

whether persons on the list are subject to this subpart.

**§ 1219.65 List of producers.**

The administrative staff of the Board shall periodically review the list of producers of Hass avocados to determine whether the persons on the list of subject to this subpart. On the request of the Secretary or the Board, the Association shall provide to the Secretary or the administrative staff of the Board the list of producers of Hass avocados.

**Miscellaneous**

**§ 1219.70 Right of the Secretary.**

All fiscal matters, programs, plans, and projects, contracts, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

**§ 1219.71 Suspension or termination.**

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof if the Secretary finds that the part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if the Secretary determines that this part or subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Order or the Act.

(b) The Secretary shall suspend or terminate this subpart at the end of the marketing year whenever the Secretary determines that its suspension or termination is approved or favored by a majority of the producers and importers voting who, during a representative period determined by the Secretary, have been engaged in the production or importation of Hass avocados.

(c) If, as a result of a referendum, the Secretary determines that this subpart is not approved, the Secretary shall:

(1) Suspend or terminate, as appropriate, the collection of assessments not later than 180 days after making such determination; and

(2) Suspend or terminate, as appropriate, all activities under this subpart in an orderly manner as soon as practicable.

**§ 1219.72 Proceedings after termination.**

(a) Upon the termination of this subpart, the Board shall recommend to the Secretary not more than five of its members to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property owned, in possession of or under control of the Board, including claims for any funds

unpaid or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contracts or agreements entered into by it pursuant to the Order;

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such person or persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary and appropriate to vest in such persons title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to the Order.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to the Order shall be subject to the same obligations imposed upon the Board and the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be returned to the persons who contributed such funds, or paid assessments, or, if not practicable, shall be turned over to the Secretary to be distributed to authorized Hass avocado producer and importer organizations in the interest of continuing Hass avocado promotion, research, and information programs.

**§ 1219.73 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or any regulation issued thereunder, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any such rule or regulation issued thereunder; or

(b) Release or extinguish any violation of this subpart or of any rule or regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any person, with respect to any such violation.

**§ 1219.74 Personal liability.**

No member, alternate member, employee, or agent of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other

acts, either of Association or omission, as such member, alternate, employee, or agent, except for acts of dishonesty or willful misconduct.

**§ 1219.75 Separability.**

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of this subpart, or the applicability thereof to other persons or circumstances shall not be affected thereby.

**§ 1219.76 Amendments.**

Amendments to this subpart may be proposed, from time to time, by the Board or by any interested persons affected by the provisions of the Act, including the Secretary. Except for changes in the assessment rate, the provisions of the Act applicable to the Order are applicable to any amendment of the Order.

**§ 1219.77 OMB control number.**

The control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581-0197.

Dated: February 12, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 02-3797 Filed 2-13-02; 2:00 pm]

BILLING CODE 3410-02-P

**DEPARTMENT OF JUSTICE**

**8 CFR Parts 3 and 280**

[AG Order No. 2559-2002]

RIN 1125-AA36; EOIR 131P

**Board of Immigration Appeals:  
Procedural Reforms To Improve Case  
Management**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule will revise the structure and procedures of the Board of Immigration Appeals, provide for an enhanced case management procedure, and expand the number of cases referred to a single Board member for disposition. These procedures are intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those

cases presenting significant issues for resolution by a three-member panel. After a transition period to implement the new procedures in order to reduce the Board's backlog of pending cases, the size of the Board will be reduced to eleven.

**DATES:** Written comments must be submitted on or before March 21, 2002.

**ADDRESSES:** Please submit written comments to Charles K. Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305-0470.

**FOR FURTHER INFORMATION CONTACT:** Charles K. Adkins-Blanch, (703) 305-0470.

**SUPPLEMENTARY INFORMATION:** This proposed rule will reform the structure and procedures of the Board of Immigration Appeals. Under the new case management procedures, all cases appealed to the Board will be examined by a Board member assigned to the screening panel. Most cases will be resolved through summary decisions issued by a single Board member. The assigned Board member on the screening panel will also identify those cases that warrant review by a three-member panel. The Board will no longer revisit factual determinations of immigration judges on a de novo basis, but will be able to remand cases for further factfinding where necessary. In addition, the rule will set specific time limits for the disposition of cases. The Board's current jurisdiction over appeals from decisions by the Immigration and Naturalization Service (INS) imposing various kinds of administrative fines (see 8 CFR 280) will be transferred to the Office of the Chief Administrative Hearing Officer (OCAHO). After a transition period of operation under the new procedures to eliminate the current backlog of cases, the Board will be reduced in size to eleven members from its present size of 19 members plus four vacancies.

### Background

In 1983, the Attorney General created the Executive Office for Immigration Review (EOIR). This reorganization consolidated the Department's immigration review programs by placing the immigration judges (formerly known as special inquiry officers within INS) and the Board of Immigration Appeals into EOIR, a Department component independent from INS. The Board has broad jurisdiction over appeals from decisions of the immigration judges in exclusion, deportation, and removal proceedings, custody appeals, asylum cases, and other specific matters, and it

also has authority to review certain final decisions by INS district directors and other officials. See 8 CFR part 3, subpart A. Decisions by the Board are subject to review by the Attorney General as provided in 8 CFR 3.1(h).

In 1987, the Attorney General also placed in EOIR the Office of the Chief Administrative Hearing Officer (OCAHO), in order to house similar quasi-judicial administrative adjudications within a single Departmental organization. OCAHO currently adjudicates certain civil penalty proceedings under sections 274A, 274B, and 274C of the Immigration and Nationality Act (Act), relating to violations of the employment verification requirements, immigration-related discrimination claims, and civil document fraud cases, respectively. See 28 CFR 68.

### Description of the proposed rule

This reform initiative is intended to accomplish four important objectives in the disposition of immigration case appeals: (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—cases that are most appropriate for searching appellate review.

Under its current structure and procedures, the Board has been unable to adjudicate incoming cases quickly enough to eliminate the unacceptable backlog that has existed for several years. Numerous cases have languished before the Board for more than two years, some for more than five years, frustrating efforts to achieve timely resolution of immigration disputes.

Since 1995, the problem of the mounting backlog of cases has been addressed by incremental increases in the size of the Board. However, in retrospect, it is now clear that the addition of new Board members has not appreciably reduced the backlog of cases. The problem is not one of personnel. Rather, the problem is rooted in the structure and procedures of the Board, which make it nearly impossible for Board members to accomplish their mission. The devotion of the Board's time and resources to cases that present no colorable grounds for appeal has made it extremely difficult to address in a timely manner those cases that most need the Board's review.

The one change in the Board's procedures that has produced positive

results in recent years is the streamlining initiative, which allows for summary decisions by a single Board member in several categories of appeals. See 64 FR 56135 (Oct. 18, 1999). The Board's existing streamlining process is currently codified at 8 CFR 3.1(a)(7), and would be recodified in this proposed rule at § 3.1(e)(4). The streamlining project has successfully expedited such appeals, and the project was recently assessed favorably by an external auditor. The proposed rule builds upon the success of the streamlining model, expanding the single-member resolution of appeals more broadly for appeals that present no difficult or controversial legal questions. The authority of individual Board members to resolve such cases in expedited fashion is a critical component of the two-phase structure of Board consideration of cases, summarized below.

The proposed rule contains amendments to 8 CFR part 3, subpart A, which combine to substantially alter the structure, procedures, and charge of the Board. These changes may be summarized as follows.

Many of the key features of the proposed rule are codified in the new provisions of § 3.1(e), which directs the Chairman to establish a case management system with specific new standards for the efficient and expeditious resolution of all appeals coming before the Board.

Under § 3.1(e)(1), all appeals will be sent initially to a screening panel of the Board, through which individual Board members will decide the majority of cases. The initial determination is whether the case is appropriate for disposition on the merits. The Board's existing regulations at § 3.1(d)(2) already provide for summary dismissal of appeals for lack of jurisdiction or other specified procedural defaults. That authority is retained in this rule and, as discussed below, this rule also restores a pre-existing ground for summary dismissal of appeals that are filed for an improper purpose or that lack an arguable basis in fact or in law. Section 3.1(e)(2) of the proposed rule reflects the authority currently codified in § 3.1(a)(1) for a single Board member to make various procedural dispositions of cases.

The Board's case management system will arrange for prompt completion of the record on appeal, including simultaneous briefing by the parties, as discussed further below. With each such appeal, as provided in § 3.1(e)(3) of the proposed rule, a single Board member assigned to the screening panel will decide every case, unless the Board

member determines that the case is appropriate for review by a three-member panel under the standards of this rule. A single Board member may summarily affirm without opinion under § 3.1(e)(4), which is very similar to the authority under the Board's existing streamlining regulation. However, the current streamlining process is limited to summary affirmances without opinion; under the existing rules any final decision on the merits that may require a written order to explain the Board's reasoning in affirming, reversing, modifying, or remanding a decision under review must be made by a three-member panel, regardless of whether the issues themselves are substantial. Accordingly, § 3.1(e)(5) would expand the existing streamlining authority to authorize a single Board member to issue a brief order affirming, reversing, modifying, or remanding a decision under review in those cases that do not meet the standards warranting review by a three-member panel. The choice between summary affirmation without opinion and the issuance of a brief order explaining the Board's disposition of the case on the merits would be made on a case-by-case basis after review by the individual Board members to which the cases are assigned.

As the proposed rule stipulates in § 3.1(e)(6), five categories of cases will qualify for review by a three-member panel. To qualify, a case must present one of the following: (1) The need to settle inconsistencies between the rulings of different immigration judges; (2) the need to establish a precedent to clarify ambiguous laws, regulations, or procedures; (3) the need to correct a decision by an immigration judge or by the INS that is plainly not in conformity with the law or with applicable precedents; (4) the need to resolve a case or controversy of major national import; or (5) the need to correct a clearly erroneous factual determination by an immigration judge. The efficient disposition by single Board members of cases that do not present such circumstances will allow the three-member panels to focus their attention and resources on those cases that warrant greater appellate scrutiny.

To facilitate the screening process, this rule amends § 3.3(b) to provide that an appellant who asserts that an appeal warrants review by a three-member panel must identify in the Notice of Appeal the specific factual or legal basis for that contention. Since the usual rule under § 3.1(e)(3) is that all appeals will be assigned to a single Board member for review except as provided in § 3.1(e)(6), the decision in each case

whether to assign an appeal to a three-member panel will be made, after consideration of the case, under the standards of this rule according to the judgment of the single Board member on the screening panel to whom the appeal is assigned.

The existing provisions of 8 CFR 3.2(b)(3) already bar a motion for reconsideration based solely on the ground that a case should not have been affirmed without opinion by a single Board member or by a panel. This rule adds an additional sentence to § 3.2(i) (Ruling on motion) to provide that any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening is appropriate for assignment to a three-member panel under the standards of § 3.1(e)(6).

Section 3.1(e)(7) reflects the current authority of the Board to grant or deny requests for oral argument, but it also makes clear that no oral argument will be available in any case assigned to a single Board member for disposition.

In § 3.1(e)(8), as well as §§ 3.3 and 3.5, the proposed rule establishes a series of time limits to expedite the handling of cases by the Board. As proposed in § 3.3(a), a party appealing a decision of an immigration judge or a decision of the Service will have 30 days in which the party may file a notice of appeal. For cases requiring the transcription of the immigration judge's oral opinion, the immigration judge must complete his or her review of the transcript within 14 days after completion, as provided in § 3.5(a), with limited exceptions. After the transcripts are made available to the parties, the parties must simultaneously brief the case within a 21-day period, with reply briefs allowed only by leave of the Board.

After the briefs are submitted, the screening panel of the Board will have 90 days in which a single Board member must either decide the case or designate the case for review by a three-member panel. Once a case is selected for panel review, the panel considering the case must render its decision and opinion within 180 days. In any case, § 3.1(e) directs the Board to assign priority to deciding cases or custody appeals involving detained aliens.

If the Board member who is the author of an opinion for the panel majority is unable to complete the opinion within the 180-day period, § 3.1(e)(8)(ii) of the proposed rule allows the Board member to request an

extension of up to 60 days from the Chairman. In order to prevent the delay of the issuance of Board decisions due to uncompleted dissenting or concurring opinions, the proposed rule also requires any dissenting or concurring member of a panel whose separate opinion is not finished at the conclusion of the 180-day period to request an extension of up to 60 days from the Chairman.

If, at the end of the 60-day period, the opinion of the panel majority is still not completed, the Chairman must either decide the case himself and render an opinion within 14 days or refer the case to the Attorney General for a decision. If a dissenting or concurring panel member fails to complete his opinion by the end of the extension period, the decision of the majority will be rendered without his dissent or concurrence attached.

In rare circumstances, when the outcome of a case before the Board may be substantially affected by pending or anticipated litigation before the United States Supreme Court or a United States Court of Appeals, the Chairman may hold the case or group of cases until such decision is rendered, temporarily suspending the time limits described above, as provided in § 3.1(e)(8)(iii).

The proposed rule at § 3.1(e)(8)(iv) also directs the Chairman to notify the Director of EOIR and the Attorney General if any Board member repeatedly fails to meet the assigned deadlines for the disposition of appeals, and to prepare an annual review concerning the timeliness of dispositions by each Board member. Although EOIR has not conducted annual performance reviews for Board members in the recent past—in general, as a reflection of the decisional independence of the Board as to the substantive disposition of appeals—it is appropriate for EOIR to begin to track the timeliness of dispositions of cases under the new case management procedures that incorporate specific performance measures. As this language suggests, the provisions of paragraph (e)(8) establishing time limits for the adjudication of appeals reflect a management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board nor create any justiciable right or remedy.

The proposed rule also adds a new § 3.1(d)(3) to eliminate the Board's de novo review of factual issues. Under the proposed rule, the Board must accept the factual findings of the immigration judges, disturbing them only if they are "clearly erroneous." This provision also generally prohibits the introduction and

consideration of new evidence in proceedings before the Board, except for taking administrative notice of current events or the contents of official documents such as country condition reports prepared by the Department of State. Where it is established that an appeal cannot be properly resolved without further findings of fact, the Board will remand the proceeding to the immigration judge or, where appropriate, the INS.

By deleting the existing § 3.1(b)(4), the proposed rule eliminates the Board's jurisdiction over appeals of INS decisions imposing various kinds of administrative fines under part 280 and transfers that review authority to the Chief Administrative Hearing Officer. Although the various administrative fine cases administered under part 280 (for example, a \$3,300 fine against an air carrier under section 273 of the Act for transporting to the United States an alien lacking a proper passport or visa) are different than the civil penalty actions currently adjudicated within OCAHO (which are handled by administrative law judges rather than immigration judges), the appellate reviewing role by the Chief Administrative Hearing Officer would nevertheless be much the same since each of the cases involves only the imposition of a specific administrative fine or civil penalty. Accordingly, the proposed rule adds a new provision, 8 CFR 280.61, for review of administrative fines imposed by the Service under part 280. This provision is modeled on the existing provisions for review by the Chief Administrative Hearing Officer of civil money penalties under 28 CFR 68.54, and the Board's existing procedures in § 3.1, 3.3, and 3.5 for the consideration of appeals. Consistent with the time limits for a single Board member to review cases under the proposed rule, the Chief Administrative Hearing Officer will be allowed 90 days to decide the appeal after the completion of the record on appeal. After transfer of appellate jurisdiction from the Board to the Chief Administrative Hearing Officer, the existing precedent decisions issued by the Board in administrative fine cases would continue to be binding except as specifically modified or overruled in new precedent decisions by the Chief Administrative Hearing Officer or by the Attorney General. Decisions of the Chief Administrative Hearing Officer in administrative fine cases under part 280 will be subject to review by the Attorney General under the same procedures as for the Board.

The proposed rule reflects the Attorney General's direction that, once

this rule is adopted in final form, the Board will immediately implement the procedural and structural changes described above with respect to all appeals pending before the Board at the time this rule takes effect. During a transition period of 180 days, the Members of the Board are directed to apply these procedures to render opinions expeditiously and particularly to dispose of the oldest cases, so as to reduce the number of pending cases before the Board by the end of the transition period so that no case remains pending more than ten months after the record on appeal was completed. The Chairman may allocate Board members to the screening panel and to three-member panels as may be deemed appropriate to accomplish this objective.

In amendments to § 3.1(a)(1), the proposed rule stipulates that, after the transition period of 180 days has elapsed, the final structural reform of the Board will occur. The number of Board members will be reduced to eleven, with the Attorney General designating the membership of the Board. The Chairman will continue to have the authority to allocate Board members to a screening panel and to three-member panels as may be deemed appropriate for the efficient adjudication of appeals.

In addition to the foregoing changes, the Department is making other modifications to the Board's rules in relation to two other recent rulemaking actions.

First, as noted above, the rule will restore as a ground for summary dismissal the fact that an appeal that is filed for an improper purpose, such as delay, or that lack an arguable basis in fact or in law. That provision, previously codified at § 3.1(d)(1)–a(i)(D) of the Board's rules, and now to be reinstated as § 3.1(d)(2)(i)(D), had been promulgated in response to the statutory directive, first enacted in the Immigration Act of 1990, requiring the Attorney General to specify the circumstances under which an administrative appeal will be considered frivolous and will be summarily dismissed. See section 240(f) of the Act (8 U.S.C. 1229a(f)); former section 242B(d) of the Act (8 U.S.C. 1252b(d) (as in effect prior to April 1, 1997)). However, at the time the streamlining initiative was adopted in 1999, EOIR deleted this provision from the Board's rules, citing (1) the fact that this summary dismissal authority was "virtually never used by the Board," and (2) a concern that retaining this authority might lead to confusion with the new process for summary affirmance

without opinion. See 64 FR 56135, 56137 (Oct. 18, 1999).

On reflection, the Department believes that this paragraph (D) should be retained, in view of the statutory direction for the Attorney General to define cases that are to be summarily dismissed as frivolous. Summary dismissal of appeals that are determined to be frivolous is distinct from a summary affirmance without opinion. The Board's streamlining process is a very effective and valuable process, but it is not a substitute for dealing with appeals that are filed for an improper purpose or that patently lack any factual or legal basis. Simply affirming "paragraph (D)" appeals on the merits, without making any effort to identify the frivolous nature of particular appeals, would do little or nothing to deter particular attorneys or representatives from filing future appeals for an improper purpose in other cases. This is particularly true if a primary purpose of the appeal was to gain some additional time through delay—because it would have succeeded in that regard. Although the Board would make a determination that an appeal was frivolous only after completion of its review, each such frivolous appeal requires the preparation of transcripts, opportunity for briefing, review by a Board attorney and a Board member, etc. Even if only a small percentage of the 28,000 appeals filed each year with the Board may be found to be "frivolous" within the meaning of paragraph (D), that still amounts to a significant number of cases imposing a substantial aggregate burden on the Board—a burden that the Board should not be expected to bear, given its very large caseload. The Board's screening panel will be expected to implement this process as part of the case management screening of cases.

The EOIR disciplinary rules do specify similar grounds for the imposition of disciplinary sanctions on an attorney or representative. See 8 CFR § 3.102(j)(2001), previously codified at § 292.3(a)(15). This existing sanction has apparently not been actively enforced through the disciplinary process. One likely reason for this is that there is no ready mechanism in place for the Board to identify such frivolous appeals. If the Board begins to identify certain appeals as frivolous under the standards of paragraph (D), then the EOIR disciplinary counsel would be able to develop a factual record of such findings in order to support appropriate disciplinary action against attorneys or

representatives who may be identified as repeat offenders.<sup>1</sup>

Second, the Department notes that former Attorney General Reno had published a proposed rule to clarify and strengthen the management authority of the Director of EOIR, the Chairman of the Board, and the Chief Immigration Judge with respect to the efficient disposition of cases pending before the Board and the immigration judges. *See* 65 FR 81434 (Dec. 26, 2000). Among other things, that earlier proposed rule enumerated specific authorities of the Chairman and defined more clearly the role of the Board and the standards governing its proceedings. That proposed rule has not been finalized and remains pending; its provisions were also organized differently than the present proposal. However, because the present proposed rule in some respects overlaps with or complements the previously published proposal, the present proposed rule incorporates some of the provisions that had previously been proposed (certain provisions in § 3.1(a)(1), (a)(2), (a)(3), and (a)(11) of the December 2000 proposal) into § 3.1(a)(2) and (d)(1) of this rule. As reorganized, the provisions of § 3.1(a) focus principally on organizational and procedural matters, and the powers of the Board are set forth in § 3.1(d).

Finally, the proposed rule adds a sentence in § 3.1(a)(5) to the Board's rule on rehearing en banc, taken from Federal Rule of Appellate Procedure 35(a) with respect to rehearing en banc in the courts of appeals, providing that rehearing en banc is disfavored and shall ordinarily be ordered only for questions of exceptional importance or to secure or maintain the uniformity of the Board's decisions. In addition, the proposed rule eliminates the provision of the existing regulations, in § 3.1(a)(4)(ii), for the use of a limited en banc panel nine members. That provision was added at a time when the Board's membership was rapidly expanding. It was rarely used in practice and, in any event, it no longer serves any purpose in view of the decision to reduce the size of the Board to eleven members.

<sup>1</sup> The Board's existing rules already contemplate this kind of reporting process with respect to *other* kinds of appeals that are summarily dismissed because the Board lacks jurisdiction or some other procedural default; § 3.1(d)(2)(iii) provides that the filing of an appeal that is summarily dismissed under § 3.1(d)(2)(i) "may constitute frivolous behavior under § 3.102(j)." However, since former "paragraph (D)" has been deleted from the summary dismissal grounds in § 3.1(d)(2)(i), there is no similar process for identifying appeals that were filed for an improper purpose and tying that result specifically to the disciplinary rules.

In summary, the proposed rule will restructure the Board to better accomplish its missions of reviewing immigration appeals in a timely and impartial manner, and providing guidance to immigration judges, the INS, and the public on the proper interpretation and administration of the Immigration and Nationality Act and related regulations. The proposed rule will allow the Board to decide simple cases in an expeditious manner, saving time and resources for those cases that most require searching review. The result will be a more efficient body that applies appropriate standards of appellate review to better serve the Department of Justice, the immigrant community, and the country.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this proposed rule and, by approving it, certifies that it will affect only Departmental employees, and aliens or their representatives who appear in proceedings before the Board of Immigration Appeals. Therefore, this proposed rule will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this

proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

#### **Executive Order 13132**

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant a federalism summary impact statement.

#### **Executive Order 12988**

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Plain Language Instructions**

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles K. Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305-0470.

#### **List of Subjects**

##### *8 CFR Part 3*

Aliens, Immigration.

##### *8 CFR 280*

Aliens, Fines and penalties.

Accordingly, for the reasons set forth in the preamble, part 3 and part 280 of chapter I of title 8 of the Code of Federal Regulations are proposed to be amended as follows:

#### **PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

1. The authority citation for 8 CFR part 3 continues to read as follows:

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

2. Amend § 3.1 by:
  - a. Revising the heading;
  - b. Revising paragraphs (a)(1) through (6) and paragraph (b) introductory text;
  - c. Removing and reserving paragraph (b)(4);
  - d. Revising paragraphs (d)(1), (d)(2)(i) introductory text, (d)(2)(ii), (d)(2)(iii), and (d)(3);

e. Redesignating paragraphs (d)(2)(i)(D) through (G) as paragraphs (d)(2)(i)(E) through (H), respectively, and adding a new paragraph (d)(2)(i)(D);

f. Revising paragraph (d)(4) and adding paragraph (d)(5); and

g. Revising paragraphs (e) and (g), to read as follows:

**Subpart A—Board of Immigration Appeals**

**§ 3.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.**

(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 (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. Within six months of the implementation of the case management screening system as provided in paragraph (e) of this section, or such other time as may be specified by the Attorney General, the Board shall be reduced to eleven members as designated by the Attorney General. 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.

(2) *Chairman.* The Attorney General shall designate one of the Board members to serve as Chairman. The Attorney General may designate a Vice Chairman to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases,

and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.

(3) *Panels.* The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) *Temporary Board members.* 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. A temporary Board member assigned to a case may continue to participate in the case to its normal conclusion, but shall have no role in the actions of the Board en banc.

(5) *En banc process.* A majority of the permanent Board members shall constitute a quorum for purposes of convening the 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 en banc, or reconsider as the Board en banc any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of exceptional importance or to secure or maintain consistency of the Board's decisions.

(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.

\* \* \* \* \*

(b) *Appellate jurisdiction.* Appeals may be filed with the Board of Immigration Appeals from the following:

\* \* \* \* \*

(d) *Powers of the Board—(1) Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals—(i) Standards.* A single Board member shall summarily dismiss any appeal or portion of any appeal in any case in which:

\* \* \* \* \*

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

\* \* \* \* \*

(ii) *Action by the Board.* The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. 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.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 3.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Review of factual issues.* 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 factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service. This paragraph does not preclude the Board from reviewing mixed questions of law and fact, including, without limitation, whether an alien has established a well-founded fear of persecution or has demonstrated extreme hardship, based on the findings of fact made by the immigration judge.

(4) *Rules of practice.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of attorneys and representatives.* The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 292.2 of this chapter. 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 immigration judge.

(e) *Case management system.* The Chairman shall establish a case management system to screen all appeals and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of

this section, all appeals shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to screen cases and to adjudicate appeals as provided in this paragraph.

(1) *Initial screening.* All cases shall be referred to the screening panel for review by a single Board member. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section shall be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a Service motion to remand any appeal before the Board where the Service requests that the matter be remanded 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 case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the screening panel shall arrange for the prompt completion of the record of proceedings and transcript, and shall issue a schedule for simultaneous briefing. The Board member who initially reviewed the appeal (or another Board member assigned under the case management system) shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section.

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned shall 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 issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) 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(e)(4)." 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.

(5) *Other decisions on the merits by single Board member.* If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, reversing, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. Except as provided in this part for review by the Attorney General, or for consideration of motions to reconsider or reopen, a decision issued by a single Board member shall constitute the final decision of the Board. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) *Panel decisions.* Cases shall be assigned for review by a three-member panel only if the case presents one of these circumstances:

(i) The need to settle inconsistencies between the rulings of different immigration judges;

(ii) The need to establish a precedent to clarify ambiguous laws, regulations, or procedures;

(iii) The need to correct a decision by an immigration judge or the Service that is plainly not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import; or

(v) The need to correct a clearly erroneous factual determination by an immigration judge.

(7) *Oral argument.* When an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. A three-member

panel or the Board en banc may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, denials of review as a matter of discretion, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) of this section, in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or herself for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the

timeliness of the disposition of cases by each Board member on an annual basis.

(v) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect a management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board nor create any justiciable right or remedy.

\* \* \* \* \*

(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. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.

\* \* \* \* \*

3. In § 3.2, paragraph (i) is amended by adding after the first sentence a new sentence, to read as follows:

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

\* \* \* \* \*

(i) \* \* \* Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 3.1(e)(6). \* \* \*

\* \* \* \* \*

4. In § 3.3, paragraphs (a) and (c) are revised, and paragraph (b) is amended by adding a new sentence at the end thereof, to read as follows:

**§ 3.3 Notice of appeal.**

(a) *Filing—(1) Appeal from decision of an immigration judge.* A party affected by a decision of an immigration judge which may be appealed to the Board under this chapter shall be given notice of the opportunity for filing an appeal. An appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) directly with the Board, within 30 days of the decision being appealed. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of

service of a copy of the appeal and all attachments on the opposing party. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A Notice of Appeal may not be filed by any party who has waived appeal pursuant to § 3.39.

(2) *Appeal from decision of a Service officer.* A party affected by a decision of a Service officer which may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR-29) directly with the office of the Service having administrative control over the record of proceeding within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate office of the Service, together with all required documents, and the fee provisions of § 3.8 are satisfied.

(3) *General requirements for all appeals.* The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. If the respondent/applicant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR-27) must be filed with the Notice of Appeal. The appeal and all attachments must be in English or accompanied by a certified English translation.

(b) \* \* \* An appellant who asserts that the appeal may warrant review by a three-member panel under the standards of § 3.1(e)(6) must identify in the Notice of Appeal the specific factual or legal basis for that contention.

\* \* \* \* \*

(c) *Briefs—(1) Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. All parties shall be provided 21 days in which to file simultaneous briefs, unless a shorter period is specified by the Board, and reply briefs shall be permitted only by leave of the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a

brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a Service officer.* Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file. The alien and the Service shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

\* \* \* \* \*

5. In § 3.5, paragraph (a) is revised to read as follows:

### § 3.5 Forwarding of record on appeal.

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review and approve the transcript within 14 days of receipt, or within 7 days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location.

\* \* \* \* \*

## PART 280—IMPOSITION AND COLLECTION OF FINES

6. The authority citation for part 280 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1221, 1223, 1227, 1229, 1253, 1281, 1283, 1284, 1285, 1286, 1322, 1323, and 1330; 66 Stat. 173, 195, 197, 201, 203, 212, 219, 221–223, 226, 227, 230; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

7. Section 280.61 is added to read as follows:

### § 280.61 Administrative review of decisions of the Service imposing an administrative fine or penalty.

(a) *Jurisdiction.* The Chief Administrative Hearing Officer has jurisdiction to consider an appeal from a decision by the Service involving administrative fines and penalties, including mitigation thereof, under this part.

(b) *Appeal.* A party affected by a decision who is entitled to appeal from a decision of a Service officer under this part shall be given notice of his or her right to appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal directly with the office of the Service having administrative control over the record of proceeding within 21 days of the issuance of the Service's decision. The Notice of Appeal shall state the reasons for or basis upon which the party seeks review. The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. The appeal and all attachments must be in English or accompanied by a certified English translation.

(c) *Written and oral arguments.* (1) The parties may file simultaneous briefs or other written statements within 21 days of the filing of the Notice of Appeal.

(2) At the request of a party, or on the Officer's own initiative, the Chief Administrative Hearing Officer may, at the Officer's discretion, permit or require additional filings or may conduct oral argument in person or telephonically.

(d) *Completion of the record on appeal.* The Service officer shall forward the record on appeal to the Chief Administrative Hearing Officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. However, a Service officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the relief that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be

immediately forwarded to the Chief Administrative Hearing Officer.

(e) *Review by the Chief Administrative Hearing Officer.* Within 90 days after receiving the record on appeal, the Chief Administrative Hearing Officer shall enter an order that affirms, modifies, or vacates the Service's decision, or remands the case to the Service officer for further proceedings consistent with the Chief Administrative Hearing Officer's order. The order shall be in writing and shall be served on the parties. The Chief Administrative Hearing Officer may make technical corrections to the Officer's order up to and including thirty 30 days subsequent to the issuance of that order.

(f) *Remand.* Where it is established that an appeal cannot be properly resolved without further findings of fact, the Chief Administrative Hearing Officer will remand the proceeding to the Service. Except for taking administrative notice of commonly known facts such as agency documents or current events, the Chief Administrative Hearing Officer will not engage in factfinding in the course of deciding appeals. If the Chief Administrative Hearing Officer remands the case to the Service, any administrative review of the Service's subsequent decision shall be conducted in accordance with this section.

(g) *Governing standards.* (1) The Chief Administrative Hearing Officer shall be governed by the provisions and limitations prescribed by applicable law, regulations and procedures, and by decisions of the Attorney General (through review of a decision of the Chief Administrative Hearing Officer, by written order, or by determination and ruling pursuant to section 103 of the Act). The existing precedent decisions issued by the Board of Immigration Appeals in administrative fine cases continue to be binding except as specifically modified or overruled in new precedent decisions by the Chief Administrative Hearing Officer or by the Attorney General.

(2) Except as they may be modified or overruled by the Chief Administrative Hearing Officer or the Attorney General, final orders of the Chief Administrative Hearing Officer shall be binding on all officers and employees of the Service in the administration of fines and penalties under this part.

(h) *Final agency order.* A final order that affirms, modifies or vacates the Service's decision becomes the final agency order 30 days after it is issued, unless the Chief Administrative Hearing Officer's order is referred to the Attorney General pursuant to paragraph (i) of this section.

(i) *Referral of cases to the Attorney General.* (1) The Chief Administrative Hearing Officer shall refer to the Attorney General for review of his decision all cases that:

(i) The Attorney General directs the Chief Administrative Hearing Officer to refer to him;

(ii) The Chief Administrative Hearing Officer believes should be referred to the Attorney General for review; or

(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 Chief Administrative Hearing Officer, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Chief Administrative Hearing Officer for transmittal and service as provided in paragraph (e) of this section.

Dated: February 11, 2002.

**John Ashcroft,**

*Attorney General.*

[FR Doc. 02-3801 Filed 2-15-02; 8:45 am]

BILLING CODE 4410-30-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 99-NE-53-AD]

RIN 2120-AA64

#### **Airworthiness Directives; Honeywell International Inc. TPE331 Series Turboprop and TSE331-3U Series Turboshaft Engines**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Federal Aviation Administration (FAA) proposes to adopt a new airworthiness directive (AD) that is applicable to Honeywell International Inc. (formerly AlliedSignal Inc., Garrett Engine Division, Garrett Turbine Engine Company, and AiResearch Manufacturing Company of Arizona) TPE331 series turboprop and model TSE331-3U series turboshift engines. This proposal would require replacing second stage turbine stator assemblies, part numbers (P/N's) 894528-1, -2, -3, -5, -6, -10, and -11, with serviceable turbine stator assemblies. This proposal is prompted by reports of six uncontained separations of the second stage turbine wheels. The actions specified by the proposed AD are

intended to reduce fatigue damage of the second stage turbine stator inner seal support, rotating knife seal, and the second and third stage turbine wheels which may result in an uncontained rotor failure and damage to the aircraft.

**DATES:** Comments must be received by April 22, 2002.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99-NE-53-AD, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may be inspected at this location, by appointment, between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: "9-ane-adcomment@faa.gov". Comments sent via the Internet must contain the docket number in the subject line.

The service information regarding the replacement and inspection of parts may be obtained from Honeywell Engines, Systems, and Services, Technical Data Distribution, M/S 2101-201, P.O. Box 52170, Phoenix, AZ 85072-2170; telephone: (602) 365-2493 (General Aviation), (602) 365-5535 (Commercial); fax: (602) 365-5577 (General Aviation and Commercial). This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

**FOR FURTHER INFORMATION CONTACT:**

Joseph Costa, Aerospace Engineer, Federal Aviation Administration, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Blvd., Lakewood, CA 90712-4137; Telephone (562) 627-5246, Fax (562) 627-5210.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments

submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 99-NE-53-AD." The postcard will be date stamped and returned to the commenter.

**Availability of NPRM's**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99-NE-53-AD, 12 New England Executive Park, Burlington, MA 01803-5299.

**Discussion**

There have been six reported uncontained separations of second stage turbine wheels associated with obstructed internal cooling holes or passages in the vanes of the second stage turbine stator. The FAA has determined that obstructed cooling holes in the second stage turbine stator will increase turbine cavity temperatures. These elevated temperatures reduce the fatigue endurance capability of the turbine stator components and could cause the seal assembly to separate from the stator housing, or the rotating knife edge seal to separate from the turbine rotor. The stator seal support, stator seal assembly, or the rotating knife edge seal may then contact and rub into the turbine rotor, potentially resulting in an uncontained turbine rotor separation. Elevated cavity temperatures may also cause a reduction in the fatigue life of the turbine rotor and may result in an uncontained turbine rotor separation. In addition, the FAA has approved an air flow inspection and re-identification procedure for the second stage stator assemblies, P/N 894528-10 and -11. The FAA has not approved an air flow inspection of the older configurations of second stage stator assemblies, P/Ns 894528-1, -2, -3, -5, and -6, due to the difficulty to maintain the dimensional integrity of the stator assembly's internal cooling passages after the final braze operation of the stator's inner seal support or after welding of the stator's vanes. The FAA has approved repair procedures for converting the older configuration of second stage turbine