development of new information in the review recommended in paragraph 1, make the following case assignments:

a. All appeals from district directors' denials of visa petitions should be heard by the B.I.A.; thus orphan, fiance(e), and occupational petitions should be transferred from the A.A.U. to the B.I.A.

b. If administrative appeals from district directors' denials of waivers of the grounds of exclusion under section 212(c) of the Immigration and Nationality Act (applicable to aliens who are returning to a lawful unrelinquished domicile in the United States of seven years) are preserved,¹ they should continue to be heard by the B.I.A.

c. Appeals from district directors' denials of waivers under sections 212(h) and 212(i) of the Act (applicable to certain close relatives of American citizens and permanent residents) should be transferred from the A.A.U. to the B.I.A.

d. Appeals from district directors' denials of applications to waive the two-year foreign residence requirement for exchange visitors should be transferred from the A.A.U. to the B.I.A.

¹ A pending Justice Department proposal would eliminate administrative appeals from these orders. The issue of whether these orders should be administratively appealable is beyond the scope of this recommendation.



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e. Appeals from denials of waivers under section 212(d)(3) of the Act (applicable to non-immigrants) should be transferred from the B.I.A. to the A.A.U.

f. Appeals from district directors' denials of applications for permission to reapply for admission after exclusion or deportation should continue to be heard by the A.A.U.

B. Structure and Independence of the Board of Immigration Appeals

1. The B.I.A. should adopt a system of randomly selected three-member panels to decide cases. *En banc* review should be afforded, upon a determination by a majority of the B.I.A., only in the following circumstances: (a) When invoked by any B.I.A. member; (b) at the request of the I.N.S. Commissioner or the Attorney General following decision; or (c) when the aggrieved party petitions for review of a split panel decision.

2. If necessary to accommodate the case transfers recommended in part A above, the B.I.A.'s membership should be slightly increased.

3. Congress should enact legislation to give the B.I.A. statutory recognition. Under the legislation, the B.I.A. should remain within the Department of Justice. The statute should confer jurisdiction over deportation, exclusion and rescission orders, and should authorize the Attorney General to adjust the Board's jurisdiction as to other matters.

4. The Attorney General should retain the power to review individual B.I.A. decisions. In accordance with current practice, this power should be exercised only in extraordinary circumstances.

Citations:

50 FR 52894 (December 27, 1985)

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