

**DEPARTMENT OF JUSTICE****8 CFR Part 3**

[EOIR No. 120F; AG Order No. 2163-98]

RIN 125-AA21

**Executive Office for Immigration Review; Board of Immigration Appeals: En Banc Procedures**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends 8 CFR part 3 by revising the en banc decision procedures of the Board of Immigration Appeals. This rule streamlines the Board's en banc process by permitting a majority of permanent Board Members or the Chairman to designate en banc cases to be heard by nine-member, limited en banc panels.

**DATES:** This final rule is effective June 11, 1998.

**FOR FURTHER INFORMATION CONTACT:** Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, (703) 305-0470.

**SUPPLEMENTARY INFORMATION:** This regulation revises and streamlines the en banc procedures of the Board of Immigration Appeals. The current regulation requires that the entire 15-member Board decide each en banc case. While this system has served the Board well in the past by promoting thoughtful decision-making and permitting each Board Member to participate in important precedent setting decisions, with the expansion of the Board to 12 members and most recently to 15 members, this procedure has become cumbersome and time-consuming.

This rule streamlines the Board's en banc process by permitting a majority of permanent Board Members or the Chairman to designate en banc cases to be heard by nine-members, limited en banc panels. Each limited en banc panel shall contain the Chairman or Vice Chairman (as decided by the Chairman). If the Chairman and Vice Chairman are both disqualified in a particular case, then the most senior remaining permanent Board Member who is not disqualified shall sit on the limited en banc panel as the Presiding Board Member. If the Chairman and Vice Chairman are both unavailable in a particular case for reasons other than disqualification, then the Chairman shall designate a Presiding Board Member to sit on the limited en banc

panel. If the Chairman is unavailable and disqualified, then the Vice Chairman, if unavailable and not disqualified, shall designate a presiding Board Member to sit on the limited en banc panel. If the case was considered or decided by a three-member panel, the limited en banc panel shall also contain all available Board Members who considered or decided that case as part of a three-member panel. The remaining members of each limited en banc panel will be randomly selected from among the permanent Board Members. In light of the Board's increasing membership and caseload, these changes are necessary to maintain an effective, efficient system of appellate adjudication.

Generally, each limited en banc panel would consider an individual case. However, the Chairman could refer a group of cases to the same limited en banc panel. It is expected that such authority would be used when the Board has a group of cases with related issues pending before it. To maintain consistency and uniformity among limited en banc panel decisions, the rule provides for referral of any limited en banc panel decision to the full Board en banc upon a majority vote of the permanent Board Members or by direction of the Chairman. This rule does not change the requirement of a majority vote of the permanent Board Members to designate a decision of the Board as a published precedent. The rule also makes certain technical and administrative changes, such as recognizing the existing position of Vice Chairman of the Board and designating retired Board Members, retired Immigration Judges, and Administrative Law Judges as persons eligible to serve as temporary Board Members. Currently, only sitting Immigration Judges can serve in this capacity. These temporary appointments are intended to assist the Board when extenuating circumstances arise, or in the absence of permanent Members or in other situations in which the temporary appointment of qualified and experienced adjudicators will allow the Board to efficiently and effectively handle its caseload.

Compliance with 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date is not necessary because this rule relates to internal agency procedure and practice.

**Regulatory Flexibility Act**

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule affects only individuals in immigration proceedings before the Executive Office for Immigration Review whose appeals are decided by

the Board of Immigration Appeals. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.

**Unfunded Mandates Reform Act of 1995**

This 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 rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. 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 regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. This rule falls within a category of actions that the Office of Management and Budget has determined not to constitute "significant regulatory actions" under § 3(f) of Executive Order 12866, Regulatory Planning and Review, and, accordingly, it has not been reviewed by OMB.

**Executive Order 12612**

This regulation 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 12612, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Executive Order 12988**

The rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order No. 12988.

**List of Subjects in 8 CFR Part 3**

Administrative practice and procedure, Immigration, Lawyers, Organizations and functions (Government agencies), Reporting and recordkeeping requirements.

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

1. The authority citation for 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. Section 3.1 is amended by revising paragraph (a)(1) and adding paragraphs (a) (4), (5) and (6) to read as follows:

**§ 3.1 General authorities.**

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall consist of a Chairman, a Vice Chairman, and thirteen other members. The Board Members shall exercise their independent judgment and discretion in the cases coming before the Board. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Director may in his discretion designate Immigration Judges, retired Board Members, retired Immigration Judges, and Administrative Law Judges employed within EOIR to act as temporary, additional Board Members for terms not to exceed six months. The Chairman may divide the Board into three-member panels and designate a Presiding Member of each panel. The Chairman may from time to time make changes in the composition of such panels and of Presiding Members. Each panel shall be empowered to decide cases by majority vote. A majority of the number of Board Members authorized to constitute a panel shall constitute a quorum for such panel. Each three-member panel may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of cases before it. In the case of an unopposed motion or a motion to withdraw an appeal pending before the Board, a single Board Member or the Chief Attorney Examiner may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of such motions before it.

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(4) *En banc Process*—(i) *Full Board en Banc.* A majority of the permanent

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

(ii) *Limited en banc panels.* The Board may on its own motion, by a majority vote of the permanent Board Members, or by direction of the Chairman, assign a case or group of cases for consideration by a limited en banc panel, or assign a case that has been considered or decided by a three-member panel for reconsideration by a limited en banc panel. Each limited en banc panel shall consist of nine members. Each limited en banc panel shall contain the Chairman or Vice Chairman (as decided by the Chairman). If the Chairman and Vice Chairman are both disqualified in a particular case, then the most senior permanent Board Member who is not disqualified shall sit on the limited en banc panel as the Presiding Board Member. If the Chairman and Vice Chairman are both unavailable to hear a case that has been assigned to a limited en banc panel, but the Chairman is not disqualified, then the Chairman shall designate a Presiding Board Member to sit on the limited en banc panel. If the Chairman is unavailable and disqualified, then the Vice Chairman, if unavailable and not disqualified, shall designate a presiding Board Member to sit on the limited en banc panel. Where a case that has been considered or decided by a three-member panel is assigned for review by a limited en banc panel, the en banc panel shall contain all available permanent Board Members who considered or decided that case as part of a three-member panel. The remaining members of each limited en banc panel will be randomly selected from among the permanent Board Members. The decision reached by a limited en banc panel shall be considered as the final decision of the Board in the case, unless the Chairman or a majority of the permanent Board Members vote to decide to assign the case to a full en banc panel for reconsideration in accordance with paragraph (a)(4)(i) of this section.

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

Board precedent pursuant to paragraph (g) of this section.

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

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Dated: June 5, 1998.

**Janet Reno,**

*Attorney General.*

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**DEPARTMENT OF JUSTICE****8 CFR Part 3**

[EOIR No. 121P; AG Order No. 2162–98]

RIN 1125–AA23

**Executive Office for Immigration Review; Motion to Reopen; Suspension of Deportation and Cancellation of Removal**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule amends the regulations of the Executive Office for Immigration Review (EOIR) by establishing a special procedure for the filing and adjudication of motions to reopen to apply for suspension of deportation and cancellation of removal pursuant to section 203(c) of the Nicaraguan Adjustment and Central American Relief Act.

**DATES:** *Effective date:* This interim rule is effective June 11, 1998.

*Comment date:* Written comments must be submitted on or before July 13, 1998.

**ADDRESSES:** Please submit written comments, in triplicate, to Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041.

**FOR FURTHER INFORMATION CONTACT:** Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305–0470.

**SUPPLEMENTARY INFORMATION:** This interim rule with request for comments amends 8 CFR part 3 by creating new § 3.43.

**Background**

This regulation relates to a previous notice, signed by the Attorney General