



AMERICAN IMMIGRATION LAW FOUNDATION

August 18, 2008

John Blum, Acting General Counsel
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Re: Comments on Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents; EOIR Docket No. 159P

Dear Mr. Blum:

The American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) submit the following in response to the request for public comment by The Executive Office of Immigration Review (EOIR), on the proposed rule (“Proposed Rule” or “Proposed Regulation”) Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg., No. 118, pages 34654-34663 (June 18, 2008).

AILF is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the Proposed Rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in removal proceedings before EOIR, seeking immigration benefits, including lawful admission to the United States, and in complying with U.S. immigration laws and regulations.

1. Use of the AWO procedure should be limited

Contrary to the supplementary information's representation, the Affirmance Without Opinion (AWO) process was not successful in terms of fulfilling the BIA's mission and responsibility to provide meaningful review of Immigration Judge decisions. Despite reducing the backlog of pending appeals, the AWO process has been soundly criticized by numerous courts and public bodies, including the U.S. Congress. The criticism focused on several bases, including, but not limited to, intemperate Immigration Judge conduct mentioned in the supplementary information.

Additionally, the AWO formula has been repeatedly challenged on the basis that it affirms the result reached by the Immigration Judge but expressly eschews reliance on the Immigration Judge's reasoning and affords no information concerning the BIA's reasoning in affirming the decision. The BIA's failure to provide its own reasoning or identify the basis on which it is affirming the Immigration Judge has left courts of appeal no alternative but to remand when a case involves more than one issue or an Immigration Judge offers more than one reason for denying a claim and/or ordering removal, and the court rejects at least a portion of the Immigration Judge's reasoning as erroneous. These defects are ripe for change and the "standard" for issuing an AWO should be changed now.

In effect, the proposed rule, in calling for the BIA to be able to exercise its discretion whether or not to issue an AWO decision, calls for a return to the original streamlining rule implemented by the BIA prior to the Ashcroft rule of 2002, but fails to incorporate the sensible categories of cases that the prior rule identified as being more appropriate for a streamlined decision to be issued by one rather than three members of the BIA.

In failing to differentiate among case types and provide meaningful guidelines for streamlining, the proposed rule misses the opportunity to respond to the many objections raised to the AWO process, correct the unfair and unreasonable aspects of the rule, and actually improve the use of the AWO. In fact, if EOIR were to appropriately incorporate some of the categorical case type guidelines that were included originally in the streamlining rule, it is likely that objections to the use of the AWO decision would be reduced substantially. For that reason, AILF and AILA call on EOIR to consider further limits to the AWO procedure along these lines.

2. Federal Court Review of AWO Decisions

AILF and AILA strongly object to EOIR's attempts to limit federal court review of the BIA's use of the AWO procedure in particular and streamlining in general.¹ EOIR has no legal authority to restrict the jurisdiction that the courts have determined they possess over

¹ The supplementary comments to the proposed regulations, in the section entitled "Reviewability," discuss limiting judicial review of AWO decisions only. 73 Fed. Reg. 34654, 34657. In the proposed regulations, however, EOIR has written new subsection (9) to 8 CFR § 1003.1(e) such that it also would cover regulations pertaining to single member and panel decisions. AILF and AILA also object to the attempt to strip judicial review over the BIA's compliance with these regulations for the same reasons stated in the context of AWO decisions.

this process; even were this not the case, policy reasons demonstrate that it is unwise for EOIR to consider limiting federal court oversight of its use of the AWO procedure.

A majority of the courts of appeals that have ruled on the issue hold that they retain some review over the BIA's use of the AWO procedure. See *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2004) (finding "law to apply" in the AWO procedure and thus jurisdiction); *Smriko v. Ashcroft*, 387 F.3d 279, 290-297 (3d Cir. 2004) (same); *Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (same); *Zhu v. Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004) (remanding AWO decision where court cannot discern its own jurisdiction because of the use of the procedure); *Lopez v. Gonzales*, 407 F.3d 492, 496 (7th Cir. 2005) (same). In contrast, only two courts of appeals generally hold that there is no review over the use of the AWO procedure. See *Ngure v. Ashcroft*, 367 F.3d 975, 981-88 (8th Cir. 2004);² *Tsegay v. Ashcroft*, 386 F.3d 1347, 1355-58 (10th Cir. 2004).

The four remaining courts of appeals have yet to fully address the issue. However, none have hesitated to remand an AWO case to the BIA with instructions when necessary. See, e.g., *Kamboli v. Gonzales*, 449 F.3d 454, 463 n. 14 (2d Cir. 2006) (explaining court could remand to BIA "for a written panel decision in those rare instances in which a formal agency statement construing either the INA or prior BIA decisions is needed"); *Mengheshha v. Gonzales*, 450 F.3d 142, 147 (4th Cir. 2006) (remanding an AWO case for the BIA to apply the correct legal standard in the first instance); *Chen v. Gonzales*, 447 F.3d 468 (6th Cir. 2006) (reversing and remanding AWO case with instructions to the BIA); *Antipova v. U.S. Attorney General*, 392 F.3d 1259 (11th Cir. 2004) (remanding with instructions as to findings BIA must make regarding past and future persecution).

Through this proposed regulation, EOIR now attempts to adopt the minority position of the courts and completely bar judicial review over the use of the AWO procedure. The proposed regulation purports to do this by making use of an AWO decision discretionary and by stating that the AWO regulation is "intended to reflect an internal agency directive for the purpose of efficient management and disposition of cases [] and do[es] not and shall not be interpreted to, create any substantive or procedural rights ..." 73 Fed. Reg. 34654, 34663 (creating new 8 CFR § 1003(e)(9)). For all of the following reasons, AILF and AILA object to this attempt to strip the courts of jurisdiction as both misguided and unlawful.

EOIR has no authority to restrict the jurisdiction of the court of appeals. Congress – not an administrative agency – determines a federal court's jurisdiction, and the courts interpret the extent of this jurisdiction. In the INA, Congress has "vest[ed] the courts of appeals with jurisdiction over 'all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States.'" *Afanwi v. Mukasey*, 526 F.3d 788, 796 (4th Cir. 2008) (citing 8 USC § 1252(b)(9) (emphasis added)). Review of compliance with mandatory AWO regulatory criteria is a question of law arising from a proceeding brought to remove a person from the United States. EOIR's attempt to shield the process from review by labeling it "discretionary" misunderstands the statutory review provisions and ignores binding case law.

² Even *Ngure* left open the issue of whether the court could review an AWO where the BIA failed to consider new and material evidence. 367 F.3d at 988.

Additionally, the Administrative Procedures Act (APA) embodies “a basic presumption of judicial review.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). There are two exceptions to applicability of judicial review: (1) where a statute otherwise bars review and (2) where the decision is committed to agency discretion by law. Neither of the two exceptions applies to review of AWO decisions, and thus such review specifically falls within the jurisdiction delegated the courts by Congress.

The first exception requires a statutory bar to review, and none exists here. 5 USC § 701(a)(1). The fact that a BIA member now has discretion *not* to use the formerly-mandatory AWO procedure does not render *use* of that procedure subject to the bar on review in 8 USC § 1252(a)(2)(B)(ii).

First, the use an AWO decision is not a decision or action “specified” in the relevant provisions of the INA and thus is not covered by the bar. *See, e.g., Zhao v. Gonzales*, 404 F.3d 295 (5th Cir. 2005) (narrowly construing provision consistent with its plain language).

Second, the still-mandatory regulatory prerequisites for use of the AWO procedure would remain reviewable, even if the ultimate exercise of discretion was not. *See, e.g., Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006) (court has jurisdiction to review statutory eligibility for § 212(a)(1)(H) waiver even if no jurisdiction over ultimate exercise of discretion). While under the proposed regulations a BIA member may have discretion to choose not to issue an AWO opinion in a case that otherwise meets the criteria, s/he still has no discretion to issue an AWO decision in a case that does *not* meet the criteria. As before, these regulatory prerequisites for AWO decisions remain mandatory.

Finally, compliance with the regulatory requirements in the use of an AWO is a question of law that can be reviewed under 8 USC § 1252(d), notwithstanding the applicability of § 1252(a)(2)(B)(ii).

The second APA exception also does not apply. Use of the AWO procedure is not committed to agency discretion by law. 5 USC § 701(a)(2). This exception to APA review only applies in “rare” circumstances “where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (*quoting Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Courts have already determined that the AWO regulation – which is specific in its standards – is not so drawn. *See, e.g., Haoud*, 350 F.3d at 206 (rejecting argument that review is barred under *Heckler v. Chaney*); *Smriko*, 387 F.3d at 292 (same); *Chen v. Ashcroft*, 378 F.3d 1081, 1087-88 (9th Cir. 2004) (same); *Denko*, 351 F.3d 731 (finding government’s *Heckler v. Chaney* argument “doubtful”). Only in the 8th and the 10th circuits would this exception apply. *Ngure, supra; Tsegay, supra*.

In short, EOIR has no authority to reverse the decisions of the majority of courts that have found jurisdiction and now attempt to strip them of this jurisdiction.

Courts have rejected the claim that the AWO procedure is an internal agency directive for the efficient management of cases. The specifics of the AWO regulations have existed in substantially the same form for over five years. As discussed above, a majority of courts have found that the use of the AWO procedure is reviewable. Moreover, courts have rejected the argument that the AWO regulation operates as an internal agency

directive for caseload control. *See, e.g., Smriko*, 387 F.3d at 292 (Finding that the AWO procedures “‘have nothing to do with the BIA’s caseload or other internal circumstances’”) (quoting *Batalova v. Ashcroft*, 355 F.3d 1246, 1253 (10th Cir. 2004)); *Denko v. INS*, 351 F.3d 717, 732 (6th Cir. 2003) (“[T]he size of the BIA’s caseload – a factor which the Board may be better equipped to assess – has no relevance in deciding which cases are appropriate for summary affirmance. That determination is made using the factors identified in § 1003.1(a)(7)”).

EOIR’s simple restatement of the claim that the AWO procedure is intended as an internal case management tool, does not make it so. Additionally, EOIR cannot adopt a regulation that conflicts with the INA with respect to jurisdiction. Regardless of EOIR’s purpose for the amended regulation, a BIA member’s failure to follow the mandatory regulations is a question of law arising from a removal proceeding, and thus is judicially reviewable pursuant to 8 USC § 1252(b). *See Afwani*, 526 F.3d at 796. (8 USC § 1259(b)(9) vests jurisdiction in courts of appeals over issues arising in removal proceedings).

EOIR’s rationales for imposing jurisdictional restrictions do not withstand scrutiny. EOIR provides two reasons for its attempt to restrict federal court jurisdiction.

First, it argues that the procedure is a “superfluous and unnecessary layer of review about an issue.” 73 Fed. Reg. 34654, 34657. This conclusion contradicts the courts that have found jurisdiction and the case examples in which such jurisdiction was found. As the Third Circuit explained, in many situations, a streamlining decision

will have no material impact on a court’s exercise of its judicial review function. ... Nevertheless, we believe the decision we here make on reviewability is of substantial importance. It is foreseeable that there will be a number of situations *like the one before us* in which an arbitrary and capricious decision to streamline will hold the potential of distorting the judicial review that both the regulation and Congress contemplated.

Smriko, 387 F.3d at 296 (emphasis added). *See also Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (finding review of AWO warranted where the BIA “streamline[s] despite the presence of novel legal questions, a complex factual scenario, and applicability to numerous other aliens”); *Georgis v. Ashcroft*, 328 F. 3d 962, 967 n4 (7th Cir. 2003) (explaining situation in which it seems “preferable” to review use of the AWO procedure rather than the Immigration Judge’s decision on merits).

Additionally, review of the use of the AWO procedure is not superfluous where the BIA fails to consider new and material evidence that was not before the Immigration Judge and could not be considered if just the Immigration Judge’s decision is reviewed. *See Haoud*, 350 F.3d at 207. It is also not superfluous in the “jurisdictional conundrum” cases, those cases in which the court cannot tell whether the BIA affirmed the Immigration Judge’s decision on a reviewable or non-reviewable ground – that is, where a court otherwise cannot tell if it has jurisdiction. *See Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Zhu v. Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004); *Lopez v. Gonzales*, 407 F.3d 492, 496 (7th Cir. 2005); *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

EOIR contends that the “jurisdictional conundrum” issue will be resolved by the BIA’s discretion to *not* issue an AWO under the proposed regulation. 73 Fed. Reg. 34654, 34657.

In fact, however, there is nothing in the regulation to prevent a BIA member from using the AWO procedure if the case meets the regulatory criteria, notwithstanding that it will result in a “jurisdictional conundrum.” While AILF and AILA hope that affording BIA members the option *not* to issue an AWO will limit the use of this procedure, there is no means to predict how individual BIA members will exercise their discretion. Thus, this discretion is not a *solution* for a federal court faced with a jurisdictional conundrum in which an AWO has been issued. Instead, the only solution for these courts is review of the use of the AWO procedure.

Second, EOIR summarily concludes that the courts’ inconsistent jurisdictional rulings “threaten[] the goal” of “secur[ing] finality in immigration cases as efficiently as possible.” 73 Fed. Reg. 34654, 34657. Final and efficient case processing has been EOIR’s goal for the AWO procedure from the outset, *see, e.g.*, 64 Fed. Reg. at 56138; 67 Fed. Reg. at 54885. Despite this, EOIR provides no evidence that judicial review of the use of the AWO procedure over the past five years has interfered with this goal. To the contrary, EOIR now claims that streamlining has been an overwhelming success. *See, e.g.*, 73 Fed. Reg. 34654, 34656. Moreover, EOIR also provides no evidence that courts are reviewing the use of the AWO procedure in cases that otherwise would not be reviewed on the merits. To the contrary, and with the exception of the “jurisdiction conundrum” cases, the courts agree that in the majority of cases, their review of the AWO procedure will collapse into a review of the merits. *See, e.g., Smriko*, 387 F.3d at 296 and n. 11. In short, there is no evidence why or how – after more than five years of a “successful” streamlining program subject to judicial review – the same streamlining program will be threatened by the very same judicial review.³

Policy reasons also counsel against any attempt by EOIR to limit the ability of the courts to review both AWO and other streamlining decisions. In the supplementary information to the proposed regulation, EOIR emphasizes that “fairness” to respondents has not been sacrificed to the twin goals of finality and efficiency in the streamlining process. AILF and AILA disagree; the many criticisms focused on the BIA and Immigration Judges by the federal courts in the past five years demonstrate that the opposite is, in fact, true. Furthermore, federal court oversight of the use of streamlining in individual cases has insured that “fairness” was achieved in those and other cases.

As the supplementary information indicates, federal courts have criticized the BIA for the quality of BIA and Immigration Judge’s decisions in general. 73 Fed. Reg. 34654, 34656 (and cases cited). Federal courts also have criticized the BIA for failing to reprimand intemperate and abusive immigration judges. *Id.* (and cases cited).

Contrary to EOIR’s assertion, such criticisms have been levied by a majority of the courts of appeals.⁴ They have also been levied in a significant number of cases: as one court

³ In fact, by adopting the proposed rule, EOIR will engender additional litigation as non-citizens will have to return to courts to relitigate the court’s jurisdiction over the use of the AWO procedure, even in those jurisdictions where the issue has been settled.

⁴ *See, e.g., El Moraghy v. Ashcroft*, 331 F.3d 195 (1st Cir. 2003); *Huang v. Gonzales*, 453 F.3d 142 (2d Cir. 2006); *Fiadjoe v. U.S. Attorney General*, 411 F.3d 135 (3d Cir. 2005); *Mece v. Gonzales*, 415 F.3d 562 (6th Cir. 2005); *Benslimane v. Gonzales*, 430 F.3d 828

noted, in one year period, “different panels of [the Seventh Circuit] reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent.” *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

The Seventh Circuit also indicated that its criticisms of the Board and Immigration Judges during this one year period often was “severe.” Coupled with this is the fact that the streamlining procedure applied to an individual’s appeal by the BIA can impact the level of review afforded the case. For this reason, one court found that, under existing regulations, three-member panel review “offers important procedural benefits” to individuals involved in immigrations cases. *Purveegiin v. Gonzales*, 448 F.3d 684, 690 (3d Cir. 2006) (finding that agency acknowledged that panel review is necessary in cases with difficult or important questions to insure that adequate attention is given them). Similarly, EOIR indicates with respect to the proposed regulation that three-member panels will enhance review and analysis of complex cases. 73 Fed Reg. 34654, 34659.

In fact, Attorney General Gonzales’ entire “comprehensive review” of the streamlining process – which in turn directly led to this proposed regulation, 73 Fed. Reg. 34654, 34655 – was in response to federal court oversight of streamlining in general and AWO decisions in particular. AILF and AILA believe that EOIR’s goals of reining in intemperate Immigration Judges and ensuring fairness in the streamlining process can only be achieved with continued federal court oversight.

3. Three Member Panel Decisions

AILF and AILA applaud EOIR for expanding the categories of cases which may be assigned for review by a three-member panel of the Board to include those involving the need to resolve a complex, novel or unusual issues of law or fact. 73 Fed. Reg. 34663 (adding new subsection (vii) to 8 CFR § 1003.1(e)(6)). We wholeheartedly agree that three-member panel review “enhance[s] the review and analysis” of a case over that provided by a single member. 73 Fed. Reg. 34654, 34659.

The single-member review regulations, like the streamlining regulations, allow the Board of Immigration Appeals to expedite disposition of cases that do not present substantial questions of fact or law. But these provisions are not to be used as a wholesale substitute for panel deliberation and decision. Resolution of disputed factual and legal issues through summary order deprives litigants of thorough consideration of their claims, deprives the Board of the opportunity to develop its own precedent, and deprives the courts of an adequate basis on which to assess the agency's compliance with statutory mandates.

Purveegiin v. Gonzales, 448 F.3d at 693.

Federal courts have criticized the Board for decisions in which individual Board members failed to provide the full review and analysis required in a case. In some situations, the

(7th Cir. 2005); *Naing Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007); *Lopez-Umanzar v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005).

Board members' inadequate review has resulted in complex or novel cases being subjected to AWO decisions – despite the fact that such cases, by definition, do not satisfy the regulatory prerequisites for an AWO. For example, after the Third Circuit remanded *Smriko* because it had been erroneously subject to an AWO decision, the BIA issued a precedent decision, further evidencing the erroneous use of an AWO decision in the first instance. *Matter of Smriko*, 23 I &N Dec. 836 (BIA 2005); see also *Chen*, 378 F.3d at 1088 (finding use of AWO erroneous because case involved a novel legal issue); *Rodriguez-Echevarria v. Mukasey*, ___ F.3d ___, 2008 U.S. App. LEXIS 15930 (9th Cir. July 25, 2008) (suggesting AWO inappropriate because precedent needed and issues substantial).

In other cases, courts have also been critical of single-member Board decisions that failed to adequately address an issue that should, instead, have been referred to a three-member panel. For example, in *Purveegiin v. Gonzales*, 448 F.3d 684 (3d Cir. 2006) the court found that the single-member misapplied the regulation by not referring case to a three-member panel.

Thus, AILF and AILA support this measure, designed to “improve[e] [the Board’s] review of complex or problematic cases.” 73 Fed. Reg. 34654, 34659.⁵

4. Scope of Board’s Disposition on Appeal

AILF and AILA also strongly object to the provision in the proposed regulation which attempts to regulate, for purposes of federal court review, exhaustion of administrative remedies. This proposed regulation purports to “obligate” a non-citizen to raise an issue or claim of error in a “meaningful” manner to the BIA in order for such issues or claims to be exhausted for federal court review, no matter whether the BIA’s subsequent opinion is by AWO, single member or panel decision. Proposed 8 CFR § 1003.1(e)(4)(3); see also 73 Fed. Reg. 34654, 34658. EOIR is without authority to regulate what satisfies either jurisdictional or prudential exhaustion requirements for federal court review. Moreover, the proposed regulation is based on a misunderstanding of the current law of exhaustion and conflicts with existing federal court precedent from a number of jurisdictions.

EOIR has no authority to determine the jurisdiction of the courts of appeals. Only Congress can set the limits on federal court jurisdiction. See, e.g., *Khadr v. U.S.*, 529 F.3d 1112, 1117 (D.C. Cir. 2008). “[O]nce Congress determine[s] the limits of th[e] [c]ourt’s jurisdiction [by statute], no rule, regulation, or notice” by the government can change those limits. *Id.*

Following delegation of jurisdiction by Congress, it is the job of the courts – and the courts alone – to determine the existence of jurisdiction in an individual case. This includes whether review is precluded because a non-citizen has failed to exhaust administrative

⁵ It is unclear, however, how a non-precedent three member panel decision can provide more “authoritative guidance,” 73 Fed. Reg. 34654, 34659, than a single-member decision, since all non-precedent decisions are equally binding on the parties involved but no one else. Furthermore, to the extent EOIR is suggesting that three-member decisions can help provide guidance for future cases, it is unclear how this is so given that EOIR does not make unpublished decisions readily accessible to the general public.

remedies. EOIR has overstepped its authority by regulating what it “deems” issues considered exhausted for purposes of federal court review. *See* 73 Fed. Reg. 34658.

Courts recently have held that issue exhaustion in immigration cases is not jurisdictional. In *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 405, 163 L. Ed. 2d 14 (2005) (per curiam), the Supreme Court cautioned against lower courts confusing mandatory prerequisites for review with jurisdictional requirements. Following this advice, courts of appeals have held since then that “issue exhaustion” in immigration cases is not jurisdictional. *See, e.g., Zhong v. U.S. DOJ*, 480 F.3d 104 (2d Cir. 2005); *Korsunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006). These courts have held that all that is required under 8 USC § 1252(d)(1) – as a jurisdictional requirement – is that a decision have been rendered by the Immigration Judge on the application in question, and appealed to the BIA. *See, e.g., Zhong*, 480 F.3d at 118. In *Zhong*, the court further held that “the failure to exhaust specific issues before the BIA is no more than an affirmative defense, subject to waiver.” *Zhong*, 480 F.3d at 124.

The proposed regulation – which deals entirely with “issue exhaustion” – is premised on an out-of-date assumption that issue exhaustion is jurisdictional. All of the cases relied upon as support for this assumption pre-date *Eberhart* by many years, *see* 73 Fed. Reg. 34654, 34658, and thus do not address the most recent Supreme Court guidance with respect to jurisdiction. Because issue exhaustion is non-jurisdictional, as determined by some courts, it is subject to waiver and other prudential and equitable defenses. Even as a prudential matter, however, it is the province of the federal courts – and not the BIA – to rule on such issues.

Once an issue has been addressed on the merits by the BIA, it has been exhausted. In the supplemental information addressing the issue of exhaustion, EOIR complains of two cases which hold that when the BIA issues an AWO or other decision adopting the decision of an Immigration Judge, exhaustion is not an issue for the courts if the BIA does not specifically state that it is declining to consider arguments not raised on appeal. 73 Fed. Reg. 34654, 34658 (citing *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) and *Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005)). As EOIR recognizes in the supplemental information, the rationale behind these decisions is that the BIA has adopted the decision of the Immigration Judge which addresses all issues in its opinion. Based upon this, “the relevant policy concerns underlying the exhaustion requirement – that an administrative agency should have a full opportunity to resolve a controversy or correct its own errors before judicial intervention,” were found to have been satisfied. *Abebe v. Gonzales*, 432 F.3d at 1041.

Thus, neither *Abebe* nor *Pasha* is remarkable. Both stand for the proposition that when the BIA has addressed a claim on the merits, it is considered exhausted for federal court review. *See Vizcarra-Ayala v. Mukasy*, 514 F.3d 870, 874 (9th Cir. 2008) (explaining the holding in *Abebe*). Other courts have reached this same unremarkable result. *See, e.g., Sidabutar v. Gonzales*, 503 F.3d 1116, 1120 (10th Cir. 2007) (“If the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all § 1252(d)(1) requires to confer our jurisdiction”).

EOIR fears that *Abebe* and *Pasha* will “usurp the agency’s role and function by setting aside an agency decision on grounds that were not raised to and disposed of by the agency” and also will allow noncitizens “to circumvent the appellate process.” 73 Fed. Reg. 34654, 34658. Neither fear is justified. The very nature of the existing AWO process – as specifically designed and implemented by the Attorney General and EOIR – is to free the individual BIA member from having to articulate a rationale for a decision when he or she determines that the Immigration Judge’s decision is correct, that any errors are harmless, and that a written BIA decision is not called for under the other criteria of the regulation. This judgment by the BIA member assures that the Immigration Judge’s decision is correct; otherwise it could not be affirmed. The compromise for such a time-saving procedure, is that the BIA member allows the Immigration Judge’s reasoning to stand as the agency reasoning for the decision. Thus, it is this reasoning that is reviewed by the federal courts. Sensibly, then, if the Immigration Judge addressed an issue, that issue will have been exhausted – regardless of whether raised on appeal. In the parallel context, where the BIA addresses an issue sua sponte, most federal courts view this issue as having been exhausted. *Sidabutar v. Gonzales*, 503 F.3d 1116, 1119-22 (10th Cir. 2007).

The proposed regulation demands more from a non-citizen than do the federal courts. The proposed regulation indicates that the nature of a BIA decision (i.e., AWO, single member summary affirmance, etc.) does not waive a non-citizen’s obligation to raise an issue or claim of error in a “meaningful” manner. The proposed regulation does not define “meaningful” manner and nowhere else is it defined. However, the term “meaningful” creates a higher standard for exhaustion than that set by the federal courts. *See also* 73 Fed. Reg. 34654, 34658 (“Further it is not enough for a party to raise an issue on appeal in passing. Rather, the party must spell out, in a meaningful manner, its arguments and claims of error.”) The federal courts require minimal notice of an issue to the Board. *See, e.g., Bhiski v. Ashcroft*, 373 F.3d 363, 367-68 (3d Cir. 2004) (requiring only that “an immigration petitioner makes some effort, however, insufficient, to place the Board on notice of a straightforward issue being raised in an appeal”); *Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) (“Petitioner’s failure to elaborate on the argument in his brief to the BIA is immaterial to our jurisdiction”); *Zhang v. INS*, 388 F.3d 713 (9th Cir. 2004) (specific legal ground for the challenge need not be mentioned in the appeal).

Thus, even if EOIR had the authority to regulate the jurisdiction of the federal courts – which it does not – this regulation on exhaustion would be impermissibly demanding.

5. Precedent decisions by three-member panels

As the supplemental information notes, precedent decisions can serve the purpose of providing guidance to Immigration Judges, promoting national uniformity, and resolving inconsistencies and conflicts in the interpretation of immigration law. While streamlining initially was criticized for the fact that it would interfere with the publication of an “adequate” number of precedent decisions, the BIA had resolved that problem by 2006. 73 Fed. Reg. 34654, 34659. Despite this, and while never defining “adequate,” EOIR proposes to increase precedent decisions by authorizing three-member panels of the BIA to issue these decisions and by identifying certain criteria that BIA panels “may” take into consideration when determining whether to publish a decision. 73 Fed. Reg. 34654, 34661-62; *see also* proposed 8 CFR § 1003.1(g).

AILF and AILA are very concerned about the proposal to allow a majority of a three-member panel of the BIA – that is, two permanent members of the Board – to issue precedent decisions. AILF and AILA object to this proposal as unnecessary; ripe for possible misuse; and lacking in adequate oversight and guarantees of uniformity.

As the supplemental information to the proposed rule acknowledges, precedent decisions are binding across the country and thus have the power to impact tens if not hundreds of thousands of non-citizens each year. These precedent decisions, unless revoked or overturned, must be followed by both Immigration Judges and DHS personnel with respect to interpretations of immigration law. The impact of a BIA precedential decision is enormous – potentially much larger in fact, than a decision of any single court of appeals.

Considering what is at stake with respect to these decisions, AILF and AILA believe that it is a grave mistake to radically change the procedure for issuing precedent decisions and allow two permanent members of the BIA to issue a precedent decision without first obtaining a majority vote of permanent Board members, as is currently required.

The current system insures that there is Board support for issuing a particular decision as precedent. The proposed alternative would eliminate this safeguard, and instead allow only for discretionary *notice* to other members of the Board. There is nothing in the supplemental information to indicate that the existing system is burdensome or unworkable, or to show that the new system will actually result in an increased number of precedent decisions. For the following additional reasons, AILF and AILA object to proposed regulation 8 CFR § 1003.1(g):

Three-member panel precedential authority is unnecessary because the BIA currently is issuing an “adequate” number of precedent decisions. The supplemental information states that the streamlining regulations were criticized because they “made it more difficult for the Board to publish adequate numbers of precedential decisions.” 73 Fed. Reg. 34654, 34659. As noted, while this may have been true at the outset of the implementation of the 2002 streamlining regulations, it is no longer true.

In FY 2006, the BIA issued 25 decisions, the most since FY 2000. In FY 2007, the BIA increased this to 40 precedent decisions; there is every indication that a similar number will be achieved in FY 2008.⁶ In the past 25 years, there was only one other year in which the BIA issued as many as 40 precedent decisions, 1996. See Volumes 19-24, I&N Dec., http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html. Instead, during most of those years, the rate was well below this level.

In short, the BIA currently is exceeding its record for precedent decisions. There is nothing to indicate that this is an “inadequate” number or that there is an unfilled need for a greater number of such decisions at this point, such that the radical shift in Board procedure proposed here is required. Instead, the BIA has addressed and remedied the criticism that too few precedent decisions were issued when the streamlining regulations were first adopted.

⁶ In the first ten months of FY 2008, the BIA issued 33 precedent decisions. See <http://www.usdoj.gov/eoir/vll/intdec/nfvol24.htm>.

Three-member precedential authority is unnecessary because the federal courts demonstrate appropriate deference to the BIA. The supplemental information justifies the need for three-member precedent decisions in large part by complaining that federal courts are usurping the BIA's role as the body to initially interpret ambiguous immigration statutes and regulations. 73 Fed. Reg. 34654, 34659. The *only* example provided of this in the supplemental information, however, is one in which a court interpreted an *unambiguous* regulation. *Id.* n. 4 (citing *Maharaj v. Gonzalez*, 450 F.3d 961, 971-76 (9th Cir. 2006)). It is well-settled that deference must be given to an agency's interpretation of its own regulations only when the regulation is ambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's [interpretation of an unambiguous regulation] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"); see also *Restrepo v. McElroy*, 369 F.3d 627, 638 n.19 (2d Cir. 2004).

Beyond this, EOIR provides case examples in which the courts have exercised deference and remanded cases to provide the BIA the first shot at interpreting an ambiguous provision. See 73 Fed.Reg. 34654, 34659-660 (and cases cited).⁷ In these cases, the system worked exactly as EOIR contends that it should, with the result that the BIA not only had the initial opportunity to interpret ambiguous statutory language, but seized this opportunity and issued precedent decisions. See *Id.* (cases cited at n.5).

EOIR's argument for three-member panel precedential authority also is not strengthened by *National Cable and Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). EOIR claims that this decision "offers an important opportunity to reclaim *Chevron* deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations." 73 Fed. Reg. 34661. No evidence has been provided that *Chevron* deference has been taken from the BIA by the federal courts; consequently there is no need to "reclaim" it. As the cases cited by EOIR itself demonstrate, federal courts generally exercise appropriate deference with respect to the interpretation of ambiguous provisions. Moreover, the one *Brand X* related example cited, *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), remains pending before the Ninth Circuit on a petition for rehearing in which the court ordered the government to file a response. Until this petition is ruled on by the court, both the *Brand X* issue and the underlying merits of the case will not be finally resolved in that case.

6. Presumption Of Full Review

Although some federal courts have recognized that a presumption of full review exists in the context of AWO decisions, AILF and AILA object to the agency's promulgating such an across-the-board presumption by regulation. The proposed rule would create such a presumption:

⁷ In fact, in one of the cases cited, the Second Circuit remanded a case so that the BIA could interpret a statutory provision in the first instance. Following the BIA's precedent decision, the court determined that the BIA had erred in failing to consider unambiguous language of the provision. *Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (en banc). Because the language was unambiguous, there had been no need for the original remand as no deference was owed the BIA's interpretation.

A decision by the Board under this paragraph (e)(4) or under paragraphs (e)(5) or (e)(6) of this section carries the presumption that the Board properly and thoroughly considered all issues, arguments, claims and record evidence raised or presented by the parties, **whether or not specifically mentioned in the decision.** (emphasis added).

Proposed regulation 1003.1(e)(4)(B)(iii).

AILF and AILA are extremely concerned with insuring that all issues raised on appeal are actually “properly” and “thoroughly” considered. In particular, in non-AWO cases, AILF and AILA are greatly concerned that all appellants receive ample notice of the basis for the BIA’s decision. The extremely broad presumption language that is proposed allows consideration of issues, arguments, claims and evidence “whether or not specifically mentioned” in the Immigration Judge’s decision. This proposal flies in the face of court decisions that have reversed the BIA because it failed to consider all issues raised “properly” and “thoroughly.”

Under the current regulations, an AWO decision indicates that the reviewer agrees with the ultimate decision reached by the Immigration Judge and deems any error made by the Immigration Judge to be harmless or nonmaterial. 8 CFR 1003.1(e)(4)(i) makes clear that such abbreviated review is reserved for cases in which the Immigration Judge’s ultimate decision was correct and that whatever else transpired in the proceeding before the Immigration Judge did not affect the ultimate decision. If an appellant challenges the AWO decision, the federal court will review the Immigration Judge’s decision, which either will contain sufficient specificity in support of the Immigration Judge’s conclusion or will lack such specificity, requiring a remand to the agency.

In contrast, if the proposed presumption survives the notice and comment process, a presumption of full review will be extended to single member and three member decisions under §§ (e)(5) and (e)(6). Unlike AWO decisions, single and three member decisions **do** discuss the bases for the BIA’s appellate decision. A party who receives a single or three member decision is entitled to know precisely what led to and underlies the BIA’s ruling on appeal, and to conclude that the BIA has disclosed its reasoning. The BIA’s explanation for the agency’s ruling in these appeals is the decision reviewed by the courts. The BIA cannot simply opt to provide some reasons for its ruling and exclude others, while benefiting from a presumption that it reviewed all there was to review.

Importing a presumption into such individual decisions will make it impossible for the federal courts to determine whether a decision by the BIA follows the proper standards. Multiple courts have found it necessary to look at the underlying decision to ensure that the BIA followed the proper standards. See *Henry v. INS*, 74 F.3d 1 (1st Cir. 1996) (Abuse of discretion to fail to consider a significant factor that bears on the discretionary decision); *Melnitsenko v. Mukasey*, 517 F.3d 42 (2nd Cir. 2008) (same); *Stankovic v. INS*, 94 F.3d 1117 (7th Cir. 1996) (Agency must make a careful and individualized determination of each case); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (Superficially mentioning factors in a decision constitutes a failure to consider all factors, which is an abuse of discretion). Adopting the proposed presumption would hinder courts from assessing whether the BIA is following the proper standards.

The proposed presumption impedes the operation of these rulings and the adjudicatory standards they represent. If all the issues, arguments, claims and record evidence raised by the parties are presumed to have been considered “properly and thoroughly,” but need not all be discussed, an appellant will not receive notice of the actual basis for the BIA’s decision. In fact, the proposed presumption turns the agency’s affirmative obligation to provide a reasoned decision into a “given” in every case.

Under these circumstances, it would be difficult for a petitioner to rebut the presumption or to show that the required consideration did not occur or which aspects of the argument or evidence were not properly and thoroughly considered. Plainly, a petitioner could not rebut the proposed presumption without access to information about the adjudication, information that ordinarily is contained in the reasoning of the decision.

For its part, a reviewing court would have no way of determining whether the adjudication was, in fact, performed by the BIA according to its own regulatory standard. Inasmuch as the proposed presumption provides that the BIA need not mention or discuss the relevant factors raised by the parties, but will be deemed to have properly considered them, the proposed presumption effectively supersedes both the procedural requirement that the agency provide a reasoned decision and the due process requirement entitling a litigant to a fair adjudication.

7. Discretionary Rulings On Issues Not Presented On Appeal

The proposed regulation also is flawed in that proposed 8 CFR §1003 (e)(4)(B)(iii) would permit the Board to include in its decision a ruling on “any issue not raised by the parties.” 73 Fed. Reg. 34654, 34663. This would have the net effect of allowing the BIA to address issues not raised by the parties on appeal at its complete and unreviewable discretion. As written, the proposed regulation appears to empower the BIA to provide the reasoning missing from an Immigration judge’s opinion so long as the issue was somehow presented before the Immigration Judge. That would, of necessity, constitute impermissible fact-finding in many, if not most cases. Moreover, such an approach to adjudication unquestionably deprives the parties of proper notice and a fair opportunity to be heard on appeal. In the context of a rule proposing to limit review where a petitioner failed to raise an issue to the BIA, expanding the BIA’s opportunity to focus on issues not presented by the parties is irrational and unfair.

The supplemental information suggests that this provision was partly motivated by vague and incomplete Immigration Judges’ decisions that did not allow the BIA to determine the basis of the Immigration Judge’s decision or to resolve an issue on appeal. While AILF and AILA appreciate that concerns for effective use of resources and the timely and efficient administration of justice might underlie the regulation in an effort to reduce remands to the Immigration Judges, the proposed rule will do little to serve those objectives. Rather, it will simply shift cases directly to the federal courts. These courts are likely to issue remands given that the proposed regulations run counter to both the BIA’s own regulations and many federal court decisions. This will place the case ultimately where it would have been without the proposed rule – back with the Immigration Judge.

Considering issues not raised by either of the parties on appeal would necessarily require the BIA – in many if not all cases – to engage in fact finding in contravention of 8 CFR §

1003.1(d)(3)(i) and (iv) even if that fact finding is merely a de facto by-product of the freedom provided by the regulation. It would also abridge or even eliminate other concomitant procedural protections.

While the BIA has the power to review questions of law *de novo*, the BIA's review power is strictly circumscribed as far as determinations of fact are concerned. See 8 CFR § 1003.1(d)(3)(i) (prohibiting BIA from engaging in *de novo* review of Immigration Judge's findings of fact); 8 CFR § 1003.1(d)(3)(iv) (prohibiting BIA from engaging in fact finding, except for administrative notice of commonly known facts). The current regulation – which is not being repealed by the proposed regulation – is quite reasonable because the BIA does not have the power to take testimony, gauge the credibility of witnesses, or otherwise test the veracity and probativeness of a particular fact.

The BIA previously had the power to engage in *de novo* review of factual findings; however, the Board's practice in that regard was regularly questioned by the federal courts, and ultimately led to the adoption of 8 CFR § 1003.1(d) in September 2002. The BIA has since refused to engage in fact finding. See *e.g. Matter of Kelly*, 24 I&N Dec. 446 (BIA 2008), *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). Moreover, attempts by the BIA to liberally construe permissible findings of “commonly known facts” have been reversed by the courts. See *e.g. Argaw v. Ashcroft*, 395 F.3d 521 (4th Cir. 2005).

EOIR might conclude that fact finding in this context would be a rare thing, but AILF and AILA respectfully disagree. A judge's reasoning is dependent upon the facts, and the presence or absence of a fact will ordinarily be determinative of the legal ruling unless the facts are not in dispute. While there are BIA cases where facts are not in dispute, there are just as many (if not more) where the facts are disputed and considering an issue not raised by the parties likely will require the BIA to resolve one or more of these disputes. It is hard not to sympathize with the BIA's task in reviewing a decision that is so deficient the federal court describes it as “literally incomprehensible.” *Recinos-De Leon v. Gonzalez*, 400 F.2d 11185 (9th Cir. 2005). However, sympathy for that task does make it tenable for the BIA to make the incomprehensible clear based on its own unfettered review of what it thinks transpired before the Immigration Judge.

Additionally, the proposed regulation would violate the BIA's obligation to allow the alien to rebut its findings and be given an opportunity to be heard on issues not raised on appeal but nevertheless addressed by the BIA. See *e.g. Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992), *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000).

In *Ramirez-Alejandro v. Ashcroft*, 320 F.3d 858 (9th Cir. 2003)(*en banc*), the Ninth Circuit found a denial of due process because the BIA lacked procedures for dealing with additional evidence not found in the record below. Here, the proposed regulation does not establish procedures to allow the parties – whose rights will be directly affected – to challenge or otherwise address findings that go beyond issues raised on appeal. In fact, these findings will not even become apparent until the BIA issues its ruling.

Assuming that the proposed regulation related to matters not raised by the parties *does* become a final part of the regulation, AILF and AILA ask that the regulation be amended to include a procedure to allow the parties to brief any issues that the BIA believes were not raised by the parties but could be dispositive of the case. See *e.g. Campos-Sanchez v. INS*,

164 F.3d 448, 450 (9th Cir.1999) (holding that due process requires BIA to give applicant opportunity to explain inconsistencies where issue first raised by BIA).

For similar reasons, a majority of the courts have held that when the BIA *sua sponte* addresses an otherwise unexhausted issue, failure to raise the issue on administrative appeal may be excused. See *Sidabutar v. Gonzales*, 503 F.3d 1116, 1119-22 (10th Cir.2007); *Ye v. Dep't of Homeland Security*, 446 F.3d 289, 296-97 (2d Cir.2006); *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir.2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 (9th Cir.2001); but see *Amaya-Artunduaga v. Attorney General*, 463 F.3d 1247, 1250-51 (11th Cir.2006) (holding that the court lacks jurisdiction to review an otherwise unexhausted claim that the BIA addresses *sua sponte*).

Given the historical due process problems inherent in the BIA's past efforts at fact finding and the successful implementation of 8 CFR §1003.1(d) to correct those deficiencies, it is not appropriate to allow *de facto* fact finding or expansion of issues on appeal *sua sponte* without any sort of procedural safeguards.

Sincerely,

AMERICAN IMMIGRATION LAW FOUNDATION

AMERICAN IMMIGRATION LAWYERS ASSOCIATION