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AUTHORITY: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949-1953 Comp., p. 1002.

EDITORIAL NOTE: Nomenclature changes to part 3 appear at 52 FR 2941, Jan. 29, 1987.

§ 3.0 Executive Office for Immigration Review.

(a) *Organization.* The Executive Office for Immigration Review shall be headed by a Director who shall be assisted by a Deputy Director. The Director shall be responsible for the general supervision of the Board of Immigration

Appeals and the Office of the Chief Immigration Judge in the execution of their duties in accordance with this part 3. The Director may redelegate the authority delegated to him by the Attorney General to the Deputy Director, the Chairman of the Board of Immigration Appeals, or the Chief Immigration Judge.

(b) *Citizenship Requirement for Employment.* (1) An application to work at the Executive Office for Immigration Review (EOIR or Agency), either as an employee or as a volunteer, must include a signed affirmation from the applicant that he or she is a citizen of the United States of America. Upon the Agency's request, the applicant must document United States citizenship.

(2) The Director of EOIR may, by explicit written determination and to the extent permitted by law, authorize the appointment of an alien to an Agency position when necessary to accomplish the work of EOIR.

[48 FR 8039, Feb. 25, 1983, as amended at 60 FR 29468, June 5, 1995; 63 FR 51519, Sept. 28, 1998]

Subpart A—Board of Immigration Appeals

§ 3.1 General authorities.

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall consist of a Chairman, a Vice Chairman, and thirteen other members. The Board Members shall exercise their independent judgment and discretion in the cases coming before the Board. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Director may in his discretion designate Immigration Judges, retired Board Members, retired Immigration Judges, and Administrative Law Judges employed within EOIR to act as temporary, additional Board Members for terms not to exceed six months. The Chairman may divide the Board into three-member panels and designate a Presiding Member of each panel. The Chairman may from time to time make changes in the

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composition of such panels and of Presiding Members. Each panel shall be empowered to decide cases by majority vote. A majority of the number of Board Members authorized to constitute a panel shall constitute a quorum for such panel. Each three-member panel may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of cases before it. In the case of an unopposed motion or a motion to withdraw an appeal pending before the Board, a single Board Member or the Chief Attorney Examiner may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of such motions before it. In addition, a single Board Member may exercise such authority in disposing of the following matters: a Service motion to remand an appeal from the denial of a visa petition where the Regional Service Center Director requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the Chairman. A motion to reconsider or to reopen a decision that was rendered by a single Board Member may be adjudicated by that Board Member.

(2) *Chairman.* The Chairman shall direct, supervise, and establish internal operating procedures and policies of the Board. He shall designate a member of the Board to act as Chairman in his absence or unavailability. The Chairman shall be assisted in the performance of his duties by a Chief Attorney Examiner, who shall be directly responsible to the Chairman. The Chief Attorney Examiner shall serve as an Alternate Board Member when, in the absence or unavailability of a Board Member or Members or for other good cause, his participation is deemed necessary by the Chairman. Once designated, his participation in a case shall continue to its normal conclusion.

(3) *Board Members.* Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board.

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(4) *En banc process*—(i) *Full Board en banc.* A majority of the permanent Board Members shall constitute a quorum of the Board for purposes of convening the full Board en banc. The Board may on its own motion, by a majority vote of the permanent Board Members, or by direction of the Chairman, consider any case as the full Board en banc, or reconsider as the full Board en banc any case that has been considered or decided by a three-member panel or by a limited en banc panel.

(ii) *Limited en banc panels.* The Board may on its own motion, by a majority vote of the permanent Board Members, or by direction of the Chairman, assign a case or group of cases for consideration by a limited en banc panel, or assign a case that has been considered or decided by a three-member panel for reconsideration by a limited en banc panel. Each limited en banc panel shall consist of nine members. Each limited en banc panel shall contain the Chairman or Vice Chairman (as decided by the Chairman). If the Chairman and Vice Chairman are both disqualified in a particular case, then the most senior permanent Board Member who is not disqualified shall sit on the limited en banc panel as the Presiding Board Member. If the Chairman and Vice Chairman are both unavailable to hear a case that has been assigned to a limited en banc panel, but the Chairman is not disqualified, then the Chairman shall designate a Presiding Board Member to sit on the limited en banc panel. If the Chairman is unavailable and disqualified, then the Vice Chairman, if unavailable and not disqualified, shall designate a presiding Board Member to sit on the limited en banc panel. Where a case that has been considered or decided by a three-member panel is assigned for review by a limited en banc panel, the en banc panel shall contain all available permanent Board Members who considered or decided that case as part of a three-member panel. The remaining members of each limited en banc panel will be randomly selected from among the permanent Board Members. The decision reached by a limited en banc panel shall be considered as the final decision of the Board in the case, unless the

Chairman or a majority of the permanent Board Members vote to decide to assign the case to a full en banc panel for reconsideration in accordance with paragraph (a)(4)(i) of this section.

(5) *Precedents.* By majority vote of the permanent Board Members, a decision of the Board, whether rendered by a three-member panel, a limited en banc panel, or by the entire Board sitting en banc, may be designated to serve as a Board precedent pursuant to paragraph (g) of this section.

(6) *Board staff.* There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(7) *Affirmance without opinion.* (i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(a)(7)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it

does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 240, subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 208.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 244.

(11) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals therefrom pursuant to § 3.65.

(12) Decisions of Immigration Judges on applications for adjustment of status referred on a Notice of Certification (Form I-290C) to the Immigration Court in accordance with §§ 245.13(n)(2) and 245.15(n)(3) of this chapter or remanded to the Immigration Court in accordance with §§ 245.13(d)(2) and 245.15(e)(2) of this chapter.

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 3.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) *Powers of the Board—(1) Generally.* Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals—(i) Standards.* The Board may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR-29 (No-

tices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The party concerned indicates on Form EOIR-26 or Form EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(E) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(F) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(G) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action by the Board.* The Chairman may provide for the exercise of the appropriate authority of the Board to dismiss an appeal pursuant to paragraph (d)(2) of this section by a three-Member panel, or by a single Board Member. The Chairman may determine who from among the Board Members is authorized to exercise the authority under this paragraph and the designation may be changed by the Chairman as he deems appropriate. Except as provided in this part for review by the Board en banc or by the Attorney General, or for consideration of motions to reconsider or reopen, an order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board. If the single Board Member to whom the case is assigned determines that the case is not appropriate for summary dismissal, the case will be assigned for review and decision pursuant to paragraph (a) of this section.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 292.2(d) of this chapter of an appeal which is summarily dismissed under paragraph (d)(1-a)(i) of

this section may constitute frivolous behavior under §292.3(a)(15) of this chapter. Summary dismissal of an appeal under paragraph (d)(1-a)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(4) *Rules of practices: Discipline of attorneys and representatives.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization desiring representation is of a kind described in §1.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any special Inquiry Officer.

(e) *Oral argument.* When an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. Oral argument shall be heard at the discretion of the Board at such date and time as the Board shall fix. The Service may be represented before the Board by an officer of the Service designated by the Service.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions of the Board as precedents.* Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or Immigration Judges in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.

[23 FR 9117, Nov. 26, 1958, as amended at 27 FR 96, Jan. 5, 1962; 27 FR 10789, Nov. 6, 1962; 30 FR 14772, Nov. 30, 1965; 36 FR 316, Jan. 9, 1971; 40 FR 37207, Aug. 26, 1975; 44 FR 67960, Nov. 28, 1979; 47 FR 16772, Apr. 20, 1982; 48 FR 8039, Feb. 25, 1983; 52 FR 2943, Jan. 29, 1987; 52 FR 24981, July 2, 1987; 55 FR 30680, July 27, 1990; 56 FR 624, Jan. 7, 1991; 57 FR 11570, Apr. 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 29469, June 5, 1995; 60 FR 57313, Nov. 15, 1995; 61 FR 18904, Apr. 29, 1996; 61 FR 59305, Nov. 22, 1996; 62 FR 9072, Feb. 28, 1997; 62 FR 10330, Mar. 6, 1997; 62 FR 15362, Apr. 1, 1997; 63 FR 27829, May 21, 1998; 63 FR 31890, June 11, 1998; 64 FR 25766, May 12, 1999; 64 FR 56141, Oct. 18, 1999]

EDITORIAL NOTE: At 63 FR 51519, Sept. 28, 1998, §3.1(a)(1) was amended by removing the words "Chairman and fourteen" in the second sentence and adding in their place the words, "Chairman, Vice Chairman, and sixteen". Since the revision of §3.1(a)(1) at 63 FR 31890, June 11, 1998, this text does not exist.

§3.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion