Proposed Rules

Federal Register
Vol. 73, No. 118
Wednesday, June 18, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[EOIR Docket No. 159P; AG Order No. 2976–2008]

RIN 1125–AA58

Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: This proposed rule would amend the Department of Justice (Department) regulations regarding the administrative review procedures of the Board of Immigration Appeals (Board) in three ways. First, this rule provides greater flexibility for the Board to decide, in the exercise of its discretion, whether to issue an affirmance without opinion (AWO) or any other type of decision. This rule clarifies that the criteria the Board uses in deciding to invoke its AWO authority are solely for its own internal guidance, and that the Board's decision depends on the Board's judgment regarding its resources and is not reviewable. The revision related to AWO is needed to address divergent precedent in the United States Courts of Appeals regarding the reviewability of the Board's decision to issue an AWO. Finally, this revision clarifies that when the Board issues an AWO or a short decision adopting some or all of the immigration judge's decision, the decision is generally based on issues and claims of errors raised on appeal and is not to be construed as waiving a party's obligation to raise issues and exhaust claims of error before the Board. Second, this rule expands the authority to refer cases for three-member panel review for a small class of particularly complex cases involving complex or unusual issues of law or fact. Third, this rule amends the regulations relating to precedent decisions of the Board by authorizing publication of decisions either by a majority of the panel members or by a majority of permanent Board members and clarifying the relevant considerations for designation of precedents. These revisions implement, in part, the Memorandum for Immigration Judges and Members of the Board of Immigration Appeals issued by the Attorney General on August 9, 2006.

DATES: *Comment date:* Comments may be submitted not later than August 18, 2008.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 159P, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference EOIR Docket No. 159P on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. Comments that will provide the most assistance to the Department of Justice will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority supporting the recommended change.

All submissions received must include the agency name and EOIR Docket No. 159P.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the ''For Further Information Contact'' paragraph.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To make an appointment, please contact the Executive Office for Immigration Review at (703) 305–0470 (not a toll free call).

II. The Attorney General's Review

On January 9, 2006, Attorney General Alberto Gonzales directed a comprehensive review of the Immigration Courts and the Board. This review was undertaken in response to concerns about the quality of decisions being issued by the immigration judges and the Board and about reports of intemperate behavior by some immigration judges.

At that time, the Deputy Attorney General and the Associate Attorney General assembled a review team, which over the course of several months conducted hundreds of interviews, administered an online survey, and analyzed thousands of documents to assess the Executive Office for Immigration Review (EOIR) adjudicative process. With regard to the Board's appellate process, the review team received much commentary about the streamlining and Board reform regulations, specifically the *Procedural Reforms To Improve Case Management Rule,* 67 FR 54878 (August 26, 2002) (''Board reform rule''). This rule provided for improved case management procedures and expanded the number of cases that could be referred to a single Board member for review. This new case management system was intended to reduce delays in the appellate review process, reduce the backlog of pending cases, and allow Board members to focus more attention on cases presenting novel or significant issues.

Critics of the procedural reforms rule speculated that the revised procedures allowed Board members insufficient time to review cases thoroughly and made it more difficult for the Board to publish adequate numbers of precedential decisions. Supporters observed that the reforms brought much-needed efficiency to the appellate process, which allowed the Board to eliminate a large backlog of cases and to adjudicate cases in a timely manner.

On August 9, 2006, Attorney General Gonzales announced that the review was complete, and he directed that a series of measures be taken to improve adjudications by the immigration judges and the Board. EOIR is implementing most of those initiatives through administrative and management actions, although several of the initiatives require changes to the existing regulations. This rule is one of several new regulatory actions resulting from this senior level review, and implements three initiatives relating to the Board.

The Department considered the Board's current and predicted caseload, its resources, and the need to adjudicate cases thoroughly and in a timely manner and concluded that the basic principles set forth in the Board reform rule were still necessary to prevent future backlogs and delays in adjudication. Accordingly, the Department is not reopening or seeking public comment on the existing final regulations that were adopted in 2002.

However, the Department has concluded that three specific adjustments to the Board reform rule are appropriate, and it is with respect to these three changes that we seek public comments. The proposed rule, accordingly, would revise the regulations governing the Board to (1) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions, instead of issuing affirmances without opinion, (2) allow for the use of three-member written opinions to provide greater legal analysis in a small class of particularly complex cases, and (3) authorize three-member panels, by majority vote, to designate their decisions as precedent decisions. The Department has already published a separate rule increasing the number of Board members in order to carry out the Board's expanded responsibilities. 71 FR 70855 (Dec. 7, 2006).

III. Affirmance Without Opinion

A. Mandatory and Discretionary Affirmances Without Opinion

Historically, with a few exceptions not mentioned here, the Board adjudicated all of its cases in panels of three Board members. Those three-member panels generally issued full written decisions explaining the order in each case. However, as the Board's caseload began to grow dramatically over the years, changes were necessary to help the Board manage its docket.

In 1999, a regulatory amendment authorized the Board to affirm the decision of an immigration judge without issuing a separate written opinion. *See Board of Immigration Appeals; Streamlining,* 64 FR 56135 (Oct. 18, 1999). This kind of order is called an affirmance without opinion (AWO), and the decision contains only two sentences prescribed by regulation, without any additional language or explanation about the reasons for the affirmance. *See* 8 CFR 1003.1(e)(4)(ii). The Board implemented the AWO process successfully, although the process was initially utilized only in certain categories of cases pending before the Board, and all other cases were still referred to a three-member panel for decision. Despite the use of this new procedural device, however, the Board's backlog of pending cases continued to grow and the average period of time that cases remained pending on appeal to the Board lengthened considerably.

More than five years ago, Attorney General John Ashcroft published the Board reform rule. *See* 67 FR 54878 (Aug. 26, 2002). That rule retained the basic AWO process as introduced in 1999, but expanded the use of affirmances without opinion by providing for the Board to issue an AWO in any case when certain regulatory criteria are met. *Compare* 8 CFR 3.1(a)(7)(ii) (2000) (providing that a single Board member ''may'' affirm without opinion) *with* 8 CFR 1003.1(e)(4)(i) (2006) (providing that, in certain circumstances, a single Board member ''shall'' affirm without opinion).[1] Under the current regulations, a single Board member will affirm an immigration judge's decision without opinion when he or she is satisfied that the immigration judge's decision reached the correct result, that any errors were harmless or nonmaterial, and that the issues on appeal are either (1) squarely controlled by precedent and do not require an application of precedent to a novel factual scenario, or (2) are not so substantial as to warrant the issuance of a written opinion in the case. *See* 8 CFR 1003.1(e)(4)(i). When a single Board member is satisfied that the regulatory criteria are met and issues an AWO, the order will state that ''[t]he Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.'' 8 CFR 1003.1(e)(4)(ii).

When the Board member determines that an AWO is not warranted in a case, the current regulation provides that most such cases will be resolved by an opinion issued by a single Board member rather than referred to a panel of three Board members. A single Board member may issue a decision that affirms, modifies, or remands an immigration judge's decision, and may provide any explanation or address any issue he or she deems appropriate. The majority of single member decisions, in fact, are not AWOs, but are fuller orders addressing the issues raised on appeal. In fact, in fiscal year 2007, only 10% of

[1] In 2003, the Attorney General redesignated the previous regulations in 8 CFR part 3, relating to EOIR, as 8 CFR part 1003 in connection with the abolition of the former Immigration and Naturalization Service and the transfer of its responsibilities to the Department of Homeland Security (DHS). Under the Homeland Security Act, EOIR (including the Board and the immigration judges) remains under the authority of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g).

the Board's decisions were issued as AWOs.

In addition to restructuring the decisional process, the Board reform rule set specific time limits for the disposition of appeals after the record on appeal is completed and the case is ready for adjudication. *See* 8 CFR 1003.1(e)(8). With rare exceptions, a Board member must adjudicate a case within 90 days of completion of the record. If the case is referred to a three-member panel, the case must be adjudicated within 180 days of referral.

With the Board reform rule, the Department provided the Board with powerful tools to address a burgeoning number of appeals and a growing backlog of cases. When he announced the Board's restructuring in February 2002, Attorney General Ashcroft cited the size of the Board's backlog and the substantial delays in reaching final decisions as the basis for the reform. At that time, 56,000 cases were pending before the Board. More than 10,000 of those cases had been pending for more than three years and another 34,000 had been pending for more than one year. Presently, approximately 27,000 cases are pending at the Board—more than a 50% decrease—even though the number of cases being filed with the Board has remained very high, with 40,000 new cases received during FY2006. Except for cases on regulatory hold, *see* 8 CFR 1003.1(e)(8)(ii), virtually none of the 27,000 current cases has been pending for more than three years. The vast majority of the pending cases were filed in FY2007 or 2008; only 10 percent were filed in FY2006. In short, the Board has essentially eliminated the backlog of pending appeals and reduced the time for processing appeals and motions in compliance with the regulatory time frames governing the completion of cases.[2]

Although individuals have challenged the Board reform rule on due process and administrative law grounds, the federal courts have consistently affirmed the Attorney General's authority to adopt the rule. *See Blanco de Belbruno* v. *Ashcroft,* 362 F.3d 272 (4th Cir. 2004); *Zhang* v. *United States Dep't of Justice,* 362 F.3d 155 (2d Cir. 2004); *Yuk* v. *Ashcroft,* 355 F.3d 1222 (10th Cir. 2004); *Dia* v. *Ashcroft,* 353 F.3d 228, 238–45 (3d Cir. 2003) (en banc); *Denko* v. *INS*, 351 F.3d 717, 724–32 (6th Cir. 2003); *Falcon Carriche* v. *Ashcroft,* 350 F.3d 845 (9th Cir. 2003); *Georgis* v. *Ashcroft,* 328 F.3d 962 (7th Cir. 2003); *Mendoza* v. *U.S. Att'y Gen.,* 327 F.3d 1283 (11th Cir. 2003); *Soadjede* v. *Ashcroft,* 324 F.3d 830 (5th Cir. 2003); *Albathani* v. *INS,* 318 F.3d 365 (1st Cir. 2003); *Capital Area Immigrants' Rights Coalition* v. *U.S. Dep't of Justice,* 264 F. Supp. 2d 14 (D.D.C. 2003).

The success of the reform regulation rests on both the ability of the Board to adjudicate the majority of cases by single-member review and the ability of the Board to affirm the decision of an immigration judge without issuing a full opinion. *See Guyadin* v. *Gonzales,* 449 F.3d 465, 469 (2d Cir. 2006) (highlighting the importance of the streamlining regulations to address a ''crushing backlog''). The number of decisions issued by a single Board member has remained relatively constant since the effective date of the reform regulation. In contrast, the rate of AWOs has been decreasing. In fiscal year 2003, approximately 36% of the Board's decisions were AWOs. That number declined to approximately 32% in fiscal year 2004, 20% in fiscal year 2005, and 15% in fiscal year 2006. The AWO rate for fiscal year 2007 is only 10%.

Despite the success of the Board's reform rule in addressing delays in decision times and in managing a very heavy caseload, some courts of appeals have levied pointed criticism in some cases where the immigration judge's conduct was intemperate or abusive, raising the concern that such conduct was not adequately addressed by the Board's decisions, particularly in cases where the Board issued an AWO. *See, e.g., Fiadjoe* v. *U.S. Att'y Gen.,* 411 F.3d 135 (3d Cir. 2005); *Cham* v. *U.S. Att'y Gen.*, 445 F.3d 683, 693–94 (3d Cir. 2006); *Huang* v. *Gonzales,* 453 F.3d 142 (2d Cir. 2006). Some courts of appeals have also criticized the quality of the immigration judge and Board decisions. *See Benslimane* v. *Gonzales,* 430 F.3d 828 (7th Cir. 2005), and cases cited therein. The criticism has been limited to a relatively small number of cases and a minority of circuit courts. Moreover, the overall rate at which the federal courts have overturned Board decisions on judicial review has remained fairly constant, averaging only 10 to 12 percent. It should also be borne in mind that only the aliens are able to petition for review in the circuit courts. DHS may not appeal adverse Board decisions to the courts of appeals; thus, the courts never see the thousands of cases in which the aliens are granted relief or protection from removal. Nevertheless, the Attorney General has concluded that some adjustments to the Board's streamlining practices are now appropriate to improve the quality of the Board's review of complex or problematic cases while retaining the fundamentals of streamlining.

Attorney General Gonzales directed the Board to increase the use of single-member written opinions to address immigration judge decisions that are poor in quality and cases in which the immigration judge's conduct during the hearing was intemperate or abusive. This rule meets that objective by providing the Board with greater flexibility to issue decisions that respond to the concerns expressed by the federal circuit courts.

Under this rule, single Board members will have discretion to decide whether to issue an AWO or to issue a written opinion with an explanation of the reasons for the decision. The existing regulations already provide that a single Board member is not required to issue an AWO when there is a substantial factual or legal issue in the case warranting the issuance of a written opinion, but this rule recognizes that Board members may choose to issue either an AWO or a written opinion, as a matter of discretion, in cases where the regulatory criteria in 8 CFR 1003.1(a)(4)(i) are met.

In determining whether to exercise its discretion to issue an AWO or a single-member opinion, the Board may consider available resources to balance the need to complete cases efficiently while evaluating whether there is a need to provide further guidance to the immigration judge, the parties, and the federal courts through a written decision addressing the issues in a case. The Board is best positioned to assess its resources and the importance of various competing demands, because the Board sees the full expanse of issues presented in the more than 40,000 cases filed each year from decisions of the immigration judges and of DHS service centers or other adjudicating officers in those cases subject to review by the Board. The Board is thus able to see recurring problems or issues arising in the decisions under review.

The Board may consider exercising its discretion to issue a written order in those cases in which the immigration judge's decision would otherwise meet the criteria for AWO, but the immigration judge exhibited inappropriate conduct at the hearing or made intemperate comments in the oral decision. Likewise, the Board may consider issuing single-member opinions in those cases in which the

[2] The regulatory time frames relate to the period beginning when the record is complete and the case is ready for adjudication. At present, the principal cause of delay in the Board's adjudications relates to the time required for preparation of transcripts of the immigration judge proceedings and other steps needed to complete the record. EOIR is already working to reduce those delays in response to another Attorney General directive.

infirmities in the decision under review are not prejudicial, but are of such a nature and extent that the Board may find it appropriate to address the basis for the decision. Examples include where the immigration judge reaches the correct result but does not provide a complete analysis, the immigration judge's analysis includes some immaterial or technical error, or the immigration judge fails to include citations to applicable precedent or regulations. While the result may be correct and the errors harmless, the Board member may consider that, in these kinds of cases, further explanation is warranted.

B. Reviewability

With the greater level of flexibility afforded by this rule, the Board is better situated to address the concern expressed by some courts that AWOs allow room for confusion in the record about the basis for the Board's decision, and thus, the jurisdiction of the federal circuit courts. *See generally Lanza* v. *Ashcroft*, 389 F.3d 917 (9th Cir. 2004). The Department acknowledges the high volume of cases now pending before the courts of appeals and sees this rule as a means of addressing some of the courts' concerns and of promoting greater uniformity in the way the courts review administrative decisions.

Existing regulations establish that when the Board issues an AWO, the decision of the immigration judge becomes the ''final agency determination.'' 8 CFR 1003.1(e)(4)(ii). Although the immigration judge's decision becomes the ''final agency determination,'' the Board remains the final agency decision maker exercising the authority delegated by the Attorney General. It is the Board's AWO that triggers the time period for seeking review in a circuit court. When an alien petitions for review following the Board's issuance of an AWO, the courts review the merits of the immigration judge's decision.

Some circuits, however, have concluded that, in addition to reviewing the merits of the underlying immigration judge's decision, the court may also review the Board's decision to issue an AWO, as opposed to another type of order. Other circuits have reached the opposite conclusion. This inconsistency threatens the goal of the Board's procedural reforms: securing finality in immigration cases as efficiently as possible.

The Eighth and Tenth Circuits have concluded that the Board's decision to issue an AWO is not reviewable. *See Ngure* v. *Ashcroft*, 367 F.3d 975, 981–88 (8th Cir. 2004); *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1355–58 (10th Cir. 2004). In particular, the Tenth Circuit found it lacked jurisdiction to review the Board's procedural decision to issue an AWO, as opposed to a single-member decision with an opinion or a three-member decision. The court noted that when the Board affirms an immigration judge's decision without opinion, the immigration judge's decision becomes the final agency decision. The Tenth Circuit concluded that because the Immigration and Nationality Act vests jurisdiction in the courts of appeals to review a ''final order of removal,'' the court was without jurisdiction to review the Board's AWO decision because an AWO is not in the nature of a final agency decision. *Id.* at 1353. The Tenth Circuit also concluded that because the decision to issue an AWO is committed to the Board's discretion, the Administrative Procedure Act did not confer jurisdiction on the circuit courts to review the Board's decision to issue an AWO. *Id.* at 1355.

The Fourth Circuit has reached a conclusion similar in effect to the decisions of the Eighth and Tenth Circuits. The Fourth Circuit held that even if the Board's decision to issue an AWO is erroneous, the court simply reviews the merits of the underlying decision of the immigration judge. *See Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004) (analyzing the similar AWO provision previously found at 8 CFR 3.1(a)(7)). In sum, the Fourth, Eighth, and Tenth Circuits do not review the Board's decision to issue an AWO, but simply review the merits of the underlying decision, as prescribed by the language in the Board's AWO order.

In contrast, the Third Circuit has concluded that the Board's decision to issue an AWO is reviewable, separate and apart from the question of whether the underlying merits decision is supported. *See Smriko* v. *Ashcroft*, 387 F.3d 279, 290–95 (3d Cir. 2004). The First Circuit also regards as reviewable the Board's determination of whether the AWO criteria exist in a particular case. *See Haoud* v. *Ashcroft*, 350 F.3d 201 (1st Cir. 2003). A divided panel of the Ninth Circuit reached the same conclusion in *Chen* v. *Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004). The court in Chen concluded that, unless the underlying issue in a case rests on a discretionary determination, it has jurisdiction to review whether the use of an AWO was appropriate. Such review causes the court to examine the propriety of the Board's decision to apply its AWO authority and summarily affirm the immigration judge's decision. This approach results in a superfluous and unnecessary layer of review about an issue—the Board's decision to affirm without opinion rather than affirm with an opinion—that does not resolve the dispositive issue, namely whether the underlying decision of the immigration judge withstands review.

The Sixth and Seventh Circuits have not squarely decided the reviewability issue. However, both circuits have suggested that, although the Board's decision to issue an AWO may be separately reviewable, the review of the decision to AWO often will merge with the review of the underlying decision of the immigration judge. *See Denko* v. *INS*, 351 F.3d 717, 731–32 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 966–67 & n.4 (7th Cir. 2003). Where those decisions essentially merge, the Seventh Circuit has stated that ''it makes no practical difference whether the BIA properly or improperly streamlined review.'' *Georgis* v. *Aschcroft, supra* at 967; *see also Hamdan* v. *Gonzales*, 425 F.3d 1051 (7th Cir. 2005).

The inconsistency in the circuit courts has prompted the Department to propose a revision to the regulatory language. The rule clarifies that the decision to issue an AWO is discretionary and is based on an internal agency directive created for the purpose of efficient case management that does not create any substantive or procedural rights. The Board reform rule was successful in creating procedures that increased efficiency and promoted finality in immigration cases without sacrificing fairness. The additional layer of review in some circuits is not consistent with the reform rule's goal of promoting efficiency and finality in the immigration system. The efficient and fair adjudication of immigration appeals remains a priority of the Department. This revision to the AWO regulation in no way reflects a diminished commitment to timely and fair adjudications at the administrative level. In light of the strict regulatory time frames governing the adjudication of appeals and the Board's decreasing use of AWOs, the Department expects that the Board will continue to manage its docket efficiently following this revision to the AWO procedure.

C. Scope of Board's Dispositions on Appeal

Finally, this rule clarifies that, when the Board chooses to issue an AWO or a short order adopting all or part of the immigration judge's decision, that decision is based not only on the nature of the case and whether it fits the criteria for AWO, but also on the nature of the issues and claims of error

properly raised on appeal. The Board's decision to issue an AWO or short order affirming the immigration judge's decision should not be construed as waiving a party's obligation to exhaust issues and claims before the Board. While it is true that the Board has the discretion to consider issues not raised on appeal, this does not excuse a party from filing a Notice of Appeal and supporting brief that are sufficiently precise in identifying any claims, errors, and other issues in the immigration judge's decision with which the party disagrees. 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 way, its arguments and claims of error in the Notice of Appeal or supporting brief. In addition, the regulation clarifies that the Board need not specifically address every issue raised on appeal, but is presumed to have considered all properly raised issues on appeal in reaching its decision, even if that decision is an AWO or short order that does not specifically discuss every issue the parties may have raised on appeal. *See, e.g., Toussaint* v. *Attorney General*, 455 F.3d 409 (3d Cir. 2006), *citing Zubeda* v. *Ashcroft*, 333 F.3d 463 (3d Cir. 2003); *Mansour* v. *INS*, 230 F.3d 902 (7th Cir. 2000).

For purposes of complying with the mandate to exhaust administrative remedies as of right under section 242(d)(1) of the Act, 8 U.S.C. 1252(d)(1), claims of error raised in the Notice of Appeal or the brief shall be deemed the matters presented to the Board for review and thereby exhausted. Exhaustion of administrative remedies is an indispensable component of administrative decision making and judicial review of an agency's decisions. *See McCarthy* v. *Madigan*, 503 U.S. 140 (1992) (superseded by statute). Litigants fail to exhaust their claims at their own peril, in that they waive matters that might have been corrected by the agency. Courts that ignore this rule 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. *See Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946).

In the Immigration and Nationality Act, Congress has dictated that the Attorney General shall, in the first instance, resolve a controversy before judicial intervention, *see* 8 U.S.C. 1252(d)(1), and the Attorney General by regulation has delegated that function to the Board. The federal courts have consistently held that they do not sit as administrative agencies. Failure to raise an issue on appeal to the Board constitutes failure to exhaust administrative remedies or preserve the issue for appeal, and deprives the courts of appeal of jurisdiction to consider the issue. *See Rivera-Zurita* v. *INS*, 946 F.2d 118 (10th Cir. 1991); *Ravindran* v. *INS*, 976 F.2d 754 (1st Cir. 1992); *Farrokhi* v. *INS*, 900 F.2d 697 (4th Cir. 1990); *Martinez-Zelaya* v. *INS*, 841 F.2d 294 (9th Cir. 1988); *Campos-Guardado* v. *INS*, 809 F.2d 285 (5th Cir. 1987); *Cisternas-Estay* v. *INS*, 531 F.2d 155 (3d Cir. 1976). The courts have concluded that when the agency resolves the matter first, the legal and factual issues have been sufficiently developed to aid the court in reviewing a person's claim and the agency's findings and conclusions regarding such claim. *See Madigan*, 503 U.S. at 145–46.

Recently, two courts of appeal have concluded otherwise when the Board's decision has been an AWO or a short order affirming the immigration judge's decision. In *Abebe* v. *Gonzales*, 432 F.3d 1037 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit held that when the Board adopts or affirms the decision of an immigration judge without further opinion, and the Board does not explicitly state in its decision that it is declining to consider any arguments not raised on appeal, then the Board's adoption of the immigration judge's decision, which discusses all issues litigated below, is enough to satisfy the exhaustion requirement. Likewise, in *Pasha* v. *Gonzales*, 433 F.3d 530 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit held that when the Board summarily affirms the immigration judge's decision below, the Board waives failure to exhaust, especially where the Board fails to specify that it was confining its review to the questions raised on appeal and deemed all others waived.

Under the rule of law created by *Abebe* and *Pasha*, aliens can circumvent the appellate process set up by the Attorney General, which is designed specifically to review and correct any errors raised on appeal. Without a Notice of Appeal or brief that points out specific errors the parties believe the immigration judge made, the Board might choose to issue an AWO or short order affirming the immigration judge. The alien can then go to the courts of appeals and raise and fully brief arguments never made to the Board.

This rule reaffirms the historical practice of the Board with respect to exhaustion requirements. The Board has repeatedly stated that it need not address issues that are not raised. *See, e.g., Matter of Cervantes-Gonzales*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (noting that ''[a]s the respondent does not raise this issue on appeal, we decline to address it''); *Matter of Gutierrez*, 19 I&N Dec. 562, 565 n.3 (BIA 1988) (stating that ''[a]s the Service does not directly raise this issue on appeal, we shall not address it'').

When the Board invokes its AWO authority or issues a short decision adopting the immigration judge's decision, there is no cause to depart from the foregoing exhaustion principles. Adopting the immigration judge's decision or designating the immigration judge's decision as the final agency determination under the AWO regulation is the final act of the Board that triggers the alien's opportunity to seek judicial review, but it occurs only after the alien has set the issues to be determined by the Board. It is those issues that the Board takes into account in determining what type of decision to issue.

This rule would make clear, however, that the Board may address an issue that was not raised on appeal *sua sponte* when the Board in its discretion concludes that the issue warrants attention. *See generally* 8 CFR 1003.1(c) (authorizing the Board to certify a case to itself). *See also Ghassan* v. *INS*, 972 F.2d 631, 635 (5th Cir. 1992) (noting that the Board may consider an issue that has not been appealed by either party). The Board will continue to review the record and address any errors that it finds, in its discretion, could result in a miscarriage of justice.

IV. Three-Member Panel Decisions

Under the current regulations, a single Board member ''may only'' refer a case to a three-member panel if the case fits one or more of the enumerated criteria set out in 8 CFR 1003.1(e)(6)(i)–(vi). These circumstances are circumscribed and include the following: (1) The need to settle inconsistencies among the rulings of different immigration judges, (2) the need to establish a precedent construing the meaning of laws, regulations, or procedures, (3) the need to review a decision by an immigration judge or DHS that is not in conformity with the law, (4) the need to resolve a case or controversy of major national import, (5) the need to review a clearly erroneous factual determination by an immigration judge, or (6) the need to reverse the decision of an immigration judge or DHS. *Id.* The streamlining provisions anticipated that a single Board member would decide a substantial majority of the cases either through an AWO or through a short order.

While the streamlining provisions allowed the Board to resolve its backlog,

the Attorney General has determined that the Board is in a better position to devote more resources to improving its review of complex or problematic cases. This regulation expands the criteria for three-member decisions by allowing a Board member, in the exercise of discretion, to refer a case to a three-member panel when the case presents a complex, novel, or unusual legal or factual issue. The Attorney General anticipates that three-member review of complex or problematic cases may enhance the review and analysis of the issues presented, and may provide more authoritative guidance.

This provision will also permit the panels to publish more cases as precedent decisions because the Board members will have greater discretion to refer cases to a three-member panel, and will therefore have more cases to consider for publication. Under the Board's current practice, opinions issued by a single Board member are not considered for publication as a precedent decision. Cases involving unusual or complex legal or factual issues are often the type of case that the Board would consider for publication of a precedent decision.

In exercising its discretion to refer a case to a three-member panel under this provision, the Board may consider available resources and the best use of those resources while fulfilling its many responsibilities such as providing a full and fair review in each individual case, offering guidance to immigration judges and the federal courts of appeals when they are faced with recurring issues, promoting national uniformity in the interpretation of the immigration laws, and the need for issuing published precedential decisions. The Board will be able to determine the need for enhanced review and analysis, and the need to issue guidance, in evaluating which cases to refer for three-member review.

V. Publication of Precedent Decisions

A. The Importance of Precedent Decisions

Another criticism that emerged during the Attorney General's review was that the promulgation of the Board reform rule made it more difficult for the Board to publish adequate numbers of precedential decisions. In fact, one of Attorney General Ashcroft's goals in adopting the Board reform rule in 2002 was to promote the cohesiveness and collegiality of the Board's decision-making process and to facilitate the publication of more precedent decisions with greater uniformity. *See* 67 FR at 54894.[3]

Initially, after publication of the Board reform rule, the Board reduced the number of precedent decisions published. Instead, the Board concentrated its efforts and resources on implementing the many changes mandated by the rule, the most pressing of which was to address the backlog of cases and to create case management practices that would allow the Board to complete appeals in a timely fashion. As noted earlier, the Board has been successful in these endeavors, while adjusting to a smaller number of Board members. Now that the backlog has been brought under control and case management practices are firmly in place, the Board has been able to turn its attention to increasing the number of published decisions. In fiscal year 2006 the Board published more precedents (25) than in any other year since fiscal year 2000, and surpassed that number in fiscal year 2007, publishing 40 decisions.

At a time when the Board has been issuing some 44,000 decisions annually, the Attorney General has concluded that publishing a greater number of precedent decisions is required to resolve more of the important and recurring legal issues, factual settings, procedural questions, and matters of discretion facing the Board and the immigration judges. Given that there are approximately 220 immigration judges around the country who are adjudicating 350,000 cases annually, there is an important need not only to provide clear guidance but also to promote a degree of national uniformity and consistency in the disposition of these cases. Without published precedent decisions, immigration judges may continue to interpret the law in inconsistent ways, requiring duplicative litigation and appeals by the parties, which in turn raises the specter of possible inconsistencies in the Board's dispositions. At the least, in the absence of published precedent decisions addressing the interpretation of a particular statutory or regulatory provision, there is no clear assurance to the parties and the federal courts that the Board and the immigration judges are resolving issues consistently through unpublished decisions in a series of different cases.

The number of Board decisions published as precedents also has important implications for judicial review. The courts of appeals have been issuing hundreds of precedent decisions each year in reviewing cases decided by the Board, and a substantial number of the court decisions are interpreting the immigration laws and regulations. As a result, the courts of appeals, in many cases, have found themselves faced with the need to resolve key interpretive or procedural issues without the benefit of any precedential guidance from the Board on those issues.

In some cases, the courts of appeals have proceeded to announce their own interpretations, which then may become binding with respect to other immigration cases arising within that circuit.[4] This effect has been particularly evident in the Ninth Circuit, which hears slightly less than half of all of the immigration cases being appealed from the Board each year; thus, a precedent decision from the Ninth Circuit affects a very large number of other pending immigration cases. In any of the circuits, though, the result all too often is that the interpretation of the immigration laws has become fragmented, with the interpretation of legal or procedural issues often varying substantially depending solely on the circuit in which each case arises. Such results frustrate the goal of national uniformity and consistency in the immigration process.

In other cases, particularly in recent years, some courts of appeals instead have remanded pending cases back to the Board, allowing the Board to issue a precedent decision on the issues raised in the case, rather than having the court of appeals announce its own legal interpretation as a matter of first impression. These remand orders provide an opportunity for the Board to

[3] The Attorney General discussed at some length the importance of the Board's role in providing precedential guidance regarding the interpretation of the immigration laws. *See* 67 FR at 54880 (''This precedent setting function recognizes that novel issues arise each and every time that the Act, or the regulations, change; complex issues arise because of the interrelationship of multiple provisions of law; and repetitive issues arise before different immigration judges because of the national nature of the immigration process. All of the participants in the immigration adjudication process deserve concise and useful guidance on how these novel, complex, and repetitive issues are best resolved * * *. Both the three-member panel and the en banc Board should be used to develop concise interpretive guidance on the meaning of the Act and regulations. Thus, the Department expects the Board to be able to provide more precedential guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.'').

[4] *See, e.g., Maharaj* v. *Gonzales,* 450 F.3d 961, 971–76 (9th Cir. 2006) (en banc) (noting that the Board had not issued a precedent decision interpreting the asylum regulation dealing with firm resettlement, 8 CFR 208.15, since it had been adopted 16 years earlier; court of appeals then surveyed judicial interpretations from various court of appeals decisions and announced its own interpretation of the regulatory language).

resolve the legal issues in each such case before the court adopts its own interpretations.

In *Yuanliang Liu* v. *U.S. Dept. of Justice,* 455 F.3d 106 (2d Cir. 2006), the Second Circuit remanded a case to the Board with instructions to develop precedential standards and procedures for the immigration judges to follow in deciding whether an alien has knowingly filed a frivolous asylum application. Section 208(d)(6) of the INA provides that, if the Attorney General determines that an alien has knowingly made a frivolous asylum application after receiving notice of the statutory penalties for doing so, the alien shall be permanently ineligible for any benefits under the INA. Despite the significance of such a powerful sanction, the court of appeals found that the existing regulatory provision in 8 CFR 1208.20 leaves important substantive and procedural questions unresolved, and noted that the Board has not issued a precedent decision relating to section 208(d)(6) since it took effect over nine years ago. However, rather than undertaking to establish its own legal standards as a matter of first impression, the court remanded the case to the Board to provide precedential guidance on the issues arising under this provision. The Second Circuit's explanation of its reasons for doing so are relevant in a broader sense, as they set forth in a concise fashion many of the reasons why the Board itself may be considering the publication of precedent decisions, including the need for national uniformity, the absence of prior precedents, the existence of a statutory ambiguity, the volume of cases raising the same or similar issues, the importance of the issues, and the need for clearer standards to avoid ad hoc decision making. *Liu,* 455 F.3d at 116–17. In response to the remand, the Board recently issued a precedent decision addressing the interpretive issues with respect to frivolous asylum applications, *Matter of Y–L–*, 24 I&N Dec. 151 (BIA 2007).[5]

Three other recent developments also emphasize the importance of precedential guidance from the Board. First, in *Gonzales* v. *Thomas,* 547 U.S. 183 (2006), the Supreme Court reversed a decision by the Ninth Circuit that had interpreted the asylum laws to mean that a person's membership in a nuclear family constitutes a ''particular social group'' for purposes of evaluating claims of persecution. The Supreme Court reversed, noting that such determinations should be made in the first instance by the Board rather than the federal courts. With respect to such issues arising under the immigration laws, *Thomas* emphasizes the importance of the Board's role to provide interpretive guidance. *Cf. Ucelo-Gomez* v. *Gonzales,* 464 F.3d 163, 172 (2d Cir. 2006) (''Our mandate serves the convenience of the BIA as well as this Court, and promotes the purposes of the INA. *Thomas* requires that we (in effect) certify this question. There is a press of cases raising similar questions in this Court, in the BIA, and before immigration judges; and the common project of deciding asylum cases promptly will be advanced by prompt guidance.''); *Jian Hui Shao* v. *BIA,* 465 F.3d 497, 502 (2d Cir. 2006) (noting the foreign policy considerations relating to Chinese coercive population control asylum cases and the large number of affected aliens and stating: ''We believe, in light of these concerns, that it would be unsound for each of the several Courts of Appeals to elaborate a potentially non-uniform body of law; only a precedential decision by the BIA—or the Supreme Court of the United States—can ensure the uniformity that seems to us especially desirable in cases such as these.''); *Matter of J–H–S–*, 24 I&N Dec. 196 (BIA 2007) (responding to *Shao* v. *BIA, supra*).

Second, the Ninth Circuit has recently concluded that interpretations of the provisions of the INA announced in unpublished decisions of the Board are not entitled to judicial deference under the standards of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See Garcia-Quintero* v. *Gonzales,* 455 F.3d 1006, 1012–14 (9th Cir. 2006). The court of appeals determined that, in light of the Supreme Court's more recent decision in *United States* v. *Mead Corp.,* 533 U.S. 218, 226–27 (2001), only published precedent decisions of the Board are entitled to *Chevron* deference. More recently, the Second Circuit also concluded that it will follow a similar approach with respect to unpublished BIA decisions. *Rotimi* v. *Gonzales,* 473 F.3d 55 (2d Cir. 2007). Given the disproportionate share of immigration cases arising in the Ninth Circuit and the Second Circuit, we recognize the importance of the issuance of precedent decisions in order to promote national uniformity and obtain *Chevron* deference for the Board's interpretive decisions.

Third, the Supreme Court has made clear that an administrative agency is free to adopt a new interpretation of an ambiguous statutory provision, even though a federal court may have already issued a decision adopting a different interpretation of that same statute. *See National Cable & Telecomm. Ass'n* v. *Brand X Internet Services,* 545 U.S. 967 (2005). ''A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'' *Id.* at 982. *Brand X Internet* makes clear that—unless the court finds the statutory provision unambiguous under *Chevron* step one—the administrative agency is free to adopt a contrary interpretation, as long as it does so with proper foundation and explanation, and the courts are thereafter required to defer to the agency's new interpretation if it is sustainable under *Chevron* step two.[6]

[5] In addition, in response to a remand order from the Second Circuit, the Board issued a comprehensive decision in *Matter of Wang,* 23 I&N Dec. 924 (BIA 2006), which addressed and resolved a number of different interpretive issues relating to the Chinese Student Protection Act and the relevance of Congress's subsequent enactment of a new process for adjustment of status under section 245(i) of the INA. As another example, in response to the Second Circuit's directive in *Shi Liang Lin* v. *U.S. Dep't of Justice,* 416 F.3d 184, 192 (2d Cir. 2005), the Board issued a precedent decision providing an interpretation of the asylum laws relating to coercive population control practices. *Matter of S–L–L–,* 24 I&N Dec. 1 (BIA 2006), *rev'd, Shi Liang Lin* v. *U.S. Dept. of Justice,* 494 F.3d 296 (2d Cir. 2007) (en banc). In another case, in response to a remand order from the court of appeals in *Ucelo-Gomez* v. *Gonzales,* 464 F.3d 163 (2d Cir. 2006), the Board issued a precedent decision concluding that the category of ''affluent Guatemalans'' does not qualify as a ''particular social group'' for purposes of claims of persecution under the asylum laws. *Matter of A–M–E– & J–G–U–,* 24 I&N Dec. 69 (BIA 2007), *aff'd sub nom. Ucelo-Gomez* v. *Mukasey,* 509 F.3d 70 (2d Cir. 2007). *See also Velazquez-Herrera* v. *Gonzales,* 466 F.3d 781, 783 (9th Cir. 2006) (''We decline to reach the question whether either of these two definitions (or any other definition) is a permissible construction of 8 U.S.C. 1227(a)(2)(E)(i) . * * * Given that the Board has twice touched upon the issue of child abuse without authoritatively defining the term, and that the Board's two definitions are not consistent with each other, we think it prudent to allow the BIA in the first instance to settle upon a definition of child abuse in a precedential opinion.''); *Mirzoyan* v. *Gonzales,* 457 F.3d 217 (2d Cir. 2006) (remanding to the Board to define standards with respect to economic persecution); *Matter of T–Z–,* 24 I&N Dec. 163 (BIA 2007) (establishing standards for determining whether nonphysical harm, including economic sanctions, rises to the level of persecution).

[6] As the Supreme Court explained, 545 U.S. at 982–83 (citations omitted):

Chevron established a ''presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'' Yet allowing a judicial precedent to foreclose an agency from interpreting

The Supreme Court also noted that leaving the agency free to reinterpret statutory provisions, notwithstanding prior judicial precedents to the contrary, reflects the proper interpretive authority vested by Congress in the agency with respect to ambiguous statutory provisions. *See id.* at 983–84 (''In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable). The [court's] precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law.'') *Cf. Jian Hui Shao,* 465 F.3d at 502 (''Accordingly, any effort expended by us interpreting the statute would be for nought should the BIA subsequently reach a different, yet reasonable, interpretation of this ambiguous provision.'').

The Supreme Court's decision in *Brand X* Internet offers an important opportunity for the Attorney General and the Board to be able to reclaim *Chevron* deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations, as long as the agency interpretation is within the scope of *Chevron* step two deference. Implementation of the interpretive authority recognized under *Brand X Internet* is undertaken through formal agency processes—*i.e.*, by rulemaking or by a precedent decision by the Board or the Attorney General.

As a recent example, in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), the Board issued a precedent decision interpreting the provisions of section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (INA) and 8 CFR 212.2, as they relate to an alien seeking to establish admissibility in conjunction with an application for adjustment of status under section 245(i) of the INA. The Board's precedent decision explained at length why the Board disagreed with a prior decision of the Ninth Circuit that interpreted these same provisions to reach an opposite result. *See Perez-Gonzalez* v. *Ashcroft,* 379 F.3d 783 (9th Cir. 2004), *recon. denied,* 403 F.3d 1116 (9th Cir. 2005); *Torres-Garcia,* 23 I&N Dec. at 873–76. The Ninth Circuit has recognized that its prior decision in *Perez-Gonzalez* is no longer good law, because the court is required, under *Brand X Internet,* to defer to the Board's decision in *Torres-Garcia* that adopted a different, reasonable interpretation of the provisions at issue. *See Gonzales* v. *DHS,* 508 F.3d 1227 (9th Cir. 2007) (''under *Chevron* and *Brand X* we are required to defer to *In re Torres-Garcia's* interpretation of the statutory scheme, regardless of whether the agency once adhered to a different interpretation. * * * [W]e hold today that we are bound by the BIA's interpretation of the applicable statutes in *In re Torres-Garcia,* even though that interpretation differs from our prior interpretation in *Perez-Gonzalez.*'').

B. Changes to the Current Regulations

Under the current regulations, the Board's decisions are published as precedents upon a majority vote of the permanent Board members. While that process ensures that precedent decisions are fully considered by the members of the Board, it also means that the Board's panels are not able to designate their decisions as precedential unless a majority of the Board members agree.

At a time when the Board had only 5 members (which was the case until 1995), it made sense to require that a majority of Board members would be needed to designate any decision as a precedent. At that time, the three members of each panel constituted a majority of the Board members, and thus the members of a panel would have been able, on their own authority, to publish unanimous decisions of that panel as precedents. In fact, when the Board had only 5 members, the Board often published as many as 50 or 60 precedent decisions annually, at a time when the Board had a much smaller caseload and there were far fewer immigration judges whose decisions were being reviewed.

To facilitate the publication of precedent decisions, the Attorney General has decided to revise the Board's processes to allow three-member panels to publish precedent opinions if a majority of the permanent Board members of a panel votes to publish a decision. This rule also proposes to codify the Attorney General's authority to direct the Board to publish a decision as a precedent.[7]

The Department acknowledges that most of the more than 40,000 decisions issued by the Board each year do not articulate a new rule of law or procedure, and indeed even a substantial number of the cases that are referred to a three-member panel under the specific standards of 8 CFR 1003.1(e)(6) may not merit publication as a precedent. However, in cases where a majority of the Board members issuing a panel decision conclude that a case involves one or more issues that the Board has not previously resolved in a precedent decision,[8] and that publishing a precedent would be appropriate, in the exercise of discretion, this rule facilitates the publication of Board decisions in order to provide authoritative guidance to the aliens and their representatives, the immigration judges, the administrative agencies, and the federal courts.

This rule encourages publication of opinions which meet certain criteria, such as whether: (1) The case involves a substantial issue of first impression; (2) the case involves a legal, factual, or procedural issue that can be expected to arise frequently in immigration cases; (3) the case announces, modifies, or clarifies a rule of law; (4) the case resolves a conflict in decisions by immigration judges or the federal courts; (5) there is a need to achieve or maintain national uniformity of interpretation under the immigration laws and regulations with respect to the issues presented in the case, or to restore such uniformity of interpretation

an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction. A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would ''lead to the ossification of large portions of our statutory law,'' by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of stare decisis requires these haphazard results.

[7] Though the authority has not previously been codified in the regulations, the Attorney General in the past has directed the Board to publish a previously issued unpublished decision as a precedent to govern all similar cases. *See Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA 1990; A.G. 1994). This rule provides specific authority for the Attorney General to direct that previously issued Board decisions be published to serve as precedents. The rule also provides that the Attorney General may redelegate that authority to other Department officials, which may include the Deputy Attorney General or the Associate Attorney General.

[8] Note that a precedent decision need not address every issue in a case. Just as the courts of appeals do at times, the Board may choose to publish a precedent decision dealing with one or two key issues in the case, and then resolve the remaining issues in an unpublished decision if those issues do not merit discussion in a precedent decision.

pursuant to interpretive authority recognized by the Supreme Court in *Brand X Internet*; or (6) the case warrants publication in light of other factors that give it general public interest.[9]

The Board members will apply these standards on a case-by-case basis, in the exercise of their discretion, in determining which decisions to designate as precedents. Also, either of the parties may file a motion with the Board suggesting the appropriateness of designating a previously unpublished decision as a precedent. In addition, in view of the increasing importance of precedent decisions in the judicial review process, the Department recognizes that the Civil Division's Office of Immigration Litigation may suggest to EOIR the appropriateness of designating a decision as a precedent.

Although under this proposed rule a panel of three Board members may publish a precedent decision, the underlying purpose of the rule is to encourage the Board to provide clear and consistent guidance to the immigration judges, the parties in removal proceedings, and the federal courts. In that regard, the rule provides that the Board Chairman or the Board en banc may set a policy that all decisions selected for publication by a panel will be circulated to all the Board members for a period of time prior to issuance. Such an opportunity for prior consideration is appropriate, because a published panel decision represents the precedential opinion of the Board and is binding on all panels. As provided in the existing regulations, 8 CFR 1003.1(a)(5), a case may be referred to the Board for en banc consideration and decision by vote of a majority of permanent Board members or by direction of the Chairman, and en banc review may be necessary to ensure that the decision reflects the views of a majority of the Board or if a potential exists for inconsistent decisions among the panels. In order not to delay the process, the Chairman or the Board en banc may establish appropriate time limits for the Board members to consider a panel's precedent decision prior to publication.

Finally, although the regulations are being revised to facilitate publication, the parties should keep in mind that, while the immigration bar often looks to the Board to publish cases covering certain issues of law or circumstance, the Board may only address novel or important issues of law in the context of cases as they appear before it. The Board favors publication where both parties have submitted briefs clearly addressing the issues presented by the case and, conversely, prefers not to publish where the parties have not adequately briefed the issues. Therefore, parties should be prepared to fully develop the issues in well-presented briefs in order to facilitate the Board's publication of precedent decisions. However, in some cases the Board may choose to issue a new briefing schedule to facilitate participation by amicus curiae in order to address the issues in a case presenting important, unresolved issues.

[9] Although the Board ordinarily does not entertain interlocutory appeals, the Board on very rare occasions does rule on the merits of interlocutory appeals where it is deemed necessary to address important jurisdictional questions regarding the administration of the immigration laws, or to correct recurring problems in the handling of cases by the immigration judges. *See, e.g.*, *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990). These standards for interlocutory appeals are appropriately narrow, in order to avoid piecemeal review of the myriad of questions that may arise in the course of removal proceedings, but they do suggest that the very rare cases that the Board concludes are appropriate for interlocutory review may also be considered for publication as precedents.

VI. Regulatory Requirements

A. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small businesses or small governmental entities. This rule is related to agency organization and management of cases pending before the immigration judges and the Board of Immigration Appeals. Accordingly, the preparation of a Regulatory Flexibility Analysis is not required.

B. 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.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement 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, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 (Regulatory Planning and Review)

The Department considers this rule to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly it has been submitted to the Office and Management and Budget for review.

E. Executive Order 13132 (Federalism)

This 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, this rule does not have sufficient federalism implications to warrant preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule has been prepared in accordance with the standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not create any information collection requirements.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, chapter V of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Section 1003.1 is amended by:

a. revising paragraph (e)(4)(i);

b. adding paragraph (e)(4)(iii);

c. revising paragraph (e)(6) introductory text;

d. amending paragraph (e)(6)(v) by removing ''or'';

e. amending paragraph (e)(6)(vi) by removing the period and adding in its place ''; or'';

f. adding paragraph (e)(6)(vii);

g. adding paragraph (e)(9); and by

h. revising paragraph (g).

The additions and revisions read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(e) * * *

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned may, in that member's discretion, affirm the decision of the DHS immigration officer or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct with respect to the issues raised by either party on appeal; that any errors in the decision under review raised by either party on appeal 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 by either party on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

* * * * *

(iii) 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. In addition, a decision by the Board under this paragraph (e)(4), or under paragraphs (e)(5) or (e)(6), is based on issues and claims of error raised on appeal by the parties and is not to be construed as waiving a party's obligation to exhaust administrative remedies by raising in a meaningful manner all issues and claims of error in the first instance on appeal to the Board. In any decision under paragraphs (e)(5) or (e)(6) of this section, the Board may, on its own motion and in the exercise of discretion, rule on any issue not raised by the parties in its decision.

* * * * *

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

* * * * *

(vii) The need to resolve a complex, novel, or unusual issue of law or fact.

* * * * *

(9) The provisions of paragraphs (e)(4)(i), (e)(5), and (e)(6) of this section are intended to reflect an internal agency directive for the purpose of efficient management and disposition of cases pending before the Board, and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or any court.

* * * * *

(g) *Decisions as precedents.*—(1) *In general.* Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board and decisions of the Attorney General shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States.

(2) *Precedent decisions.* Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security as provided in paragraph (i) of this section shall serve as precedents in all proceedings involving the same issue or issues.

(3) *Designation of precedents.* By majority vote of the permanent Board members, by majority vote of the permanent Board members assigned to a three-member panel, or as directed by the Attorney General or his designee, selected decisions of the Board issued 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. Under procedures established by the Chairman or the Board en banc, a panel shall provide notice to the Board en banc before publishing a precedent decision, in order to allow the Board to determine whether to consider the case en banc as provided in paragraph (a)(5) of this section. In determining whether to publish a precedent decision, the Board may take into account relevant considerations, in the exercise of discretion, including among other matters:

(i) Whether the case involves a substantial issue of first impression;

(ii) Whether the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases;

(iii) Whether the decision announces a new rule of law, or modifies or clarifies a rule of law or prior precedent;

(iv) Whether the case involves a conflict in decisions by immigration judges, the Board, or the federal courts;

(v) Whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations; and

(vi) Whether the case warrants publication in light of other factors that give it general public interest.

* * * * *

Dated: June 5, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–13435 Filed 6–17–08; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0640; Directorate Identifier 2008–NM–070–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400, 747–400D, and 747–400F Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 747–400, 747–400D, and 747–400F series airplanes. This proposed AD would require installing an extension tube to the existing pump discharge port of the scavenge pump on the outboard side of the center fuel tank in the main fuel tank #2. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent a fire or explosion in the fuel tank and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by August 4, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–