Immigration Workshop
2011 Practical Guide to Removal Proceedings

Appeals to the Board of Immigration Appeals

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I) Introduction

Review of the decision of an immigration judge is generally accomplished in one of two ways: a) direct appeal to the Board of Immigration Appeals, or; b) a motion to reopen or reconsider the decision of the immigration judge. This is filed with the judge. The following section is a brief outline on the bases and procedure for appealing the decision of the immigration court to the Board of Immigration Appeals (BIA or Board), and ultimately to the Attorney General.

II) Classes

There are several types of administrative decisions which can be appealed to the Board including:

A) Decisions relating to the removal, deportation or exclusion of individuals, or denials of relief by immigration judges.
B) Bond decisions relating to custody re-determination.
C) Decisions on visa petitions.
D) Administrative fines.
E) Decisions on the discipline of practitioners.
F) Motion denials.
G) Representation of aliens and inclusion on list of legal service providers

This outline will focus on decisions relating to the removal, deportation or exclusion of aliens and bond decisions relating to custody re-determination. See Section III B for more inclusive list of types of appeals.

III) Board of Immigration Appeals

A) Who Serves on the Board

The Board of Immigration Appeals is an 11 member body, appointed by the Attorney General. It was reduced from a 21 member body to the current membership of 11 in 2002 after the Attorney General's "streamlining" regulations which will be discussed below. A Chairman is designated also by the Attorney General. It was created in 1940 by the Attorney General and members serve at his/her discretion. It is a creation of regulation, not statute. 8 C.F.R. § 1003.1, et. seq. In 1983 the Board, along with the immigration court system, was removed as part of the former Immigration and Naturalization Service (INS), and made part of a new agency at the time, called the Executive Office for Immigration Review (EOIR), within the Department of Justice. See Practice and Procedure Before the Board of Immigration Appeals: An Update, by Anna Marie Gallagher, Immigration Briefing; February 2003.

B) Board Jurisdiction

The Board has jurisdiction over all appeals from the decisions of the immigration courts under 8 C.F.R. § 1003.1(b) as well as certain administrative decisions by DHS. The following issues may be appealed to the Board:

1) Final decisions of the immigration court in exclusion and deportation cases: (unless the only issue is the length of time granted for voluntary deportation);

2) Final decisions in removal cases (unless it is an in absentia order under Sec. 240(b)(5)(c), or the length of time granted for voluntary departure by the Immigration Judge);

3) Decisions on relief from removal, including: cancellation of removal (LPR's or non-LPR's under Sec. 240A of the Act); adjustment of status under Section 245 of the Act; asylum under Section 208; withholding of removal under Section 241(b)(3); relief under the Convention Against Torture (8 C.F.R. § 208.16-208.18); waivers adjudicated by the immigration judge including: former section 212(c); 212(h); 212(i); 212(d)(11).

4) Decisions on applications for Temporary Protected Status (TPS) under Section 244:

5) Decisions involving fines and penalties including mitigation of fines;

6) Decisions on visa preference issues, except employment-based and orphan petitions;

7) Bond and custody decisions by the immigration judge except for mandatory detention cases (unless mandatory detention is being challenged). Matter of Guerra, 24 I & N Dec. 37 (BIA 2006). There is no jurisdiction to review custody decisions in exclusion proceedings. 8 C.F.R. § 1236.1(d)(3);

8) Determinations by immigration judge to detain a person beyond the removal period under 8 C.F.R. § 1241.14;

9) Immigration judge decisions on rescission of adjustment of status under Section 246 of the INA;

10) Decisions on LIFE Act claims in accordance with 8 C.F.R. § 1245.13;

11) Decisions on applications for individual and agency accreditation and listing on the legal services list under 8 C.F.R. § 1292.2;

12) Decisions of immigration judges in attorney disciplinary proceedings, see Matter of Truong, 24 I & N Dec. 52 (BIA 2006).

C) Issues on Which The Board Has no Jurisdiction

The Board has no jurisdiction to review the following issues:

1) The length of the period of voluntary departure granted by the court under Section 240B of the Act;

2) In absentia removal orders;

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