Proposed Rules

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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 Parts 1003 and 1240

[EOIR Docket No. 19–0022; A.G. Order No. 4800–2020]

RIN 1125–AA96

Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (''Department'') proposes to amend the regulations of the Executive Office for Immigration Review (''EOIR'') regarding the handling of appeals to the Board of Immigration Appeals (''BIA'' or ''Board''). The Department proposes multiple changes to the processing of appeals to ensure the consistency, efficiency, and quality of its adjudications. The Department also proposes to amend the regulations to make clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases. Finally, the Department proposes to remove inapplicable or unnecessary provisions regarding the forwarding of the record of proceedings on appeal.

DATES: Written or electronic comments must be submitted on or before September 25, 2020. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight Eastern Time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 19–0022, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 19–0022 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305–0289 (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. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments must be submitted in English, or an English translation must be provided. To provide the most assistance to EOIR, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support the recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 19–0022. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

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 and precisely and prominently identify the confidential business information of which you seek redaction. 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 *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the agency counsel's contact information specific to this rule.

II. Executive Summary

Under this rule, for most appeals from immigration judge decisions and from certain decisions of Department of Homeland Security (''DHS'') officers, the parties would have a standardized briefing schedule with the filing of simultaneous briefs within 21 days. The Department also proposes to set the period of time by which the BIA may extend the period for filing a brief at 14 days. Additionally, the Department proposes to revise the regulations regarding cases that require current identity, law enforcement, or security investigations or examinations in order to eliminate unnecessary remands to the immigration court for purposes of completing or updating identity, law enforcement, or security investigations or examinations and to standardize the authority of EOIR adjudicators to deem an application abandoned if an applicant fails to comply with the necessary requirements regarding identity, law enforcement, or security investigations or examinations.

Furthermore, the Department proposes to amend the regulations to clearly authorize the BIA to issue dispositive decisions, including decisions on voluntary departure, and to limit the BIA's authority to consider new evidence on appeal or to grant motions to remand for consideration of new evidence, except in cases where there is new evidence or information obtained as the result of identity, law enforcement, or security investigations or examinations or where the new information raises a question of jurisdiction or removability. The

Department also proposes to clarify the limited situations in which the BIA may engage in factfinding on appeal, to make it clear that the BIA may affirm a decision based on any reason contained in the record, and to make clear that there is no ''totality of the circumstances'' standard of review. It also proposes to clarify that the Board may limit the purpose or scope of a remand when it divests jurisdiction to the immigration judge on remand. The Department proposes to amend the regulations to assure quality control and accuracy of Board decisions through an immigration judge certification process in limited circumstances.

The Department proposes to amend 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or BIA members to administratively close immigration cases absent an express regulatory or settlement basis to do so. The Department also proposes to withdraw the Attorney General's delegated authority to the BIA to certify cases to itself and the authority of the BIA and immigration judges to *sua sponte* reopen a case or reconsider a decision, except in limited circumstances evincing a need to correct typographical errors or defective service. The Department also proposes to allow the filing of motions to reopen notwithstanding existing time and number bars in limited circumstances implicating jurisdiction or removability, though such motions before the Board could be granted only by a three-member panel. The Department further proposes to clarify regulatory timeliness guidelines for appeals assigned to three-member panels of the BIA. Finally, the Department is proposing to add additional timeliness guidelines for the processing of appeals, provide for a further delegation of authority from the Attorney General to the EOIR Director (''Director'') regarding the efficient disposition of appeals, and delete inapplicable or unnecessary provisions regarding the forwarding of the record of proceedings on appeal.

A party to EOIR proceedings may appeal immigration judge decisions and certain DHS decisions, including administrative fines and visa petitions under section 204 of the Immigration and Nationality Act (''INA''), to the BIA. *See* 8 CFR 1003.1(b). Because the INA contains few details regarding the appeals process, EOIR's regulations govern the specific procedural requirements for appeals to the BIA. *See generally* 8 CFR part 1003, subpart A.[1] Over time, the Department has frequently reviewed the relevant regulations in order to address management challenges at the BIA and to ensure the efficient adjudication of immigration proceedings to best use EOIR's resources. This proposed rule will further ensure that cases heard at the BIA are adjudicated in a consistent and timely manner.

The number of cases pending within EOIR has increased tremendously, particularly in recent years. EOIR had approximately 130,000 pending cases in 1998. At the end of Fiscal Year (''FY'') 2019, EOIR had approximately 1.08 million pending cases, up from approximately 430,000 pending at the end of FY 2014 and approximately 263,000 at the end of FY 2010. EOIR's current pending caseload represents a more than 800 percent increase over the amount pending 21 years ago. *See* EOIR, *Adjudication Statistics: Pending Cases* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1242166/download;* EOIR, *Adjudication Statistics: New Cases and Total Completions* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1060841/download.*

With the increase in pending cases at the immigration courts, EOIR has recently begun to have a corresponding increase in the number of appeals of immigration judge decisions. In FY 2018, the number of such appeals increased to 39,096—a 70 percent increase over the previous high in the last five fiscal years. EOIR, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending* (Oct. 23, 2019), *https://www.justice.gov/eoir/page/file/1198906/download.* In FY 2019, the number of such appeals increased to 54,092, a 38 percent increase from FY 2018 and a 250 percent increase from FY 2015. *Id.* The BIA ended FY 2019 with 65,201 pending appeals from immigration judge decisions, up from 12,677 at the end of FY 2017. *Id.*

Due to these significant increases, the Department believes it is necessary to again review the BIA's regulations to reduce any unwarranted delays in the appeals process and to ensure the efficient use of BIA and EOIR resources. Additionally, the Department believes that it is necessary to provide the BIA with the appropriate tools to make final decisions wherever possible to reduce unnecessary and inefficient remands to the immigration courts, including remands solely for the completion of background checks or to allow a respondent to be granted voluntary departure. Remands to the immigration court delay case completion due to the amount of time it takes for the case to be placed back on the immigration courts' already full dockets. Additionally, remands to the immigration court for issues that could be addressed by the BIA needlessly prolong case adjudications and take valuable time away from other cases before the immigration court, further straining the limited court resources.

Accordingly, the Department proposes to make seven changes to the BIA's regulations regarding adjudicative and appellate procedures:

1. In all cases, shorten the time allowed for the BIA to grant an extension for a party to file an initial brief or a reply brief from 90 days to 14 days, while also allowing the Board to seek supplemental briefing if it believes such briefing would be beneficial;

2. Make all briefing for appeals of immigration judge decisions simultaneous;

3. End the BIA practice of remanding to the immigration court solely for the purpose of completing or updating identity, law enforcement, or security investigations or examinations or solely because an immigration judge did not provide required advisals regarding an application for voluntary departure;

4. Delegate clear authority to the BIA to issue orders of removal, termination or dismissal, and voluntary departure, and orders granting relief or protection as part of the process to adjudicate appeals;

5. Decrease the scope of motions to remand that the BIA may consider, make clear that the BIA cannot remand a case under a ''totality of the circumstances'' standard, clarify the limited situations in which the BIA may engage in factfinding on appeal, and make clear that the BIA may affirm a decision based on any valid reason supported by the record;

6. Clarify that the BIA may limit or qualify the scope of a remand while simultaneously divesting itself of jurisdiction over the case; and

7. Allow immigration judges to certify BIA remand or reopening decisions for further review in limited circumstances as part of a quality assurance process.

Overall, the Department believes these proposed changes will enable

[1] As the Supreme Court has recognized, ''the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes.'' *INS* v. *Doherty,* 502 U.S. 314, 327 (1992). Although there is a reference to the BIA in section 101(a)(47)(B) of the INA, 8 U.S.C. 1101(a)(47)(B), that reference occurs only in the context of establishing the finality of an order of deportation or removal after the BIA has affirmed the order or the time allowed for appeal to the BIA has expired. It does not address the scope of the BIA's authority or its procedures.

EOIR to better address the growing number of cases and related challenges, as well as to ensure that all cases are treated in an expeditious manner consistent with due process. These changes also build on ongoing reviews of all procedures to ensure that cases are completed in a timely manner consistent with due process. Each change is discussed in turn below. The Department intends for these changes to be effective for appeals filed with the BIA on or after the effective date of the final rule.

The Department also proposes to clarify the scope of 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) regarding the extent of authority of immigration judges and Board members to take action ''appropriate and necessary for the disposition'' of the cases they adjudicate. The broad sweep of this language has caused confusion regarding the limits of immigration judges and Board members' authority to take action in handling cases before them, especially regarding administrative closure. The proposed rule seeks to address that confusion by making it clear that neither the Board nor immigration judges have authority under 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to administratively close a case—either unilaterally or with the consent of the parties—unless authorized by regulation or a judicial settlement and that neither 8 CFR 1003.1(d)(1)(ii) nor 1003.10(b) provides such authorization.

The Department also proposes to make changes to the BIA to improve its internal consistency in decision-making and its adjudicatory efficiency. First, the proposed rule will improve consistency in BIA decision-making by withdrawing, with limited exceptions, the delegation of the Attorney General's authority for the BIA to *sua sponte* reopen or reconsider decisions [2] and for the Board to certify cases to itself on its own motion. These procedures have few standards to ensure consistent application. Without clear standards, and without the possibility of further review in most cases, they are subject to inconsistent application and even abuse. Moreover, they severely undermine the importance of finality in immigration proceedings by encouraging the filing of motions in contravention of the strict time and number limits imposed by statute. *See, e.g., Doherty,* 502 U.S. at 323 (''Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'' (citation omitted)); *INS* v. *Abudu,* 485 U.S. 94, 107 (1988) (''The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.'' (footnotes omitted)); *see also Matter of Beckford,* 22 I&N Dec. 1216, 1221 (BIA 2000) (en banc) (''When Congress directed the Attorney General to promulgate regulations limiting motions to reopen and reconsider, it clearly sought to (1) limit the ability of aliens to file motions, and (2) bring finality to immigration proceedings.''). To ensure that there remains a mechanism for reopening the proceedings of individuals with colorable claims to United States citizenship or nationality and aliens whose removability is vitiated in full prior to the execution of the removal order, the Department also proposes to amend the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, in certain circumstances. Those circumstances are when an alien claims that an intervening change in law or fact renders the alien no longer removable and the alien has exercised diligence in pursuing his or her motion, or when an individual claims, supported by evidence, that he or she is a United States citizen or national.

Second, the proposed rule will ensure that cases at the Board are timely adjudicated. Current regulations place an emphasis on timeliness only near the end of the adjudication process, which ignores the potential for significant delays much earlier in the process. Moreover, the regulations do not provide for an overall timeliness goal, and the BIA's accounting of the timeliness of adjudications is confusing and potentially misleading. *See* Office of the Inspector Gen., Dep't of Justice, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* 41 (Oct. 2012), *https://oig.justice.gov/reports/2012/e1301.pdf* (''DOJ OIG Report'') (''EOIR's performance reporting does not reflect appeal delays and underreports actual processing time, which undermines EOIR's ability to identify problems and take corrective actions.''). Consequently, this proposed rule ensures that all phases of the appeal process are subject to timeliness goals, provides appropriate accounting of the timely disposition of appeals, and provides a mechanism to ensure that no one appeal remains pending for too long without a regulatory or operational basis for the delay.

III. Background

A. Appellate Briefings

A party to EOIR proceedings may appeal immigration judge decisions and certain DHS decisions, including administrative fines and visa petitions under section 204 of the INA, to the BIA. *See* 8 CFR 1003.1(b). Because the INA contains few details regarding the appeals process, EOIR's regulations govern the specific procedural requirements for appeals to the BIA. *See generally* 8 CFR part 1003, subpart A. Over time, the Department has reviewed the relevant regulations in order to find the proper balance between the length of time allowed for the appeal process and the efficient adjudication of immigration proceedings that best uses EOIR's resources.

EOIR first implemented regulations regarding the time for filing a BIA appeal in 1987. Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 FR 2931 (Jan. 29, 1987).[3] EOIR's regulations did not historically specify a particular time period for the BIA briefing schedule, though EOIR did set briefing schedules in certain situations by policy. *See, e.g.,* EOIR, *Operating Policies and Procedures Memorandum 84–1: Case Priorities and Processing* 1 (Feb. 6, 1984), *https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-1.pdf* (''Because of the necessity of forwarding bond appeals expeditiously to the Board, I [Chief Immigration Judge William R. Robie] suggest that requests for briefing time wherever possible be

[2] For the same reasons, and to maintain a parallel level of authority, the proposed rule also withdraws the delegation of the Attorney General's authority for immigration judges to reopen or reconsider decisions *sua sponte,* subject to a limited exception.

[3] The 1987 final rule amended 8 CFR 3.36, in addition to other regulatory sections. In 1992, 8 CFR 3.36 was redesignated as 8 CFR 3.38. Executive Office for Immigration Review; Rules of Procedures, 57 FR 11568 (Apr. 6, 1992). Following the creation of DHS in 2003 after the passage of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, EOIR's regulations were moved from chapter I of Title 8 of the Code of Federal Regulations to chapter V. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Accordingly, section 3.38 of the EOIR regulations was transferred to 8 CFR 1003.38. *Id.* at 9830.

limited to a *maximum* of ten days per party.'' (underlining in original)).

Congress subsequently instructed the Department to implement regulations regarding, among other things, ''the time period for the filing of administrative appeals . . . and for the filing of appellate and reply briefs.'' Immigration Act of 1990, Public Law 101–649, sec. 545(d)(2), 104 Stat. 4978, 5066. In 1996, the Department updated the regulations regarding the BIA appeals process after publishing multiple related proposed rules in 1994 and 1995. *See* Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 FR 18900 (Apr. 29, 1996). The final rule established a sequential filing schedule for BIA briefing, which allowed each party 30 days to file a brief in sequence, although the BIA retained the authority to set a shorter period in individual cases. *Id.* at 18906. The 30-day period for all cases was a departure from the Department's 1994 proposal to allow 30 days to file a brief only in non-detained cases and to allow 14 days for detained cases, which commenters objected to for treating the different classes of appellants differently. *See* Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 59 FR 29386, 29386 (June 7, 1994).

In 2002, the Department again updated EOIR's regulations regarding the BIA's appeals process. Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 54878 (Aug. 26, 2002). The reforms were designed to reduce the BIA's backlog of pending cases, eliminate unwarranted delays in the adjudication of appeals, use the BIA's resources efficiently, and focus resources on the most complicated appeals. Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 7309, 7310 (Feb. 19, 2002) (notice of proposed rulemaking (''NPRM'') that was finalized with the publication of 67 FR 54878). The Department reduced the time allowed for filing briefs from 30 days to 21 days after the transcript becomes available, regardless of the alien's detention status, and maintained the BIA's ability to set a shorter time for briefing in individual cases. 67 FR at 54904; 8 CFR 1003.3(c)(1). The Department also implemented a simultaneous briefing requirement for cases involving a detained alien but retained consecutive briefing for non-detained aliens. 67 FR at 54904.

In 2002, the Department also changed the standard time to file a brief in support of or in opposition to an appeal from a DHS decision from 30 days to 21 days. *Id.;* 8 CFR 1003.3(c)(2). These regulatory changes standardized the briefing process for all appeals under the BIA's jurisdiction.

The Department has not made any further amendments to the relevant regulations governing BIA briefing schedules since 2002. Under the current regulatory framework, for appeals of immigration judge decisions in cases involving aliens who are not detained in DHS custody, the appellant has 21 days to file a brief and the appellee then has the same amount of time to file a response brief. 8 CFR 1003.3(c)(1).[4] For appeals of immigration judge decisions in cases involving aliens detained in DHS custody, as well as appeals from certain DHS adjudications, the parties have 21 days to file briefs in support of or in opposition to the appeal. 8 CFR 1003.3(c)(1) and (2).[5] The BIA may extend the time to file a brief, including a reply brief, for an additional 90 days for good cause shown. 8 CFR 1003.3(c)(1). Briefs in appeals from an immigration judge decision involving an alien who is in custody are filed simultaneously, while briefs in appeals from an immigration judge decision involving an alien who is not in custody are filed consecutively. *Id.*

B. Identity, Law Enforcement, or Security Investigations or Examinations

The BIA generally may not grant an application for relief or protection unless DHS has completed the appropriate identity, law enforcement, or security investigations or examinations of the applicant and the results of those investigations or examinations are current. 8 CFR 1003.1(d)(6).[6] Affected applications include the forms of relief or protection most frequently sought before EOIR, such as asylum, statutory withholding of removal, and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'');[7] adjustment of status; and cancellation of removal. 8 CFR 1003.47(b); *see also* 8 CFR 1003.1(d)(6)(i).

In cases where identity, law enforcement, or security investigations or examinations have not been completed or the results of such are no longer current, 8 CFR 1003.1(d)(6)(ii) currently allows the BIA two alternatives in order to further the adjudication of the case. First, the BIA may issue an order remanding the case to the immigration judge with instructions to permit DHS to complete or update investigations or examinations and report the results to the immigration judge. 8 CFR 1003.1(d)(6)(ii)(A). Alternatively, the BIA may provide notice to the parties that the case is being placed on hold until all identity, law enforcement, or security investigations or examinations are completed or updated and those results reported to the BIA. 8 CFR 1003.1(d)(6)(ii)(B).

The current regulations regarding the identity, law enforcement, or security investigations or examinations for aliens in EOIR proceedings were implemented in 2005. Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 FR 4743 (Jan. 31, 2005).[8] At that time, the Department included the option for the BIA to remand a case to the immigration judge while DHS completed or updated the appropriate investigations or examinations. *Id.* at 4748. This option addressed those cases that were pending before the BIA prior to publication of the interim rule. *Id.* This was because, prior to the regulatory changes, the record before the BIA would likely not have indicated whether DHS had ever conducted identity, law enforcement, or security investigations or examinations, and the BIA would not have been able to issue a final decision based on an incomplete record. *Id.* The Department did not intend the BIA issuance of

[4] Although the regulation from 2002 refers to the appellee's brief as a ''reply brief,'' the BIA Practice Manual refers to it as a response brief. Bd. of Immigration Appeals, Dep't of Justice, *Practice Manual* 63 (2018), *https://www.justice.gov/eoir/page/file/1101411/download* (''BIA Practice Manual''). By contrast, it refers to a brief filed in reply to the response brief as a ''reply brief.'' *Id.* The Supreme Court similarly distinguishes between response briefs and reply briefs. *E.g., Amgen, Inc.* v. *Sandoz, Inc.,* 137 S.Ct. 908 (2017). By requiring simultaneous briefing in all cases, the proposed rule makes clear that there are no longer response briefs, only the possibility of reply briefs.

[5] For appeals of immigration judge decisions in which the underlying proceedings are transcribed, the briefing schedule is set by the BIA after the transcript is available. 8 CFR 1003.3(c)(1).

[6] Immigration judges are similarly unable to grant most applications for relief or protection without complete and current DHS identity, law enforcement, or security investigations or examinations. *See* 8 CFR 1003.47. Further, by statute, no alien can be granted asylum ''until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.'' 8 U.S.C. 1158(d)(5)(A)(i).

[7] *See generally* 8 CFR 1208.16(c), 1208.17, 1208.18.

[8] The regulations were promulgated through an interim rule with request for comments, but that rule has not yet been finalized.

remands for the completion of identity, law enforcement, or security investigations or examinations to be an ongoing practice. *See id.* at 4749 (noting that ''after the [rule's] implementation period, it [was] expected that the number of cases where . . . the Board is required to hold or remand a case under 8 CFR 1003.1(d)(6) [would] diminish over time'').

Additionally, the EOIR regulations state that an alien's failure to file necessary documentation or to comply with the requirements to provide biometrics and other biographical information in conformity with the applicable regulations, the instructions to the applications, the biometrics notice, and instructions provided by DHS within the time allowed by the immigration judge's order constitutes abandonment of the application. 8 CFR 1003.47(c). The immigration judge may then enter an appropriate order dismissing the application unless the applicant demonstrates that such failure was the result of good cause. *Id.* For cases pending before the BIA, if the alien fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether the relief sought should be denied. 8 CFR 1003.1(d)(6)(iii). The regulations, however, do not currently provide Board members with the same authority as immigration judges to deem an application abandoned on this basis.

C. Voluntary Departure

An alien in removal proceedings may request voluntary departure pursuant to section 240B of the INA, 8 U.S.C. 1229c. Voluntary departure permits an eligible alien to leave the United States on his or her own volition, and at his or her own expense, in lieu of receiving an order of removal. INA 240B(a)(1), 8 U.S.C. 1229c(a)(1). To qualify for voluntary departure before an immigration judge prior to the conclusion of removal proceedings pursuant to INA 240B(a)(1), an alien must make such request prior to or at the master calendar hearing during which the case is initially calendared for a merits hearing; make no additional requests for relief (or if such requests have been made, withdraw such requests prior to any grant of voluntary departure pursuant to that section); concede removability; waive appeal of all issues; not be convicted of a crime described in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43); and not be deportable under section 237(a)(4) of the INA, 8 U.S.C. 1227(a)(4). *See* 8 CFR 1240.26(b). To qualify for voluntary departure before an immigration judge at the conclusion of removal proceedings, an alien must have at least one year of physical presence in the United States; have been a person of good moral character for five years preceding the application for voluntary departure; must not be deportable under specified sections of the INA; and must be able to establish by clear and convincing evidence that he or she has the means and intention to depart the United States. INA 240B(b)(1)(A)–(D), 8 U.S.C. 1229c(b)(1)(A)–(D); 8 CFR 1240.26(c).[9]

Although voluntary departure provides an alternative to an order of removal, it does not allow an alien to remain in the United States beyond a prescribed period, and the disposition of a request for voluntary departure does not affect determinations of an alien's removability or adjudication of an alien's application for protection or relief from removal that would allow the alien to remain in the United States. In *Dada* v. *Mukasey,* the Supreme Court described voluntary departure as ''an agreed-upon exchange of benefits, much like a settlement agreement.'' 554 U.S. 1, 19 (2008). An alien, in agreeing to voluntary departure, avoids the consequences of being ordered removed from the United States, thus preserving the opportunity for future benefits, including the possibility of lawful readmission. *Id.; cf.* INA 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A) (providing for the inadmissibility of aliens ordered removed or who depart while under an order of removal). The Supreme Court recognized that voluntary departure is beneficial for the Government as well, as it ''expedites the departure process and avoids the expense of deportation'' as well as ''eliminate[s] some of the costs and burdens associated with litigation over the departure.'' *Dada,* 554 U.S. at 11.

Upon granting a request for voluntary departure, an immigration judge must also enter an alternate order of removal. 8 CFR 1240.26(d). Failure to comply with specified conditions of voluntary departure, filing a motion to reopen or reconsider during the voluntary departure period, or filing a petition for review or any other judicial challenge to the final administrative order may result in automatic termination of voluntary departure and effectuate the alternative order of removal. 8 CFR 1240.26(c)(4), (e), (i). In addition to rendering the alien subject to the alternate order of removal, failure to depart within the voluntary departure period may result in civil penalties. INA 240B(b), 8 U.S.C. 1229c(b); 8 CFR 1240.26(j).

Currently, the regulations describe only an immigration judge's authority to grant voluntary departure in the first instance. *See generally* 8 CFR 1240.26. However, the regulations specify that in limited circumstances, the BIA may reinstate an order of voluntary departure when removal proceedings have been reopened for a purpose other than solely requesting voluntary departure. 8 CFR 1240.26(h). Under current EOIR practice, the BIA may remand a case to the immigration court for the sole purpose of considering eligibility for voluntary departure, a decision that has no bearing on the respondent's removability or eligibility for relief or protection that would allow the respondent to remain in the United States. The BIA may also remand a case for the purpose of the immigration judge's ''ministerial review'' of whether the alien received the proper voluntary departure advisals described in 8 CFR 1240.26(b)(3)(iii), (c)(3) and (j). *See Batubara* v. *Holder,* 733 F.3d 1040, 1042 (10th Cir. 2013). The BIA will also remand a case when such advisals have not been given. *Matter of Gamero,* 25 I&N Dec. 164, 168 (BIA 2010).

D. Motions To Remand

Parties to EOIR proceedings may file a motion to remand while their appeal is pending before the BIA. A motion to remand seeks to return jurisdiction of a case pending before the BIA to the immigration judge. Motions to remand, which are not described in the INA, were initially a judicially created concept rooted in principles of civil practice that were later codified into Title 8 of the CFR. *See Matter of Coelho,* 20 I&N Dec. 464, 470–71 (BIA 1992); 61 FR at 18904.

Currently, a party asserting that the BIA cannot properly resolve an appeal without further factfinding must file a motion to remand. 8 CFR 1003.1(d)(3)(iv). Motions to remand in most cases are subject to the same substantive requirements as motions to reopen. *See Matter of Coelho,* 20 I&N Dec. at 471. Accordingly, the BIA may deny a motion to remand where the evidence was previously available at an earlier stage in the proceedings or if the evidence is not material. *See* BIA Practice Manual at 84.

A motion to remand is filed while an appeal is still pending before the BIA, whereas a motion to reopen is typically filed after agency review of the case has concluded. A motion to reopen a

[9] Under certain circumstances, an alien may be granted voluntary departure by DHS in lieu of removal proceedings, as provided in 8 CFR 240.25. This form of voluntary departure is subject to regulatory procedures that are not implicated by the proposed rule.

decision rendered by an immigration judge that is pending when an appeal is filed or that is filed while an appeal is pending may be deemed a motion to remand and may be consolidated with the appeal. 8 CFR 1003.2(c)(4). Motions to remand are not subject to the same time or number limitations as motions to reopen because they are made during the pendency of an appeal. *See Matter of Oparah,* 23 I&N Dec. 1, 2 (BIA 2000). Currently, BIA policy states that if the BIA grants a motion to remand a decision back to the immigration judge, a party may once again file an appeal from the immigration judge's resulting decision, and that party may pursue any new or unresolved issues from the prior appeal. BIA Practice Manual at 85.

E. Factfinding

Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board does not engage in factfinding in the course of deciding appeals. 8 CFR 1003.1(d)(3)(iv). A party asserting that an appeal cannot be properly resolved without further factfinding must file a motion for remand. *Id.* If further factfinding is needed, the Board may remand the proceeding. *Id.*

F. Scope of a Board Remand

When the Board remands a case, it divests itself of jurisdiction unless jurisdiction is expressly retained. *Matter of Patel,* 16 I&N Dec. 600, 601 (BIA 1978). ''[W]hen this is done, unless the Board qualifies or limits the remand for a specific purpose, the remand is effective for the stated purpose and for consideration of any and all matters which the service officer deems as appropriate . . . .'' *Id.* Cases remanded for the completion of identity, law enforcement, or security investigations or examinations pursuant to 8 CFR 1003.47(h) are also treated as general remands, and an immigration judge may consider new evidence in such a remanded case ''if it is material, was not previously available, and could not have been discovered or presented at the former hearing.'' *Matter of M–D–,* 24 I&N Dec. 138, 141 (BIA 2007). Circuit courts have construed *Matter of Patel* to mean that the BIA can limit the scope of its remand only if it (1) expressly retains jurisdiction and (2) qualifies or limits the scope of remand. *Bermudez-Ariza* v. *Sessions,* 893 F.3d 685, 688 (9th Cir. 2018); *Johnson* v. *Ashcroft,* 286 F.3d 696, 701 (3rd Cir. 2002). No regulation allows the Board to expressly retain jurisdiction over a remanded case, however, and the Board rarely, if ever, does so in practice unless the remand is for a ministerial issue such as the need to forward the administrative record. *See* BIA Practice Manual at 76 (''Once a case has been remanded to the Immigration Judge, the only motion that the Board will entertain is a motion to reconsider the decision to remand.'').

G. Quality Assurance

In contrast to other administrative adjudicatory agencies, the Board does not have a formal quality assurance process to ensure that its remand decisions provide appropriate and sufficient direction to the immigration judges. *See, e.g.,* Soc. Sec. Admin., *Hearings, Appeals, and Litigation Law Manual* I–2–1–85 through I–2–1–88, *https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1.html* (''HALLEX'') (outlining policies for administrative law judges (''ALJs'') at the Social Security Administration (''SSA'') to seek clarifications of remand orders from the SSA Appeals Council and a feedback initiative allowing ALJs to raise other issues regarding remand orders). Although the Board has used various informal and internal quality control measures over time, no formal mechanism exists allowing immigration judges to raise issues regarding remand orders that may need clarification or further explication.

H. 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) and Administrative Closure

Under 8 CFR 1003.1(d)(1)(ii) and 1003.10(b), Board members and immigration judges are authorized, *inter alia,* to ''take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition'' of cases before them.[10]

Prior to 2012, the Department did not consider 8 CFR 1003.1(d)(1)(ii) or 1003.10(b) or any similar regulatory provision to authorize an immigration judge or the Board to unilaterally administratively close a case over a party's objection.[11] To the contrary, longstanding Board precedent made clear that an immigration judge was required both to complete a case and to complete it through only one of three avenues: An order of termination, an order of removal, or an order of relief or protection. *Matter of Chamizo,* 13 I&N Dec. 435, 437 (BIA 1969) (''We hold that 8 CFR 242.18(c) [now 8 CFR 1240.13(c)] requires that in deportation proceedings an order be entered which will result in the proceedings being processed to a *final conclusion,* whether by the deportation of the alien, the termination of proceedings or the granting of some form of discretionary relief as provided in the [INA].'' (emphasis added)).[12]

Moreover, similarly longstanding Board precedent and administrative law separation-of-function principles dictated that the Board or an immigration judge should not assume the role of the prosecutor and determine which immigration cases should be adjudicated and which ones should not. Thus, as one Board decision described the previous state of affairs, an immigration judge ''may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation . . . [and] [o]nce deportation proceedings have been initiated by the District Director, the immigration judge may not review the [discretion] of the District Director's action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner.'' *Matter of Quintero,* 18 I&N Dec. 348, 350 (BIA 1982), *aff'd sub nom. Quintero-Martinez* v. *INS,* 745 F.2d 67 (9th Cir. 1984); *see also Matter of Roussis,* 18 I&N Dec. 256, 258 (BIA 1982) (''It has long been held that when enforcement officials of the [Immigration and Naturalization Service (''INS''), now DHS] choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged.''); *cf. Lopez-Telles* v. *INS,* 564 F.2d 1302, 1304 (9th Cir. 1977) (''Rather, these decisions plainly hold that the

[10] Similar language for immigration judges also occurs in 8 CFR 1240.1(a)(1)(iv) and (c).

[11] ''In 1984, the Chief Immigration Judge instructed immigration judges to consider administrative closure as one means of addressing the 'recurring problem' of respondents' failure to appear at hearings. The Chief Immigration Judge did not identify any basis for this authority. Nonetheless, immigration judges and the Board soon employed administrative closure in all types of removal proceedings. By 1988, the Board described the practice as an 'administrative convenience.' Between 1988 and 2012, Board precedent held that an immigration judge could grant administrative closure only where both parties supported the request. These decisions again assumed without explanation that immigration judges and the Board possessed this general authority.'' *Matter of Castro-Tum,* 27 I&N Dec. 271, 273–74 (A.G. 2018) (citations omitted).

[12] Administrative closure is not in itself relief from removal. *Matter of W–Y–U–,* 27 I&N Dec. 17, 18 (BIA 2017) (''Administrative closure is not a form of relief from removal and does not provide an alien with any immigration status.''), *overruled on other grounds by Matter of Castro-Tum,* 27 I&N Dec. 271. Courts, however, have routinely (and erroneously) characterized it as such. *See, e.g., Caballero-Martinez* v. *Barr,* 920 F.3d 543, 549–550 (8th Cir. 2019); *Perez Alba* v. *Gonzales,* 148 F. App'x 593, 594 (9th Cir. 2005); *Singh* v. *Gonzales,* 123 F. App'x 299, 300 (9th Cir. 2005); *Mickeviciute* v. *INS,* 327 F.3d 1159, 1161 n.1 (10th Cir. 2003).

immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INS choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion. The immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings. His powers are sharply limited, usually to the determination of whether grounds for deportation charges are sustained by the requisite evidence or whether there has been abuse by the INS in its exercise of particular discretionary powers. This division between the functions of the immigration judge and those of INS enforcement officials is quite plausible and has been undeviatingly adhered to by the INS.''); *Matter of Silva-Rodriguez,* 20 I&N Dec. 448, 449–50 (BIA 1992) (undue delay by an immigration judge may frustrate or circumvent statutory purpose of prompt immigration proceedings); *Matter of Yazdani,* 17 I&N Dec. 626, 630 (BIA 1991) (''However, so long as the enforcement officials of the [INS] choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge and the Board must order deportation if the evidence supports a finding of deportability on the ground charged.'').

In 2012, however, the Board relied, in part, on language in 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to hold that immigration judges may unilaterally and indefinitely suspend immigration proceedings through the use of administrative closure even if one party objected. *Matter of Avetisyan,* 25 I&N Dec. 688, 697 (BIA 2012), *overruled by Matter of Castro-Tum,* 27 I&N Dec. 271. The *Avetisyan* decision was overruled in 2018 when the Attorney General, in accordance with his statutory authority, 8 U.S.C. 1103(a)(1), held that immigration judges and Board members ''do not have the general authority to suspend indefinitely immigration proceedings by administrative closure'' and that they ''may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.'' *Matter of Castro-Tum,* 27 I&N Dec. at 271. Notwithstanding the Attorney General's controlling interpretation of the law under 8 U.S.C. 1103(a)(1), the question whether 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) allow immigration judges and Board members to indefinitely adjourn immigration proceedings through the use of administrative closure continues to drive litigation and cause inconsistent application of immigration laws. *See, e.g., Romero* v. *Barr,* 937 F.3d 282 (4th Cir. 2019) (holding that 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) allow immigration judges and Board members to indefinitely postpone immigration proceedings through the use of administrative closure and abrogating *Matter of Castro-Tum* within the jurisdiction of the Fourth Circuit); *see also Morales* v. *Barr,* 963 F.3d 629 (7th Cir. 2020) (same for the Seventh Circuit).[13]

I. Sua Sponte Reopening or Reconsideration of Closed Cases

In general, motions to reopen or reconsider a case in which the immigration judge or the Board has rendered a decision are subject to time and number limitations. These limitations were initially promulgated by regulation. *See* 8 CFR 3.2, 3.23, 103.5, and 208.19 (1996). Congress subsequently enacted statutory time and number limitations for reopening or reconsideration of removal proceedings, as provided in section 240(c)(6) and (7) of the INA, 8 U.S.C. 1229a(c)(6) and (7). In general, the EOIR regulations and the statutory provisions of section 240 of the INA provide that an alien may file only one motion to reconsider the decision of the immigration judge or the BIA and must do so within 30 days of the entry of the final administrative order, and that the alien may file only one motion to reopen the decision of the immigration judge or the BIA and must do so within 90 days of the entry of the final administrative order. However, there are specific statutory exceptions from these time limits in cases involving in absentia orders of removal, asylum claims based on changed country conditions after the entry of the previous decision, or certain claims involving battered spouses, children, or parents. *See* 8 U.S.C. 1229a(c)(7)(C)(ii)–(iv). These principles are embodied in the current EOIR regulations at 8 CFR 1003.2 and 1003.23.

As a further exception to the time and number limitations on motions to reopen and reconsider, both the BIA and immigration judges presently have the authority to reopen or reconsider a case *sua sponte. See* 8 CFR 1003.2(a), 1003.23(b)(1). The Board has made clear that this authority ''is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.'' *Matter of J–J–,* 21 I&N Dec. 976, 984 (BIA 1997); *see also Matter of G–D–,* 22 I&N Dec. 1132, 1133–34 (BIA 1999) (explaining that the Board's discretion to reconsider a case *sua sponte* is ''an extraordinary remedy reserved for truly exceptional situations''). It has further emphasized the importance of both complying with the time and number limitations on motions and ensuring the finality of immigration proceedings and of not utilizing its *sua sponte* authority to circumvent those considerations. *Matter of Beckford,* 22 I&N Dec. at 1221.

J. Certification Authority

In most instances, decisions by immigration judges are brought to the Board for review through an appeal filed by the respondent or by DHS. Under 8 CFR 1003.38, the parties have 30 calendar days from the issuance of an oral decision or the mailing of a written decision to file an appeal with the Board. However, apart from the appeal process, the Secretary of Homeland Security, any other duly authorized officer of DHS, any immigration judge, or the Board itself may certify an immigration judge's decision or a reviewable DHS decision for review by the Board. 8 CFR 1003.1(c); *see also* 8 CFR 1001.1(c) and (d). The Board can certify cases only for matters within its appellate jurisdiction. 8 CFR 1003.1(c); *Matter of Sano,* 19 I&N Dec. 299, 301 (BIA 1985). Further, the Board cannot certify cases or issues implicitly. *Matter of Jean,* 23 I&N Dec. 373, 380 n.9 (A.G. 2002). Although the regulations do not specify any standard governing the Board's certification to itself, the Attorney General has concluded that the Board's discretion is not unbounded and is analogous to its authority to reopen or reconsider proceedings *sua sponte. Id.*

K. Timeliness of the Adjudication of BIA Appeals and Composition of BIA Panels

Except in limited circumstances, appeals assigned to a single Board member are to be decided within 90 days of completion of the record on appeal, whereas appeals assigned to a three-member panel are to be decided within 180 days (including any

[13] *Matter of Castro-Tum* continues to apply to immigration proceedings outside of the Fourth and Seventh Circuits. Also, neither *Romero* nor *Morales* addressed the statutory commitment to the Attorney General to make ''controlling'' determinations of immigration laws under 8 U.S.C. 1103(a)(1); the regulatory specifications that only the Director, the Chief Appellate Immigration Judge, and the Chief Immigration Judge—and not line appellate immigration judges or line immigration judges—have authority to defer adjudication of cases; nor the evident superfluousness of those specifications for the Chief Appellate Immigration Judge and the Chief Immigration Judge if all appellate immigration judges and immigration judges already possess that authority. *See* 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3); *compare* 8 CFR 1003.0(b)(1)(ii) *and* 1003.1(a)(2)(i)(C), *with* 8 CFR 1003.1(d)(1)(ii) *and* 1003.10(b).

additional opinion by a member of the panel) of assignment to the panel. 8 CFR 1003.1(e)(8)(i). The regulations do not specify completion parameters for other categories of appeals, such as interlocutory appeals and appeals subject to summary dismissal, nor do they specify time frames for pre-adjudicatory processing such as requesting the record of proceeding and ordering transcripts. *See id.*

If an appeal is taken from a decision of an immigration judge, the record of proceeding is forwarded to the Board upon request or order of the Board. 8 CFR 1003.5(a). Where transcription of a decision is required, the immigration judge shall review the transcript within 14 days of receipt or within 7 days after returning to his or her duty station. *Id.* If an appeal is taken from a decision by DHS, the record of proceeding shall be forwarded to the Board by the DHS officer upon receipt of the briefs or expiration of the time allowed for briefs. 8 CFR 1003.5(b); *see also* 8 CFR 1001.1(c).

IV. Proposed Changes

The changes proposed by the Department are summarized below. The changes discussed in subsections A through G, K, and L below are intended to apply to appeals filed on or after the effective date of publication. The changes discussed in subsections H through J below are intended to be effective on the date of publication.

A. Briefing Extensions

First, this NPRM would reduce the maximum allowable time for an extension of the briefing schedule to 14 days. Although current regulations allow an extension of up to 90 days, Board policy for many years has been to grant an extension of only 21 days regardless of the amount of time actually requested. BIA Practice Manual at 65; *cf.* Revised General Practice Regarding First Briefing Deadline Extension Request for Detained Aliens, 71 FR 51856, 51857 (Aug. 31, 2006) (noting that Board policy will continue to allow granting briefing extension requests of 21 days in detained cases). Because briefing extensions are disfavored in the first instance, BIA Practice Manual at 65 (''In the interest of fairness and the efficient use of administrative resources, extension requests are not favored.''), and because the Board expects any extension request to be for the purpose of completing or finalizing a brief—rather than drafting it from the beginning—there is no justification for a lengthy extension period. Moreover, reducing the amount of time for an extension will decrease the likelihood of gamesmanship associated with simultaneous briefing in which one party files a last-minute extension request and then has a lengthy period of time to review and address arguments made in the opposing party's brief that was already filed consistent with the prior deadline.

If the appeal is from an immigration judge decision in a case that is transcribed, the BIA will continue to set the briefing schedule after the transcript becomes available. This proposal would not eliminate the BIA's continued ability to extend the time allowed for filing a brief for good cause shown or to consider a late-filed brief as a matter of discretion. 8 CFR 1003.3(c). However, it would expressly limit the number of allowable extensions consistent with current Board policy ''*not* to grant second briefing extension requests.'' BIA Practice Manual at 65 (emphasis in original).

The proposed rule further clarifies that there is no right to a briefing extension by any party in any case and prohibits the Board from adopting a policy of granting all extension requests without an individualized finding of good cause. Should the Board determine that supplemental briefing may be beneficial in particular cases, however, the proposed rule allows the Board to ask for such briefing after the expiration of the initial briefing schedule.

Under the proposed framework, depending on whether the case requires the preparation of a transcript, whether the transcript can be timely prepared, and whether a briefing extension is granted, a party would have at least a month and potentially up to almost three months to submit a brief if it chooses, from the time an appeal is filed, which the Department expects to be ample time even without access to the transcript to address the issues in most cases. Approximately 78 percent of respondents have representation on appeal, and DHS is represented in all appeals. EOIR, *Adjudication Statistics: Current Representation Rates* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.* Consequently, in most cases, both parties have reviewed the case at the time an appeal is filed. Moreover, the issues should be squarely presented in the Notice of Appeal, which requires specific details about the case and arguments to be considered, well before any briefs are filed. Under 8 CFR 1003.3(b), the party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i). Such a statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. Moreover, 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. In addition, where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. Furthermore, the parties frequently do not file a brief at all.[14] For instance, in FY 2019, the Board issued a briefing schedule in approximately 17,069 cases. Of those, the respondent did not file a brief in approximately 4,400 cases, DHS did not file a brief in roughly 10,900 cases, and neither party filed a brief in over 3,000 cases.[15]

Consequently, although the changes will allow the Board to more expeditiously address its growing caseload, they should have relatively little impact on the preparation of cases by the parties on appeal. Further, it is expected that these changes will shorten the time required for a case to work through the BIA's adjudicatory process, enabling the BIA to maximize its adjudicatory capacity and EOIR to meet its obligation to complete cases in an expeditious manner. EOIR will be able to adjudicate more cases annually, ensuring that both parties receive a final decision expeditiously following notice and an opportunity to be heard consistent with the requirements of due process.

B. Simultaneous Briefing

Additionally, the Department proposes to adopt simultaneous briefing schedules instead of consecutive briefing schedules for cases involving aliens who are not in custody. This change would reduce adjudicatory delay by shortening the briefing period for non-detained cases from a total of 63 days (21 days for the initial brief, plus a 21-day extension, and 21 days for the responsive brief) to a total of 35 days (21 days for simultaneous briefs, plus a 14-day extension), not counting any time needed for preparation of a transcript

[14] Neither the appellee nor the appellant is required to submit a brief. The party taking an appeal will indicate on Form EOIR 26, Notice of Appeal from a Decision of an Immigration Judge, whether it intends to submit a brief on appeal by checking a box.

[15] These numbers treat the filing of a motion to summarily affirm the decision below as the filing of a brief. These numbers do not exclude cases in which a party indicated on the Notice of Appeal that it did not intend to file a separate brief.

and setting the briefing schedule or filing of a reply brief, if applicable. This change in turn will enable the BIA to more expeditiously review and adjudicate non-detained appeals. The proposed regulation maintains the BIA's ability to permit reply briefs in certain cases. 8 CFR 1003.3(c).

The Department previously considered simultaneous briefing for all appeals but ultimately adopted the practice only for detained appeals. 67 FR 54895. Simultaneous briefing has worked well for appeals involving aliens who are in custody, and upon further consideration, there is no apparent reason not to apply it to non-detained cases as well, particularly when both parties are frequently represented on appeal and one or both parties may often choose not to file a brief at all. It is also important to harmonize the briefing requirements to the maximum extent possible to ensure that all cases—and not solely detained cases—are adjudicated in a timely manner. Both the parties and the Department have a strong interest in ensuring that appeals are adjudicated expeditiously, and there is currently no legal or operational reason to adjudicate non-detained cases in a less efficient manner than detained cases. In light of the Department's experience with simultaneous briefing in detained cases, the Department believes that, whatever basis there may have been previously to treat the two categories of cases differently, *see id.,* those reasons are no longer sufficiently compelling to warrant the continued disparate treatment of detained and non-detained cases on appeal. To that end, the Department believes that implementing simultaneous briefing would allow non-detained cases to be adjudicated in a more expeditious manner. The Department also notes that this change is consistent with a previously-expressed public concern that treating two classes of appellants differently—*i.e.,* non-detained aliens and detained aliens—was ''inequitable and fundamentally unfair.'' *See* 61 FR 18902–03.

C. BIA Remands for Identity, Law Enforcement, or Security Investigations or Examinations

The Department proposes to revise 8 CFR 1003.1(d)(6)(ii) to provide that, when a case before the BIA requires completing or updating identity, law enforcement, or security investigations or examinations, the exclusive course of action would be for the BIA to place the case on hold while identity, law enforcement, or security investigations or examinations are being completed or updated, unless DHS reports that identity, law enforcement, or security investigations or examinations are no longer necessary or until DHS does not timely report the results of completed or updated identity, law enforcement, or security investigations or examinations. Under this NPRM, the BIA would no longer remand a case to the immigration court for the sole purpose of completing or updating identity, law enforcement, or security investigations or examinations, which has become a common practice in the 14 years since the relevant regulations were last updated. *See, e.g., Matter of S–A–K– and H–A–H–,* 24 I&N Dec. 464, 466 (BIA 2008) (order sustaining appeal and remanding the case to the immigration judge for DHS to complete or update background checks). There is no apparent operational reason why the BIA cannot hold a decision until it receives information from DHS regarding completed or updated identity, law enforcement, or security investigations or examinations. And routinely remanding cases solely for that purpose both needlessly delays resolution of a case and takes up space on an immigration court docket that could otherwise be used to address another case. In light of the growing immigration court backlog and the necessity to preserve overburdened judicial resources at the immigration courts, it is appropriate to remove the option to remand cases to the immigration court for the sole purpose of completing or updating identity, law enforcement, or security investigations or examinations to ensure that such cases are addressed as expeditiously as possible.[16] The Board need not hold a case, however, if it decides to dismiss a respondent's appeal or to deny the relief or protection sought. 8 CFR 1003.1(d)(6)(iv).[17]

Only if the results are not reported by DHS within 180 days of the Board's notice of placing a case on hold will the Board remand a case to an immigration court for further proceedings. The proposed rule makes clear, however, that the Board may also remand a case if the results of the identity, law enforcement, or security investigations or examinations raise an issue that should be considered by the immigration judge in the first instance.

Additionally, the Department proposes to authorize the BIA to deem an application abandoned when the applicant fails, after being notified by DHS, to comply with the requisite procedures for DHS to complete the identity, law enforcement, or security investigations or examinations within 90 days of the BIA's notice that the case is being placed on hold for the completion of the identity, law enforcement, or security investigations or examinations. This change provides the BIA with similar authority already delegated to immigration judges pursuant to 8 CFR 1003.47(c) and (d).[18] The Department believes that authorizing the BIA to deem such applications abandoned will promote uniformity in EOIR adjudicatory procedure and maximize the prompt adjudication of cases.

D. Finality of BIA Decisions and Voluntary Departure Authority

The Department proposes to amend 8 CFR 1003.1(d)(7) to provide further guidance regarding the finality of BIA decisions. First, the Department proposes to add a new paragraph (d)(7)(i) to clarify that the BIA has authority to issue final orders when adjudicating an appeal, including final orders of removal when a finding of removability has been made by an immigration judge and an application for protection or relief from removal has been denied;[19] grants of relief or

[16] As discussed further, *infra,* the Board may remand cases to the immigration judge in which the identity, law enforcement, or security investigations or examinations need to be completed or updated but DHS has not timely reported the results of those checks. Further, DHS may move to remand a case based on the results of the identity, law enforcement, or security investigations or examinations.

[17] The proposed rule makes conforming edits to 8 CFR 1003.1(d)(6)(iv) due to the proposed changes to 8 CFR 1003.1(d)(6)(ii). It also makes a clarifying edit to 8 CFR 1003.1(d)(6)(iv) in recognition of the fact that the Board considers appeals of applications for protection—*e.g.,* withholding of removal under the INA or protection under the CAT—in addition to appeals of applications for relief.

[18] Because DHS is responsible for biometrics checks for detained aliens, because a non-detained alien will have already had biometrics taken at the immigration court level, and because the biometrics checks can often be updated without requiring the alien to be fingerprinted again, *see* U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., *Fingerprint Check Update Request: Agreement Between USCIS and ICE* (July 27, 2016), *https://www.uscis.gov/forms/fingerprints/fingerprint-check-update-request-agreement-between-uscis-and-ice,* the alien will not generally need to do anything once the BIA issues its notice. Nevertheless, the BIA's notice will notify the alien that, if the alien is non-detained and biometrics need to be taken again, DHS will contact the alien.

[19] An immigration judge generally will not consider an application for protection or relief from removal until a finding of removability has been made. Thus, in cases in which an immigration judge has terminated proceedings after finding an alien not removable, DHS has appealed that decision, and the Board sustains the appeal, the Board would remand that case to the immigration judge for consideration of any applications for protection or relief the alien may choose to file rather than issuing an order of removal in the first instance.

protection from removal; and orders to terminate or dismiss proceedings. Most circuit courts to consider this issue have concluded that the BIA possesses such authority.[20] *See, e.g., Sosa-Valenzuela* v. *Gonzales,* 483 F.3d 1140, 1146 (10th Cir. 2007) (collecting cases); *accord Solano-Chicas* v. *Gonzales,* 440 F.3d 1050, 1054 (8th Cir. 2006) (''[T]he BIA's power is not just one of merely affirming or reversing IJ decisions; it may order relief itself. We find it entirely consistent that the BIA also may deny status and order an alien removed.'' (internal citations omitted)).

The Department also proposes to add a new paragraph (d)(7)(iii) to 8 CFR 1003.1 to delegate clear authority to the BIA to consider issues relating to the immigration judge's decision on voluntary departure *de novo* and, within the scope of the BIA's review authority on appeal, to issue final decisions on requests for voluntary departure based on the record of proceedings. The proposed rule enumerates procedural and substantive requirements related to this authority, including, *inter alia,* the content of advisals that the BIA must provide to the alien, the means by which the BIA must provide advisals, the means by which an alien may accept or decline the BIA's grant of voluntary departure, and how an alien is required to post a voluntary departure bond. These amendments follow the current regulations regarding voluntary departure before the immigration court at 8 CFR 1240.26 and are intended to create analogous authority at the BIA, based on the record developed at the immigration judge hearing.

Additionally, the proposed rule would directly state that the BIA may not remand a case to the immigration court solely to consider a request for voluntary departure under section 240B(b) of the INA. Because the Board may provide relevant advisals to a respondent regarding voluntary departure; because appeals raising the issue of voluntary departure will proffer a respondent's eligibility for that relief before the immigration court (or else the issue will be deemed waived); and because the record will otherwise contain evidence of such eligibility (or else the opportunity to present such evidence will be deemed waived), a remand solely to consider that issue is a waste of resources and places wholly unnecessary burdens on immigration courts. In short, there is no operational reason that the BIA cannot resolve a request for voluntary departure rather than remanding the case to an immigration judge, prolonging the case unnecessarily, and inviting an additional appeal if the respondent disagrees with the immigration judge's determination. Any BIA final order or grant of voluntary departure would continue to be a legal determination based upon the facts as found by the immigration judge during the course of the underlying proceedings, subject to a ''clearly erroneous'' standard. Moreover, for cases in which an immigration judge failed to provide advisals related to a request for voluntary departure, the Board can provide such advisals without needing to engage in factfinding—and without remanding the case—because the advisals are established by regulation.

Together with the amendment to the identity, law enforcement, or security investigations or examinations procedures described above, these amendments would ensure that the BIA is empowered to make all relevant decisions related to an appeal and prevent the BIA from issuing an order to remand a case solely to instruct the immigration judge to issue a particular final order that is within the BIA's authority.

E. Prohibition on Consideration of New Evidence, Limitations on Motions To Remand, Factfinding by the BIA, and the Standard of Review

The Department proposes several changes to clarify the BIA's ability to take certain actions in adjudicating an appeal to ensure that appeals are adjudicated in a timely fashion without undue remands and consistent with the applicable law. First, the Department proposes to limit the scope of motions to remand that the BIA may consider. Under the proposed paragraph (d)(7)(v) to 8 CFR 1003.1, the BIA would be prohibited from receiving new evidence on appeal, remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal, or considering a motion to remand based on new evidence. Parties who wish to have new evidence considered in other circumstances may file a motion to reopen in accordance with the standard procedures for such motions, *i.e.,* compliance with the substantive requirements for such a motion at 8 CFR 1003.2(c). There would be three exceptions to these prohibitions. The first would be for new evidence that is the result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud.[21] The second would be for new evidence pertaining to a respondent's removability under the provisions of 8 U.S.C. 1182 and 8 U.S.C. 1227. The third would be for new evidence that calls into question an aspect of the jurisdiction of the immigration courts, such as evidence pertaining to alienage, *e.g., Matter of Fuentes,* 21 I&N Dec. 893, 898 (BIA 1997) (EOIR has no jurisdiction over United States citizens), or EOIR's authority vis-à-vis DHS regarding an application for immigration benefits, *see, e.g.,* 8 U.S.C. 1158(b)(3)(C) (DHS has initial jurisdiction over an asylum application filed by a genuine unaccompanied alien child (as defined in 6 U.S.C. 279(g))); *Matter of M–A–C–O–,* 27 I&N Dec. 477, 480 (BIA 2018) (an immigration judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application); *Matter of Martinez-Montalvo,* 24 I&N Dec. 778, 778–89 (BIA 2009) (immigration judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application); *Matter of Singh,* 21 I&N Dec. 427, 433–34 (BIA 1996) (EOIR lacks jurisdiction over legalization applications pursuant to section 245A of the INA).

Ordinarily the BIA does not consider new evidence on appeal. *Matter of Fedorenko,* 19 I&N Dec. 57, 74 (BIA 1984). In other cases, however, it will remand a case for consideration of new evidence when the alien ''ha[s] met the 'heavy burden' of showing that the new evidence presented 'would likely change the result in the case.' '' *Matter of L–O–G–,* 21 I&N Dec. 413, 420 (BIA 1996) (quoting *Matter of Coelho,* 20 I&N Dec. at 473). It will also sometimes construe the submission of new evidence on appeal as a motion to remand for further factfinding pursuant to 8 CFR 1003.1(d)(3)(iv). The lines

[20] The Department is not aware of a circuit court that has concluded to the contrary. Although the Ninth Circuit in 2004 held the Board lacked such authority, it reversed itself in 2007 and agreed with three other circuits that the Board does possess such authority. *See Lolong* v. *Gonzales,* 484 F.3d 1173, 1176 (9th Cir. 2007) (overruling *Molina-Camacho* v. *Ashcroft,* 393 F.3d 937 (9th Cir. 2004)).

[21] The proposed rule makes clear that nothing in the regulation prohibits the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including investigations occurring separate from those required by 8 CFR 1003.47.

between these three views of new evidence on appeal are not clearly delineated and may lead to inconsistent application. *Cf. Ramirez-Alejandre* v. *Ashcroft,* 319 F.3d 365, 376 (9th Cir. 2003) (''However, the BIA was inconsistent with respect to its treatment of relevant supplemental evidence tendered on appeal. It did not have formal procedures for consideration of such evidence. In some cases, it accepted the evidence; in other cases it remanded for further findings; and in some, like the present case, it declared itself precluded from entertaining the evidence.''). Their lack of clarity also allows gamesmanship on appeal—*e.g.,* a respondent whose application is denied might seek additional evidence to present on appeal in order to procure a second attempt at establishing eligibility, even though such evidence should have been presented in the first instance. Although a motion to remand must ''be based on new, previously unavailable'' evidence, *Matter of W–Y–C– & H–O–B–,* 27 I&N Dec. 189, 192 (BIA 2018), respondents frequently seek remands based on evidence that could have been submitted to the immigration judge in the first instance. Consequently, to eliminate confusion, avoid inconsistent results, and encourage the presentation of all available and probative evidence at the trial level before an immigration judge, the Department believes it is appropriate to establish a clearer, bright-line rule regarding the submission of new evidence on appeal.

Prohibiting the BIA from considering new evidence on appeal as a ground for remand is in keeping with the general authority of EOIR adjudicators to manage the filing of applications and collection of relevant documents. Additionally, this prohibition reduces the likelihood of the need for a remand to the immigration court given the BIA's general inability to engage in factfinding about the newly proffered evidence. The proposed exceptions cover situations in which the need for a remand due to new evidence—*e.g.,* to address an issue of alienage or removability—overrides any other consideration because the new evidence calls into question the availability or scope of proceedings in the first instance. In all other situations, the potential for gamesmanship, the need to ensure that evidence is heard in a timely manner at the trial level, and the operational burden of sending the case back to an immigration judge to begin the adjudicatory process anew strongly counsel against allowing the Board to consider allegedly new evidence on direct appeal. Given the requirement to submit relevant evidence within the deadlines set by the immigration judge and the ability to submit newly discovered or previously unavailable evidence as part of a motion to reopen, the Department believes that these changes are an appropriate means to reduce remands and ensure the BIA is able to move forward independently with as many appeals as possible without further delay.

An immigration judge loses jurisdiction over a motion to reopen that is pending when an appeal of the immigration judge's decision is filed with the BIA, and an immigration judge lacks jurisdiction over a motion to reopen filed while an appeal is already pending at the BIA. *See* 8 CFR 1003.23(b)(1). The proposed rule would remove 8 CFR 1003.2(c)(4) and eliminate the treatment of motions to reopen in such situations as motions to remand for the same reasons that the proposed rule seeks to establish clearer rules for the submission of new evidence and the handling of remands by the BIA. Due to the requirement to submit relevant evidence within the deadlines set by the immigration judge and the ability to submit newly discovered or previously unavailable evidence as part of a motion to reopen, these changes are an appropriate means to reduce remands and ensure the BIA is able to move forward independently with as many appeals as possible without further delay.

The Department proposes to more clearly delineate the circumstances in which the BIA may engage in factfinding on appeal. Because the BIA is not authorized to consider new evidence on appeal, *see* 8 CFR 1003.1(d)(3)(iv), and because an issue not raised before the immigration judge is waived, *see, e.g., Matter of J–Y–C–,* 24 I&N Dec. 260, 266 n.1 (BIA 2007), the BIA should not have any need to engage in factfinding in the mine run of immigration case appeals, nor should it have a need to remand for further factfinding. To that end, the proposed rule more clearly spells out the limitations on the Board's ability to remand for additional factfinding, subject to an exception related to factual issues raised by identity, law enforcement, or security investigations or examinations, or other investigations as noted above in footnote 21.

Nevertheless, the Department recognizes that there may be situations in which the Board should engage in factfinding and proposes to clarify limited circumstances in which the Board may do so—*i.e.,* situations in which the Board may take administrative notice of facts that are not reasonably subject to dispute, such as current events, the contents of official documents outside the record, or facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed. The proposed rule makes clear, however, that if the Board intends to administratively notice a fact outside the record that would be the basis for overturning a grant of relief or protection issued by an immigration judge, the Board must give notice to the parties and an opportunity for them to address the matter.

The Department further proposes to amend the regulations to make clear that the Board may take administrative notice of any undisputed facts contained in the record. There is simply no operational or legal reason to remand a case for factfinding if the record already contains evidence of undisputed facts, and the BIA may appropriately rely on such facts without remanding the case. *See generally Guerrero-Lasprilla* v. *Barr,* 140 S. Ct. 1062, 1072 (2020) (holding that ''the application of a legal standard to established or undisputed facts'' is a question of law).[22] To that end, the proposed rule also makes clear that the BIA may affirm the decision of the immigration judge or DHS on any basis supported by the record, including a basis supported by facts that are not disputed.[23]

Finally, the proposed rule would make clear that the BIA cannot remand a case based solely on the ''totality of the circumstances.'' Although the Board sometimes uses that standard to justify remanding a case, there is no statutory or regulatory basis for this standard. Accordingly, the proposed rule makes clear that the BIA could not employ such a standard in its review.

[22] Facts may be undisputed when the one party proffers them and the opposing party concedes the truth of those facts, *see, e.g., Matter of T–M–H– & S–W–C–,* 25 I&N Dec. 193, 193–94 (BIA 2010), or when they are found by the immigration judge and they are ''not meaningfully challenged on appeal,'' *Matter of Diaz & Lopez,* 25 I&N Dec. 188, 189 (BIA 2010).

[23] Although the Board is not an Article III appellate tribunal, this rule also follows the longstanding principle of federal appellate review that a reviewing court may affirm a lower court decision on any basis contained in the record. *See, e.g., Richison* v. *Ernest Group, Inc.,* 634 F.3d 1123, 1130 (10th Cir. 2011) (''We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.''); *cf. Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937) (''In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'').

F. Scope of a Board Remand

When the Board remands a case, it divests itself of jurisdiction unless jurisdiction is expressly retained. *Matter of Patel,* 16 I&N Dec. at 601. When this is done, unless the Board qualifies or limits the remand for a specific purpose, the remand is effective for the stated purpose and for consideration of any and all other matters as appropriate. *Id.* Cases remanded for the completion of identity, law enforcement, or security investigations or examinations pursuant to 8 CFR 1003.47(h) are also treated as general remands, and an immigration judge may consider new evidence in such a remanded case ''if it is material, was not previously available, and could not have been discovered or presented at the former hearing.'' *Matter of M–D–,* 24 I&N Dec. at 141. Circuit courts have construed *Matter of Patel* to mean that the BIA can only limit the scope of its remand if it (1) expressly retains jurisdiction and (2) qualifies or limits the scope of remand. *Bermudez-Ariza,* 893 F.3d at 688; *Johnson,* 286 F.3d at 701.

Confusion arises, however, because no regulation allows the Board to expressly retain jurisdiction over a remanded case, and the Board rarely, if ever, does so in practice. *See* BIA Practice Manual at 76 (''Once a case has been remanded to the Immigration Judge, the only motion that the Board will entertain is a motion to reconsider the decision to remand.''). Consequently, even though a Board remand may clearly be intended for a limited purpose, the Board's failure to explicitly state that it is retaining jurisdiction over an appeal while simultaneously remanding the case—consistent with both its practice and the lack of clear regulatory authority to do so—means that the remand is not actually so limited. *See, e.g., Bermudez-Ariza,* 893 F.3d at 688–89 (''We think it likely that the BIA limited the scope of remand to a specific purpose in this case by stating that it was remanding 'for further consideration of the respondent's claim under the Convention Against Torture.' That said, the BIA's remand order nowhere mentioned jurisdiction, much less expressly retained it. Thus, irrespective of whether the BIA qualified or limited the scope of remand, the IJ had jurisdiction to reconsider his earlier decisions . . . .'').

Put differently, even if the Board clearly indicates that the remand is for a limited purpose, most—if not all—of its remands would be interpreted to be general remands allowing for consideration of issues well beyond the intended scope of the remand. Consequently, even where the Board clearly intends a remand to be for a limited purpose, an immigration judge faces potential confusion regarding the scope of the remand and will often treat the order as a general remand that would allow consideration of other issues. *See id.* (a remand to consider a claim under the CAT does not preclude consideration of an asylum claim because the Board did not specifically reserve jurisdiction); *see also Matter of M–D–,* 24 I&N Dec. at 141–42 (a remand for completion of background checks for one application does not preclude consideration of new evidence for another application).

To eliminate this confusion for immigration judges, the Department proposes to amend the regulations to make it clear that the Board may limit the scope of a remand while simultaneously divesting itself of jurisdiction on remand.[24] Thus, a remand for a limited purpose—*e.g.,* the completion of identity, law enforcement, or security investigations or examinations—would be limited solely to that purpose consistent with the Board's intent, and the immigration judge would be precluded from considering any issues beyond the scope of the remand.

G. Immigration Judge Quality Assurance Certification of a BIA Decision

To ensure the quality of Board decision-making, the Department proposes to allow immigration judges to certify BIA decisions reopening or remanding proceedings for further review by the Director in situations in which the immigration judge alleges that the BIA made an error. Currently, there is no clear mechanism to efficiently address concerns regarding errors made by the BIA in reopening or remanding proceedings. Although parties may file a motion to reconsider, that process is cumbersome, time-consuming, and may not fully address the alleged error. If the error inures to the favor of DHS, the respondent must again wait for an order of removal in order to bring another appeal, either to the BIA or to federal court through a petition for review. If the error inures to the favor of the respondent, DHS has no effective mechanism of correcting the error, except through another hearing and an appeal to the BIA. Additionally, an erroneous remand by the BIA inappropriately affects an immigration judge's performance evaluation by affecting that judge's remand rate, which is a component of the judge's performance evaluation. Overall, an immigration judge is in the best position to identify an error made by the BIA and to seek to remedy it expeditiously without needlessly placing additional burdens on the parties. Consequently, the Department has determined that it is appropriate to ensure immigration judges have a mechanism through which they can request the correction of errors by the Board and thereby improve the quality of adjudications as whole.

The Department's proposal is limited only to cases in which the immigration judge articulates a specific error allegedly committed by the Board within a narrow set of criteria: (1) The Board decision contains a typographical or clerical error affecting the outcome of the case; (2) the Board decision is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or a published, binding precedent; (3) the Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or (4) a material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the Board decision. These criteria are used in similar circumstances at other adjudicatory agencies, *e.g.,* HALLEX I–3–6–10 (delineating criteria for protests of decisions by SSA ALJs or administrative appellate judges), and they are intended to strike an appropriate balance in situations in which errors by the Board should be corrected as quickly as possible.

The Department's proposal also outlines three procedural criteria that an immigration judge must follow in order to certify a Board decision for review: (1) The certification order must be issued within 30 days of the Board decision if the alien is not detained and within 15 days of the Board decision if the alien is detained; (2) the immigration judge, in the certification order, must specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and (3) the immigration judge must provide notice of the certification to both parties. To ensure a neutral arbiter between the immigration judge and the Board, such certification orders would be reviewed by the Director. In reviewing such orders, the Director would have delegated authority from the Attorney General similar to that of the Board but would be limited in deciding the merits of the case. For a case certified to the Director, the Director would be allowed to dismiss

[24] The only exception would be cases in which the Board remands a case to an immigration court due to the court's failure to forward the administrative record in response to the Board's request.

the certification and return the case to the immigration judge or to remand the case back to the Board for further proceedings; the Director, however, would not issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal. Finally, the Department's quality assurance certification process would make clear that it is a mechanism to ensure that BIA decisions are accurate and dispositive—and not a mechanism solely to express disagreements with Board decisions or to lodge objections to particular legal interpretations.

H. 8 CFR 1003.1(d)(1)(ii) and 1003.10(b)

Prior to 2012, the Department did not consider 8 CFR 1003.1(d)(1)(ii) or 1003.10(b), or similar language in 8 CFR part 1240, to authorize an immigration judge or the Board to unilaterally administratively close a case over a party's objection. In fact, longstanding Board precedent was clear that an immigration judge was required both to complete a case and to complete it through only one of three avenues: An order of termination, an order of removal, or an order of relief[25] or protection. *Matter of Chamizo,* 13 I&N Dec. at 437.

Further, as previously noted, longstanding Board precedent and well-established administrative law separation-of-function principles strongly oppose placing the immigration judge in the role of the prosecutor and determining which immigration cases should be adjudicated and which ones should not. *See, e.g., Matter of Quintero,* 18 I&N Dec. at 350; *cf. Lopez-Telles* v. *INS,* 564 F.2d at 1304; *Matter of Silva-Rodriguez,* 20 I&N Dec. at 449–50.

Nevertheless, the Board in 2012 departed from these established precedents without explanation and held that an immigration judge—and by extension, the Board itself—could unilaterally determine which cases should not be adjudicated by administratively closing cases over the objections of one or both parties. *Matter of Avetisyan,* 25 I&N Dec. at 690. In doing so, the Board did not substantively engage with its prior precedent, *e.g., Matter of Chamizo, Matter of Quintero,* or *Matter of Roussis.* Rather, it simply asserted—paradoxically and without justification—that its decision would not preclude DHS from pursuing removal proceedings, even though administrative closure, in fact, does preclude DHS from pursuing the removal proceedings while the administrative closure order is in effect.[26] *Compare Matter of Avetisyan,* 25 I&N Dec. at 694 (''Although administrative closure impacts the course removal proceedings may take, it does not preclude the DHS from . . . pursuing those proceedings . . . .''), *with Matter of Amico,* 19 I&N Dec. 652, 654 (BIA 1988) (''When a case is administratively closed, the respondent is allowed . . . to avoid an order regarding his deportability, and the consequences an order of deportation could bring.''). It also did not address regulatory provisions that assign the authority to defer adjudication of cases to the Director, the Board Chairman, and the Chief Immigration Judge—but not to immigration judges or Board members themselves. *See* 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3). Further, the Board did not acknowledge that, if 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) provided freestanding authority for administrative closures, then other regulatory provisions that do expressly provide for such closures would be superfluous. *See, e.g.,* 8 CFR 1245.13(d)(3)(i) (stating that immigration judges or the BIA ''shall, upon request of the alien and with the concurrence of [DHS], administratively close the proceedings''). Finally, the Board did not address the reference in 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to the ''disposition'' of cases, which ordinarily connotes a final or dispositive decision, which an order of administrative closure is not. *Compare* Black's Law Dictionary (11th ed. 2019) (defining ''disposition'' as ''[a] *final* settlement or determination'' (emphasis added)), *with Matter of Avetisyan,* 25 I&N Dec. at 695 (describing the ''fact that administrative closure does not result in a final order'' as ''undisputed'') *and Matter of Amico,* 19 I&N Dec. at 654 n.1 (''The administrative closing of a case does not result in a final order.'').

In 2018, the Attorney General overruled *Matter of Avetisyan* and expressly renounced reliance on 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) as a basis for Board members and immigration judges to utilize a freestanding authority to administratively close cases. *See Matter of Castro-Tum,* 27 I&N Dec. at 284 (''Neither section 1003.10(b) nor section 1003.1(d)(1)(ii) confers the authority to grant administrative closure. Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend such cases indefinitely. Administrative closure, in fact, is the antithesis of a final disposition. These provisions further direct immigration judges or the Board to resolve matters 'in a timely fashion'—another requirement that conflicts with a general suspension authority.'').[27] Although the Department continues to maintain that *Matter of Castro-Tum* is the correct reading of the law, it also seeks to codify that determination in the regulations in order to eliminate any residual confusion regarding the scope of 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) and associated regulations in 8 CFR part 1240.

To that end, the Department proposes to amend 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so. The balance of authority is clear that DHS exercises prosecutorial functions in immigration proceedings and that it is inappropriate for neutral arbiters such as immigration judges or Board members to second-guess DHS prosecution decisions in order to determine which cases should be prosecuted. *See, e.g., Lopez-Telles,* 564 F.2d at 1304; *Matter of Quintero,* 18 I&N Dec. at 350; *Matter of Roussis,* 18 I&N Dec. at 258. Moreover, the regulations make clear that general authority to defer the adjudication of cases lies with EOIR leadership and not with individual Board members or immigration judges themselves. *See* 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3). Further, as the Attorney General previously noted, interpreting 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to allow for general authority for adjudicators to administratively close cases would render other regulatory provisions referencing such authority superfluous.

[25] Relief, as used here, includes voluntary departure, even though such an order is issued with an alternate order of removal. 8 CFR 1240.26(d).

[26] Although DHS could still move to recalendar proceedings after *Matter of Avetisyan,* such recalendaring was no longer automatic, and it would be strange to expect an immigration judge to simply recalendar a case upon a motion by DHS that he or she had already determined should not proceed.

[27] The Board is subject to the decisions of the Attorney General under 8 CFR 1003.1(d)(1)(i), which provides that the Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General. Also, section 1003.1(d)(1)(ii) provides that the authority of the Board in adjudicating cases is ''[s]ubject to [the] governing standards'' in paragraph (d)(1)(i). Immigration judges are similarly subject to the Attorney General's decisions under 8 CFR 1003.10(d).

Finally, as a policy matter, the changes wrought by *Matter of Avetisyan* simply exacerbated both the extent of the existing backlog of immigration court cases and the difficulty in addressing that backlog in a fair and timely manner. In the six-plus years between the decisions in *Matter of Avetisyan* in 2012 and *Matter of Castro-Tum* in 2018, despite the lowest levels of new case filings by DHS since the early and mid-2000s, the active pending caseload in immigration proceedings increased from 301,250 cases to 715,246 cases and the inactive pending caseload increased from 149,006 cases to 306,785 cases. *See* EOIR, *Adjudication Statistics: Active and Inactive Pending Cases Between February 1, 2012 and May 17, 2018* (Jan. 30, 2019), *https://www.justice.gov/eoir/page/file/1296536/download.* Similarly, between FY 2012 and FY 2017, the number of completed cases annually fell below 200,000 for the first time in a decade, including dropping below 145,000 for three consecutive years and to the lowest overall number since 1995. EOIR, *Adjudication Statistics: New Cases and Total Completions* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1139176/download.* After averaging approximately 225,000 completions per year in the five full FYs prior to the FY in which *Matter of Avetisyan* was decided, immigration judges averaged only approximately 149,500 completions per year in the five full FYs after it was decided. *See id.* This marked decline in productivity, which is correlated with the increase in the use of administrative closure caused by *Matter of Avetisyan,* unquestionably exacerbated the growth in the pending caseload during that time period.[28]

Additionally, by definition, administrative closure lengthens and delays proceedings because it defers disposition of a case until an unknown and unpredictable date. Although administrative closure removes a case from an immigration court's active calendar, it does not remove the case from the docket. Consequently, the practice of administrative closure does not reduce the overall pending caseload, and the strain on immigration courts due to the volume of cases is the same, regardless of whether administrative closure is available. Moreover, indefinite delay does not create flexibility in docketing; it merely puts off a decision until an unknown time in the future. Thus, as additional cases continue to accrue while an administratively closed case remains pending, the deferral of a significant number of cases in the present ultimately undermines the ability of an immigration court to address both new cases and postponed cases in the future.[29] Further, the churning of cases required to separate those to administratively close and those to proceed, as well as the likelihood of inconsistent outcomes among immigration judges regarding which cases should proceed and which ones should not, strongly militates against the use of administrative closure as an efficient or fair docket management strategy. Overall, administrative closure does little to manage immigration court dockets effectively and does much to undermine the efficient and timely administration of immigration proceedings.

In short, administrative closure of cases by the immigration judges or the Board, especially the unilateral use of administrative closure, failed as a policy matter and is unsupported by the law; accordingly, the Department proposes to amend 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to ensure that it is clearly prohibited unless authorized by a Department regulation [30] or a judicially approved settlement agreement.

The Department also proposes to revise §§ 1003.1(d)(1)(ii) and 1003.10(b) for clarity, to provide explicitly that the existing references in those paragraphs to ''governing standards'' refer to the applicable governing standards as set forth in the existing provisions of §§ 1003.1(d)(1)(i) and 1003.10(d), respectively.

I. Sua Sponte Authority

As currently constituted, 8 CFR 1003.2(a) and 8 CFR 1003.23(b)(1) allow the BIA and immigration judges, respectively, to reopen proceedings or reconsider a decision *sua sponte* without regard to the time or number limits that would otherwise apply to motions to reopen or reconsider filed by a party. This *sua sponte* authority is entirely a product of delegated authority from the Attorney General, pursuant to 8 U.S.C. 1103(g)(1)–(2), which is codified in the regulations. *See* 8 CFR 1003.1(a)(1) (''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.''); 8 CFR 1003.10(a) (''Immigration judges shall act as the Attorney General's delegates in the cases that come before them.''). Although use of *sua sponte* authority is limited to ''exceptional situations,'' *Matter of J–J–,* 21 I&N Dec. at 984, that term is not defined by statute or regulation. Further, as explained in *Lenis* v. *United States Attorney General,* ''no statute expressly authorizes the BIA to reopen cases *sua sponte;* rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context.'' 525 F.3d 1291, 1293 (11th Cir. 2008).

Notwithstanding the BIA's disclaimer that *sua sponte* authority ''is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship,'' *Matter of J–J–,* 21 I&N Dec. at 984, and despite the Supreme Court's instruction that a *sua sponte* order is one necessarily independent of any party's motion or request, *see Calderon* v. *Thompson,* 523 U.S. 538, 554 (1998), aliens often invite the BIA and immigration judges to reopen or reconsider a case *sua sponte* where the alien's motion for such an action was untimely or otherwise procedurally improper.[31] *See also*

[28] The Department notes that in the first full FY after *Matter of Castro-Tum* was decided, it completed the highest number of immigration court cases in its history. EOIR, *Adjudication Statistics: New Cases and Total Completions* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1139176/download.* That level of productivity would have been sufficient to reduce the pending caseload in every FY prior to FY 2017. *See id.*

[29] For example, in the first full FY after *Matter of Castro-Tum* was decided, DHS filed the highest number of new immigration cases in the Department's history, 537,793, representing a 70 percent increase over the previous high. EOIR, *Adjudication Statistics: New Cases and Total Completions* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1139176/download.* The need to address both that volume of new cases and the significant volume of cases deferred following the decision in *Matter of Avetisyan,* some of which would have otherwise already been completed, illustrates that the practice of administrative closure makes fair and efficient docket administration harder, not easier.

[30] A regulation applying only to another agency cannot provide authorization for an immigration judge or Board member to administratively close a case. *Matter of Castro-Tum,* 27 I&N Dec. at 277 n.3 (''Regulations that apply only to DHS do not provide authorization for an immigration judge or the Board to administratively close or terminate an immigration proceeding.'').

[31] Despite this case law to the contrary, the Board has sometimes granted motions using what it erroneously labels as ''*sua sponte*'' authority. *See, e.g., Matter of Sandra Gabriela Martinez-Reyes,* 2016 WL 6519966 (BIA Sept. 28, 2016) (''Based on the totality of the circumstances in this case, we will grant the respondent's motion to reopen to allow her to pursue relief from removal pursuant to our sua sponte authority.''); *Matter of Nana Owusu Poku,* 2016 WL 4120576 (BIA July 8, 2016) (''[W]e are granting the motion to reopen in the exercise of our sua sponte authority.''); *Matter of Tania Suyapa Padgett-Zelaya,* 2010 WL 4035400 (Sept. 29, 2010) (''This case was last before us on August 31, 2009, when we denied the respondent's motion to reopen as untimely and numerically barred. The

Gonzales-Veliz v. *Barr,* 938 F.3d 219, 227 n.3 (5th Cir. 2019) (''If the BIA does something because an alien requests it to do it, then the BIA's action cannot be characterized as *sua sponte.*''); *Malukas* v. *Barr,* 940 F.3d 968, 969 (7th Cir. 2019) (''Reopening in response to a motion is not *sua sponte;* it is a response to the motion and thus subject to the time-and-number limits.'').

Further, eleven federal circuit courts agree that, as a general matter, no meaningful standards exist to evaluate the BIA's decision not to reopen or reconsider a case based on *sua sponte* authority. *See Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam); *Lenis,* 525 F.3d at 1293; *Ali* v. *Gonzalez,* 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Doh* v. *Gonzales,* 193 F. App'x 245, 246 (4th Cir. 2006) (per curium); *Enriquez-Alvarado* v. *Ashcroft,* 371 F.3d 246, 249 (5th Cir. 2004), *overruled on other grounds by Mata* v. *Lynch,* 576 U.S. 143 (2015); *Harchenko* v. *INS,* 379 F.3d 405, 411 (6th Cir. 2004); *Calle-Vujiles* v. *Ashcroft,* 320 F.3d 472, 475 (3d Cir. 2003); *Pilch* v. *Ashcroft,* 353 F.3d 585, 586 (7th Cir. 2003); *Belay-Gebru* v. *INS,* 327 F.3d 998, 1000–01 (10th Cir. 2003); *Ekimian* v. *INS,* 303 F.3d 1153, 1159 (9th Cir. 2002); *Luis* v. *INS,* 196 F.3d 36, 41 (1st Cir. 1999); *accord Malukas,* 940 F.3d at 970 (''*Gonzalez* [v. *Crosby,* 545 U.S. 524 (2005)] and *Calderon* require us to reject Malukas's position that adding the phrase '*sua sponte'* to an untimely or number-barred motion makes those limits go away and opens the Board's decision to plenary judicial review. Instead we reiterate the conclusion of *Anaya-Aguilar* v. *Holder,* 683 F.3d 369, 371–73 (7th Cir. 2012) that, because the Board has unfettered discretion to reopen, or not, *sua sponte,* its decision is not subject to judicial review at all.'').[32] Consequently, Federal circuit courts are, in most cases, unable to review decisions not to reopen or reconsider based on the BIA's or immigration judges' *sua sponte* authority. *See Tamenut,* 521 F.3d at 1004–05 (collecting cases).

The Board has never utilized genuine *sua sponte* authority—rather than in response to a motion—as the direct basis for any precedential decision.[33] Although it has putatively invoked such authority on occasion—*e.g., Matter of X–G–W–,* 22 I&N Dec. 71, 73 (BIA 1998)—in each case its invocation was in response to a motion rather than a true exercise of its *sua sponte* authority. Further, although it ostensibly used its *sua sponte* authority in response to a motion in 1998 to effectuate a policy change allowing the Board to grant untimely motions to reopen due to a fundamental change in law, *see id.,* it subsequently withdrew from that policy in 2002 due to finality concerns and has not relied on such authority to effectuate policy in the subsequent 18 years, *see Matter of G–C–L–,* 23 I&N Dec. 359, 361 (BIA 2002) (ending the policy of considering untimely motions to reopen asylum claims *sua sponte*). The Department has determined that this one-time, *sui generis* use of *sua sponte* authority to make policy, which was subsequently ended after 4 years and has not been repeated in the subsequent 18 years, does not justify continuing the delegation of such authority from the Attorney General. To the contrary, the Board's one-time direct use of genuine *sua sponte* authority in a precedential decision, coupled with its more frequent misapplication of the *sua sponte* label, demonstrate the problems with such authority and strongly counsel in favor of withdrawing it.

Given the lack of a meaningful standard to guide a decision whether to order reopening or reconsideration of cases through the use of *sua sponte* authority, the lack of a definition of ''exceptional situations'' for purposes of exercising *sua sponte* authority, the resulting potential for inconsistent application or even abuse of this authority, the inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request, and the strong interest in finality, the Attorney General has concluded that such delegation of *sua sponte* authority, particularly to the extent that it may be used to circumvent timing and numerical limits for such motions, is no longer appropriate. *See Doherty,* 502 U.S. at 323; *Abudu,* 485 U.S. at 107. Although there may be rare instances in which *sua sponte* authority could be appropriately used—*e.g.,* correcting clerical mistakes [34]—the Department has concluded, on balance, that the negative consequences delineated above outweigh any benefits that may accrue as a result of Board members or immigration judges retaining such authority. Accordingly, the regulation would remove the Attorney General's general delegation of *sua sponte* authority to the BIA and immigration judges to reopen or reconsider cases.

The inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request, its potential for inconsistent usage and abuse, and the strong interest in bringing finality to immigration proceedings all strongly outweigh its one-time, limited usage over 20 ago. First, as noted, genuine *sua sponte* authority has been used directly by the Board only once in a precedential decision in the past several decades and not at all in a precedential decision since 2002. Second, there is no right by a respondent to the exercise of *sua sponte* authority; to the contrary, the Board maintains ''unfettered discretion to reopen, or not, *sua sponte.*'' *Malukas,* 940 F.3d at 970. Third, the regulations already contemplate a mechanism for overcoming time and numerical limitations in order to reopen cases, thus making *sua sponte* authority unnecessary, as the time or numerical limitations that would otherwise prompt a request for *sua sponte* reopening do not apply to joint motions to reopen. *See* 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv). Nothing in this proposed rule precludes the parties from filing such joint motions, including in situations in which there has been a relevant change in facts or law. Other regulations similarly provide expressly that the parties may file a joint

respondent now has filed another motion to reopen based on changed country conditions in Honduras. We will grant the respondent's motion *sua sponte* and will remand the record to the Immigration Judge for further proceedings consistent with this order.''). The Board's putative use of its ''*sua sponte*'' authority in response to a motion highlights the inherent problems in exercising *sua sponte* authority based on procedurally improper motions or requests.

[32] Several circuit courts have concluded that there is a limited exception to this jurisdictional limitation where the BIA's decision not to exercise its *sua sponte* authority is based on a legally erroneous determination, or where a colorable constitutional issue is raised in a petition for review. *See Bonilla* v. *Lynch,* 840 F.3d 575, 587–89 (9th Cir. 2016) (citing 8 U.S.C. 1252(a)(2)(D)); *Salgado-Toribio* v. *Holder,* 713 F.3d 1267, 1271 (10th Cir. 2013); *Zambrano-Reyes* v. *Holder,* 725 F.3d 744, 751 (7th Cir. 2013); *Pllumi* v. *U.S. Att'y Gen.,* 642 F.3d 155, 160 (3d Cir. 2011); *Mahmood* v. *Holder,* 570 F.3d 466, 471 (2d Cir. 2009). Otherwise, however, the Board's choice not to exercise its *sua sponte* authority is unreviewable. *See, e.g., Bonilla,* 840 F.3d at 586; *Mahmood,* 570 F.3d at 471. As noted, however, the Board's authority in these contexts was not genuinely *sua sponte* because it involved the Board ruling on a motion. *See Gonzales-Veliz,* 938 F.3d at 227 n.3 (''If the BIA does something because an alien requests it to do it, then the BIA's action cannot be characterized as *sua sponte.*''); *Malukas,* 940 F.3d at 969 (''Reopening in response to a motion is not *sua sponte;* it is a response to the motion and thus subject to the time-and-number limits.'').

[33] In 2011, the Board did *sua sponte* reopen a case in an unpublished interim order and then reinstate an appeal following a decision by the Ninth Circuit. Following briefing by both parties, it subsequently issued a precedential decision in the case in 2012. *See Matter of Valenzuela Gallardo,* 25 I&N Dec. 838 (BIA 2012).

[34] The Department is retaining the ability of the Board and immigration judges to use *sua sponte* authority to correct ministerial mistakes or typographical errors or to reissue decisions if service was defective.

motion to circumvent time and number limits, rather than rely on an immigration judge's or the Board's *sua sponte* authority, when an intervening event no longer makes an alien removable. *See, e.g.,* 8 CFR 214.11(d)(9)(ii), 214.14(c)(5)(i) (both noting that the parties may file a joint motion to reopen an order of removal issued by an immigration judge in order to overcome any time or number bars when an alien has received a nonimmigrant visa subsequent to the issuance of the removal order). Moreover, nothing in this proposed rule precludes the ability of a respondent to argue, in an appropriate case, that a time limit is inapplicable due to equitable tolling. In short, given the exceptional nature of a situation required to invoke *sua sponte* authority in the first instance, the general lack of use of genuine *sua sponte* authority since 2002, and the availability of multiple other avenues to reopen or reconsider cases and to alleviate the hardships imposed by time and number deadlines, the Attorney General no longer sees a need to retain the delegation of *sua sponte* authority to the Board or to immigration judges as either a matter of law or policy.

In addition, the Department recognizes that the Board may have cited its *sua sponte* authority to reopen—albeit typically in response to a motion rather than a genuine *sua sponte* situation—in circumstances where an alien is no longer removable due, for example, to an intervening change in law or the vacatur of a criminal conviction on the merits. To ensure that aliens whose removability is vitiated *in toto* prior to the execution of the removal order retain a mechanism for reopening their proceedings, the Department proposes to amend the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an alien claims that an intervening change in law or fact renders the alien no longer removable at all and the alien has exercised diligence in pursuing his or her motion.[35] This amendment is consistent with current case law allowing the equitable tolling of the time and number bars for motions to reopen in exceptional circumstances when an alien has shown diligence in pursuing the claim. *See, e.g., Avila-Santoyo* v. *U.S. Att'y Gen.,* 713 F.3d 1357, 1363–64 & n.2 (11th Cir. 2013). To ensure consistency of application regarding both what constitutes a change in law or fact and whether an alien exercised diligence, the proposed rule provides that such a motion could be granted only by a three-member panel at the Board level. Similarly, the Department proposes to amend the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an individual claims that he or she is a United States citizen or national in recognition that the law provides jurisdiction only in removal proceedings for aliens. *See* 8 U.S.C. 1229a(a)(1).

Finally, the Department proposes to amend the regulations to clarify that the filing of a motion to reopen with the Board by DHS in removal proceedings or in proceedings initiated pursuant to 8 CFR 1208.2(c) is not subject to the time and numerical limits applicable to such motions. Such an allowance already exists for DHS motions to reopen at the immigration court level, 8 CFR 1003.23(b)(1), and extending that allowance to DHS motions filed with the Board would provide greater parity between proceedings at the immigration court level and the appellate level. Moreover, doing so would ameliorate the effects of the withdrawal of *sua sponte* authority to reopen cases from the Board for DHS just as the exceptions discussed above ameliorate any deleterious effects of the withdrawal of such authority for respondents.

J. Certification Authority

Current regulations authorize the Board to certify cases to itself for review but provide no standards for deciding when to exercise that authority. 8 CFR 1003.1(c). Although the Attorney General has concluded that the Board's self-certification authority is similar to its *sua sponte* authority and, thus, should be used only in ''exceptional'' situations, *Matter of Jean,* 23 I&N Dec. at 380 n.9, the certification authority is subject to inconsistent application for the same reasons as the *sua sponte* authority. Further, unlike certification requests made by DHS or an immigration judge, which require notice to the parties, 8 CFR 1003.7, the Board may certify a case without notice if it concludes that the parties have been given a fair opportunity to make representations before the Board regarding the case, 8 CFR 1003.1(c). In those circumstances, however, the parties would not have had the opportunity to address whether self-certification by the Board is appropriate—*i.e.,* whether the case presents an exceptional situation—because they would have had no way of knowing that the Board was considering taking the case through self-certification.

Additionally, despite clear language requiring the Board to have jurisdiction over the underlying matter in the first instance in order to exercise its certification authority, *see* 8 CFR 1003.1(c) (restricting self-certification to cases arising under the Board's appellate jurisdiction), the Board often reverses that principle and uses its certification authority to avoid deciding a question of jurisdiction. *Compare Matter of Sano,* 19 I&N Dec. at 300 (holding that the use of certification authority to circumvent a jurisdictional requirement is ''inappropriate''), *with, e.g., Matter of Carlos Daniel Jarquin-Burgos,* 2019 WL 5067262, at *1 n.1 (BIA Aug. 5, 2019) (''On March 29, 2019, we accepted the respondent's untimely appeal. To further settle any issues of jurisdiction, we accept this matter on appeal pursuant to 8 CFR 1003.1(c).''), *Matter of Daniel Tipantasig-Matzaquiza,* 2016 WL 4976725, at *1 (BIA Jul. 22, 2016) (''To settle any issues regarding jurisdiction, we will exercise our discretionary authority to accept this appeal on certification. *See* 8 CFR 1003.1(c).''), *and Matter of Rafael Antonio Hanze Fuentes,* 2011 WL 7071021, at *1 n.1 (BIA Dec. 29, 2011) (''In order to avoid any question regarding our jurisdiction over this appeal, we take jurisdiction over this matter by certification pursuant to 8 CFR 1003.1(c).'').

Similarly, despite the clear directive in *Matter of Jean* that certification should be used only in ''exceptional'' situations, the Board frequently uses its certification authority in otherwise unexceptional circumstances, such as to avoid finding appeals untimely, or to simply correct filing defects. *Matter of Alhassan Kamara,* 2015 WL4873247, at *1 (BIA Jun. 30, 2015) (''To resolve any issue of timeliness, we adjudicate the appeal in the exercise of our certification authority. 8 CFR 1003.1(c).''); *Matter of Mohamed Saad Maroof,* 2006 WL 3712722, at *1 n.1 (BIA Nov. 17, 2006) (''We will take this appeal on certification to correct any filing defects. *See* 8 CFR 1003.1(c)(2006).''); *Matter of Edwin R. Jimenez,* 2005 WL 3016034, at *1 n.1 (BIA Aug. 8, 2005) (''To resolve any questions of timeliness, we will assume jurisdiction over the appeal by certification pursuant to our authority

[35] This provision would apply only when the intervening change vitiated the alien's removability completely—an alien charged with multiple removability grounds would remain subject to the time and number bars unless the intervening change vitiated each removability ground. Additionally, this provision would apply only to grounds of removability. Aliens arguing that an intervening change in law or fact affected their eligibility for relief or protection from removal would remain subject to existing regulatory provisions on such motions.

under 8 CFR 1003.1(c).''); *cf. Matter of Liadov,* 23 I&N Dec. 990, 993 (BIA 2006) (short delays in filing timely are not ''rare'' or ''extraordinary'' such that the acceptance of an appeal through the Board's certification authority would be warranted).

Due to the lack of clear governing standards, the lack of a definition of ''exceptional'' situations for purposes of utilizing self-certification, the potential for lack of notice of the Board's use of certification authority, the overall potential for inconsistent application and abuse of this authority, and the strong interest in finality, the Attorney General has concluded that such delegation of self-certification authority to the BIA, particularly to the extent it may be used to circumvent appellate filing deadlines, is no longer appropriate. Accordingly, for reasons similar to those underlying the withdrawal of the delegation of *sua sponte* authority, this rule would withdraw the delegation of certification authority from the Board. No other aspect of the regulations governing certification of cases to the Board would be affected.[36]

K. Timeliness of Adjudication of BIA Appeals

The number of cases pending before EOIR has increased tremendously, particularly in recent years. EOIR had approximately 130,000 pending cases in 1998. At the end of FY 2019, EOIR had 1,079,168 pending cases, up from 430,123 at the end of FY 2014 and 262,748 at the end of FY 2010. *See* EOIR, *Adjudication Statistics: Pending Cases* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1242166/download.* Put differently, EOIR's current pending caseload has increased more than 800 percent in the past 21 years.

With the increase in pending cases at the immigration courts, EOIR has recently begun to have a corresponding increase in the number of appeals of immigration judge decisions. In FY 2019, 54,092 case appeals were filed with the BIA—an increase of over 250 percent from FY 2015, when 15,423 case appeals were filed. The BIA ended FY 2019 with 65,201 pending case appeals, up from 12,677 at the end of FY 2017. EOIR, *Adjudication Statistics: Case Appeals1 Filed, Completed, and Pending* (Oct. 23, 2019), *https://www.justice.gov/eoir/page/file/1198906/download.* Paradoxically, although the Board operated with between 16 and 21 adjudicators for all of FY 2018, adjudications of case appeals actually *fell* by roughly 500 from FY 2017 when it had no more than 16 adjudicators for nearly all of the fiscal year. *Id.* Case appeal completions fell yet again in FY 2019, by nearly 1500, even though the Board operated with at least 18 adjudicators—and, at times, as many as 21 total—for the entire fiscal year. *Id.* Overall, Board productivity in adjudicating case appeals has declined by 33 percent since FY 2008.[37] Although the Department has utilized multiple temporary Board members and increased the number of permanent Board members in 2018, *see* Expanding the Size of the Board of Immigration Appeals, 83 FR 8321 (Feb. 27, 2018), an increase in the number of adjudicators is not necessarily commensurate with an increase in productivity. Due to these concerns about BIA productivity—and the need to ensure that improved productivity at the immigration court level is not subverted by inefficient practices at the administrative appellate level—the Department believes it is necessary to again review the BIA's regulations to reduce any unwarranted delays in the appeals process and to ensure that the BIA's, as well as the rest of EOIR's, resources are used efficiently.

To that end, the Department is changing the BIA's case management system to ensure that all appeals are being adjudicated in a timely manner. Currently, except in limited circumstances, appeals assigned to a single Board member are expected to be decided within 90 days of completion of the record on appeal, whereas appeals assigned to a three-member panel are to be decided within 180 days of assignment to the panel (including any additional opinion by a member of the panel), which may occur well after the record on appeal is complete. 8 CFR 1003.1(e)(8)(i). Although the Board maintains a single case management system to screen cases for either single-member or three-member panel disposition, the current regulatory language sets timeliness deadlines based on different criteria, which may cause inefficiencies and potential delays. *See* 8 CFR 1003.1(e). It has also caused confusion regarding how the Board tracks cases and raised questions about the accuracy of the Board's statistics and the timeliness of the Board's adjudications. *See* DOJ OIG Report at 50 (''Further, EOIR's tracking method for the length of appeals does not include total processing times for appeals. Depending on the type of review—one or three board members—EOIR counts the appeal processing time from different starting points. These different starting points significantly skew the reported achievement of its completion goals for appeals and impede EOIR's effective management of the appeals process. The total number of days taken to review and decide appeals, not EOIR's count of days, represents how long the aliens and the DHS wait for decisions on their appeals.''). Because the number of appeals has risen considerably in recent years, the Department believes it is important to eliminate all potential inefficiencies to ensure that appeals are completed in a timely manner. Consequently, the Department is changing the regulatory language to harmonize the time limits for adjudicating appeals so that both the 90- and 180-day deadlines are set from the same starting point—when the record is complete.

The Department is also implementing additional changes to ensure that appeals are adjudicated in a timely manner. For example, the proposed rule establishes specific time frames for review by the screening panel, processing of transcripts, issuance of briefing schedules, and review by a single Board member to determine whether a single member or a three-member panel should adjudicate the appeal, none of which are considered in the current regulations or tracked effectively to prevent delays. It also adds tracking and accountability requirements for the Board Chairman in cases where the adjudication of appeals must be delayed to ensure that no appeals are overlooked or lost in the process. It also establishes specific time frames for the adjudication of summary dismissals, providing substance to the current language that such cases be identified ''promptly'' by the screening panel. *See* 8 CFR 1003.1(d)(2)(ii). Additionally, it establishes specific time frames for the adjudication of interlocutory appeals, which are not currently addressed in the regulations, except insofar as they may be referred to a three-member panel for review. The BIA does not normally entertain interlocutory appeals, and neither transcripts nor briefing schedules are generally issued for interlocutory appeals. *See* BIA Practice Manual at 63, 70–71. Consequently, there is no reason

[36] On November 25, 2002, the President signed into law the Homeland Security Act of 2002, creating the new DHS and transferring the functions of the former INS to DHS. Public Law 107–296, tit. IV, subtitles D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002). Accordingly, this rule also replaces outdated references to the INS in 8 CFR 1003.1(c) and 1003.7 with references to DHS.

[37] The Board completed 29,433 case appeals in FY 2008, but only 19,449 in FY 2019. *See* EOIR, *Case Appeals Filed, Completed, and Pending* (Oct. 23, 2019), *https://www.justice.gov/eoir/page/file/1198906/download.*

that those appeals also cannot be addressed promptly within 30 days, unless the BIA determines that they involve ''important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges'' amenable to review by a three-member panel. *Id.* at 70 (citing *Matter of K–,* 20 I&N Dec. 418 (BIA 1991)). Finally, these changes will ensure that EOIR will ''improve its collecting, tracking, and reporting of BIA appeal statistics to accurately reflect actual appeal processing times,'' as has previously been recommended. DOJ OIG Report at 50.

Further, the Department is cognizant that, absent a regulatory basis for delay,[38] there is no reason for a typical appeal to take more than 335 days to adjudicate—including time for transcription, briefing, and adherence to the existing 90- or 180-day time frames for decision.[39] The rule therefore also ensures timely dispositions by referring appeals pending beyond that mark to the EOIR Director for adjudication.[40] As indicated in 8 CFR 1003.1(e)(8)(vi), these changes reflect management directives in favor of timely dispositions and do not establish any substantive or procedural rights. Because most appeals are already decided within these parameters, unless there is a regulatory or policy basis for delay, the Department expects few, if any, appeals to need to be referred to the Director. Nevertheless, such authority is necessary to ensure management oversight consistent with the Director's authority to ''set priorities or time frames for the resolution of cases'' and the Director's responsibility ''to ensure the efficient disposition of all pending cases.'' 8 CFR 1003.0(b)(1)(ii).[41] Moreover, this delegation of authority to the Director does not change the applicable law that the Board or the Director must apply in deciding each appeal, nor does it change appellate briefing procedures, which would be expected to be completed before any case would need to be referred. Rather, this delegation ensures that any unwarranted delays in the adjudication of appeals are eliminated and any bottlenecks in the Board's processing of appeals are minimized or eliminated.

Finally, the rule removes and reserves 8 CFR 1003.1(e)(8)(iv). That provision allowed the BIA Chairman to grant an extension of 120 days to the 90- and 180-day adjudicatory time frames for cases ready for adjudication as of September 25, 2002, that had not been completed within those time frames. That provision is no longer necessary because the relevant dates and time frames have long since passed.

L. Forwarding the Record on Appeal

The Department is also revising 8 CFR 1003.5 regarding the forwarding of the record of proceedings in an appeal to ensure that the transcription process does not cause any unwarranted delays. The Department notes that it is not necessary for immigration judges to affirmatively review, potentially revise, and then approve the transcripts of oral decisions; EOIR utilizes reliable digital audio recording technology that produces clear audio recordings, and the additional 7- or 14-day review period creates an unnecessary delay in the adjudication of appeals. Moreover, because errors should not be corrected during the review, *see, e.g., Mamedov* v. *Ashcroft,* 387 F.3d 918, 920 (7th Cir. 2004) (''[I]n general it is a bad practice for a judge to continue working on his opinion after the case has entered the appellate process . . . .''); because EOIR already has a procedure for the parties to address defective or inaccurate transcripts on appeal, BIA Practice Manual at 51–52; and because the BIA may remedy defects through a remand for clarification or correction if necessary, 8 CFR 1003.1(e)(2), there is no operational reason for immigration judges to continue to review transcripts of their decisions solely for minor typographical errors. *Accord Witjaksono* v. *Holder,* 573 F.3d 968, 976 (10th Cir. 2009) (''When an alien follows these procedures [under the regulations and the BIA Practice Manual], the BIA is able to evaluate whether the 'gaps [in the transcript] relate to matters material to [the] case and [whether] they materially affect [the alien's] ability to obtain meaningful review.' Moreover, if the BIA concludes that a defective transcript did not cause prejudice, these procedures create a record that facilitates the meaningful and effective *judicial* review to which a petitioner is entitled.'' ((first alteration added) (internal citation omitted)). Further, such review also takes immigration judges away from their primary duty of adjudicating cases expeditiously and impartially, consistent with the law. Finally, federal courts have criticized the practice of immigration judges revising transcripts after an appeal has been filed. *See Mamedov,* 387 F.3d at 920. Accordingly, there is simply no reason to retain the requirement that immigration judges continue to review transcripts, and removing this requirement will also eliminate the possibility of the transcript being amended incorrectly, even

[38] For example, in exigent circumstances, the BIA Chairman may grant a 60-day extension of the 90- and 180-day adjudicatory processing deadlines currently in the regulations. 8 CFR 1003.1(e)(8)(ii). Additionally, the BIA may place a case on hold while it awaits the completion or updating of all identity, law enforcement, or security investigations or examinations. 8 CFR 1003.1(d)(6)(ii)(B). The Chairman may also hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a Board *en banc* decision, or in anticipation of an amendment to regulations. 8 CFR 1003.1(e)(8)(iii). The proposed rule amends this last category by removing a pending Court of Appeals decision and a pending regulatory action as bases for a hold. Unlike Supreme Court decisions, which are typically issued by the end of a fixed term, and Board *en banc* decisions, which are subject to regulatory timelines discussed herein, neither regulatory actions nor Court of Appeals decisions have a fixed deadline and may stretch out for years, making them poor bases to warrant an adjudicatory delay. In recognition of the need for efficient decision-making and finality in case adjudications, the rule also places a 120-day limit on the length of a hold imposed by the Chairman.

[39] The median time for all appeals from immigration judge decisions in FY 2019 was 168 days. Excluding interlocutory appeals, appeals from custody redetermination decisions, and appeals from decisions on motions to reopen, the median time to completion for case appeals in FY 2019 was 323 days, which is consistent with the timeline outlined in the proposed rule. More specifically, the proposed rule provides that screening should occur no later than 14 days after the notice to appeal is filed with the Board. If there is funding and vendor availability, the transcript should be ordered within 7 days, and transcription takes 14 to 28 days. The briefing schedule is then issued within seven days of receipt of the transcript. Completion of briefing requires, at most, 63 days under the current regulation and would require less time under the proposed rule. Once the record is complete, a single panel member should review the case within 14 days to determine whether it should be referred to a three-member panel or adjudicated by that single Board member. If it is referred, the panel has 180 days to decide the appeal. Combined, even under the current regulations, a typical appeal should take no longer than 313 days to adjudicate from the date it was filed, though the proposed rule provides an additional allowance to account for miscellaneous delays that may occur due to human error or movement of the record of proceeding from one location to another.

[40] The Attorney General recently delegated authority to the EOIR Director to potentially adjudicate appeals that have exceeded the established 90- and 180-day regulatory time limits, unless the Board Chairman assigns the case to himself or the Vice Chairman. Organization of the Executive Office for Immigration Review, 84 FR 44537, 44538 (Aug. 26, 2019). As the DOJ OIG previously pointed out, however, those time limits count only part of the overall appellate processing time, ''and the parts that are excluded represent a significant portion of the processing time.'' DOJ OIG Report at 48. The narrowness of the prior delegation and the lack of an overall timeliness metric for deciding appeals that accounts for all of the appellate processing time limits the utility of that delegation in addressing delays in the overall appeals process.

[41] The Director is also responsible for providing ''comprehensive, continuing training and support'' for, *inter alia,* EOIR staff ''in order to promote the quality and consistency of adjudications.'' 8 CFR 1003.0(b)(1)(vii). Consequently, the Director will ensure that any support staff assisting in preparing cases for adjudication under this delegation of authority are sufficiently trained. Additionally, the proposed rule makes clear that the Director may not delegate this authority further to any employee within EOIR.

inadvertently, after a decision has been rendered.

Further, the Department notes that the section regarding the forwarding of the physical record of proceeding to the BIA is being rendered obsolete by the EOIR Court & Appeals System (''ECAS''), which has been deployed to 14 immigration courts and adjudication centers and is currently in the midst of a nationwide rollout following a successful pilot.[42] *See* EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018); EOIR, *EOIR Launches Electronic Filing Pilot Program* (July 19, 2018), *https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program;* EOIR Policy Memorandum 20–13, *EOIR Practices Related to the COVID–19 Outbreak* 3 n.7 (June 11, 2020), *https://www.justice.gov/eoir/page/file/1284706/download.* ECAS will enable EOIR to maintain fully electronic records of proceeding, which in turn will enable the BIA to directly access all relevant records in an appeal from the decision of an immigration judge without the need for court staff to forward the record. In short, there is no basis to retain 8 CFR 1003.5(a) in its current format, and the Department is revising it accordingly.[43]

Finally, 8 CFR 1003.5(b) describes procedures regarding appeals from DHS decisions that are within the BIA's appellate jurisdiction. *See* 8 CFR 1003.1(b)(4)–(5). Much of the language in that paragraph concerns authority exercised by DHS officers rather than by EOIR. Accordingly, EOIR is proposing to delete language that is not applicable to its adjudicators and modifying the regulatory text accordingly. In doing so, EOIR also proposes replacing outdated references to the INS. *See supra,* note 36. The changes do not substantively affect the Board's adjudication of any appeals subject to 8 CFR 1003.5(b).

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate ''small entities,'' as that term is defined in 5 U.S.C. 601(6). The rule will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility.

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 (adjusted annually for inflation), 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. Congressional Review Act

This proposed rule is not a major rule as defined by section 804 of the Congressional Review Act. 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 enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563

The Department has determined that this 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.

The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866 and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Department believes that shortening the time for briefing extensions and schedules and clarifying the standards for review will help reduce the number of cases pending before EOIR and will enable the BIA to adjudicate more appeals annually. The Department believes the costs to the public will be negligible, if any, because the basic briefing procedures will remain the same, because current BIA policy already disfavors multiple briefing extension requests, and because the BIA is already prohibited from considering new evidence on appeal. The proposed rule does not impose any new costs, and most, if not all, of the proposed rule is directed at internal case processing. Any changes contemplated by the rule would have no apparent impact on the public but would substantially improve both the quality and efficiency of BIA appellate adjudications.

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, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

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

G. Paperwork Reduction Act

This rule does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Immigration.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, the Department proposes to amend 8 CFR parts 1003 and 1240 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

[42] The rollout was temporarily paused on March 16, 2020, due to the outbreak of COVID–19 in the United States and will resume at an appropriate time.

[43] The Department is also streamlining the language in § 1003.5(a) to better reflect responsibility for ensuring the timely processing of transcripts consistent with the EOIR Director's authority to ensure the efficient disposition of all pending cases. 8 CFR 1003.0(b)(1)(ii).

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. Amend § 1003.1 by:
■ a. Revising paragraphs (c), (d)(1)(ii), and (d)(3)(iv);
■ b. Adding paragraph (d)(3)(v);
■ c. Revising paragraphs (d)(6)(ii) through (iv), (d)(7), (e)(1), (e)(8) introductory text, and (e)(8)(i) and (iii);
■ d. Removing and reserving paragraph (e)(8)(iv);
■ e. Adding four sentences at the end of paragraph (e)(8)(v); and
■ f. Adding paragraph (k).

The revisions and additions read as follows:

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

* * * * *

(c) *Jurisdiction by certification.* The Secretary, or any other duly authorized officer of DHS, or an immigration judge may in any case arising under paragraph (b) of this section certify such case to the Board for adjudication.

(d) * * *

(1) * * *

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, 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. Nothing in this paragraph shall be construed as authorizing the Board to administratively close or suspend adjudication of a case unless a regulation promulgated by the Department of Justice or a previous judicially approved settlement expressly authorizes such an action. Only the Director or Chief Appellate Immigration Judge may direct the deferral of adjudication of any case or cases by the Board.

* * * * *

(3) * * *

(iv)(A) The Board will not engage in factfinding in the course of deciding appeals, except that the Board may take administrative notice of facts that are not reasonably subject to dispute, such as

(*1*) Current events;

(*2*) The contents of official documents outside the record;

(*3*) Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed; or

(*4*) Undisputed facts contained in the record.

(B) If the Board intends to rely on an administratively noticed fact outside of the record, such as those indicated in paragraphs (d)(3)(iv)(A)(*1*) through (*3*) of this section, as the basis for reversing an immigration judge's grant of relief or protection from removal, it must provide notice to the parties of its intent and afford them an opportunity of not less than 14 days to respond to the notice.

(C) The Board shall not *sua sponte* remand a case for further factfinding unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case.

(D) Except as provided in paragraph (d)(6)(iii) or (d)(7)(v)(B) of this section, the Board shall not remand a case for additional factfinding unless

(*1*) The party seeking remand preserved the issue by presenting it before the immigration judge;

(*2*) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;

(*3*) The additional factfinding would alter the outcome or disposition of the case;

(*4*) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and

(*5*) One of the following circumstances is present in the case:

(*i*) The immigration judge's factual findings were clearly erroneous, or

(*ii*) Remand to DHS is warranted following de novo review.

(v) The Board may affirm the decision of the immigration judge or the Department of Homeland Security on any basis supported by the record, including a basis supported by facts that are not reasonably subject to dispute, such as undisputed facts in the record.

* * * * *

(6) * * *

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, and the completion of the investigations or examinations is necessary for the Board to complete its adjudication of the appeal, the Board will provide notice to both parties that, in order to complete adjudication of the appeal, the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board. Unless DHS advises the Board that such information is no longer necessary in the particular case, the Board's notice will notify the alien that DHS will contact the alien to take additional steps to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary investigations or examinations. The Board's notice will also advise the alien of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any alien in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If a non-detained alien fails to comply with necessary procedures for collecting biometrics or other biographical information within 90 days of the Board's notice under paragraph (d)(6)(ii) of this section, the Board shall deem the application abandoned unless the alien shows good cause before the 90-day period has elapsed, in which case the alien should be given no more than an additional 30 days to comply with the procedures. If the Board deems an application abandoned under this section, it shall adjudicate the remainder of the appeal within 30 days and shall enter an order of removal or a grant of voluntary departure, as appropriate. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, any pending applications for immigration relief or protection should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion. If DHS fails to report the results of timely-completed or updated identity, law

enforcement, or security investigations or examinations within 180 days of the Board's notice under paragraph (d)(6)(ii) of this section, the Board shall remand the case to the immigration judge for further proceedings under § 1003.47(h).

(iv) The Board is not required to hold a case pursuant to paragraph (d)(6)(ii) of this section if the Board decides to dismiss the respondent's appeal or deny the relief or protection sought.

* * * * *

(7) *Finality of decision*—(i) *In general.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. In adjudicating an appeal, the Board possesses authority to issue an order of removal, an order granting relief from removal, an order granting protection from removal combined with an order of removal as appropriate, an order granting voluntary departure with an alternate order of removal, and an order terminating or dismissing proceedings, provided that the issuance of any order is consistent with applicable law. The Board may affirm the decision of the immigration judge or DHS on any basis supported by the record. In no case shall the Board order a remand for an immigration judge to issue an order that the Board itself could issue.

(ii) *Remands.* After applying the appropriate standard of review on appeal, the Board may issue an order remanding a case to an immigration judge or DHS for further consideration based on an error of law or fact, subject to any applicable statutory or regulatory limitations, including paragraph (d)(3)(iv)(D) of this section and the following:

(A) The Board shall not remand a case for further action without identifying the standard of review it applied and the specific error or errors made by the adjudicator below.

(B) The Board shall not remand a case based on the ''totality of the circumstances.''

(C) The Board shall not remand a case based on a legal argument not presented below unless that argument pertains to an issue of jurisdiction over an application or the proceedings, or to a material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the date of the immigration judge's decision, and substantial evidence indicates that change has vitiated all grounds of removability applicable to the alien.

(D) The Board shall not *sua sponte* remand a case unless the basis for such a remand is solely a question of jurisdiction over an application or the proceedings.

(E) The Board shall not remand a case to an immigration judge solely to consider a request for voluntary departure nor solely due to the failure of the immigration judge to provide advisals following a grant of voluntary departure. In such situations, the Board shall follow the procedures in § 1240.26(k).

(iii) *Scope of the remand.* Where the Board remands a case to an immigration judge, it divests itself of jurisdiction of that case, unless the Board remands a case due to the court's failure to forward the administrative record in response to the Board's request. The Board may qualify or limit the scope or purpose of a remand order without retaining jurisdiction over the case following the remand. In any case in which the Board has qualified or limited the scope or purpose of the remand, the immigration judge shall not consider any issues outside the scope or purpose of that order, unless such an issue calls into question the immigration judge's continuing jurisdiction over the case.

(iv) *Voluntary departure.* The Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the alien requested voluntary departure before an immigration judge, the alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging, and the Board finds that the alien is otherwise eligible for voluntary departure, as provided in § 1240.26(k). In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the alien merits voluntary departure as a matter of discretion. If the Board does not grant the request for voluntary departure, it must deny the request.

(v) *New evidence on appeal.* (A) Subject to paragraph (d)(7)(v)(B) of this section, the Board shall not receive or review new evidence submitted on appeal, shall not remand a case for consideration of new evidence received on appeal, and shall not consider a motion to remand based on new evidence. A party seeking to submit new evidence shall file a motion to reopen in accordance with applicable law.

(B) Nothing in paragraph (d)(7)(v)(A) of this section shall preclude the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, regardless of whether the investigations or examinations were conducted pursuant to § 1003.47(h) or paragraph (d)(6) of this section, nor from remanding a case to address a question of jurisdiction over an application or the proceedings or a question regarding a ground or grounds of removability specified in section 212 or 237 of the Act.

(e) * * *

(1) *Initial screening.* All cases shall be referred to the screening panel for review upon the filing of a Notice of Appeal or a motion. Screening panel review shall be completed within 14 days of the filing. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section, except for those subject to summary dismissal as provided in paragraph (d)(2)(i)(E) of this section, shall be promptly dismissed no later than 30 days after the Notice of Appeal was filed. Unless referred for a three-member panel decision pursuant to paragraph (e)(6) of this section, an interlocutory appeal shall be adjudicated within 30 days of the filing of the appeal.

* * * * *

(8) *Timeliness.* The Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, the Board shall promptly order a transcript, if appropriate, within seven days after the screening panel completes its review and shall issue a briefing schedule within seven days after the transcript is provided. If no transcript may be ordered due to a lack of available funding or a lack of vendor capacity, the Chairman shall so certify that fact in writing to the Director. The Chairman shall also maintain a record of all such cases in which transcription cannot be ordered and provide that record to the Director. If no transcript is required, the Board shall issue a briefing schedule within seven days after the screening panel completes its review. The case shall be assigned to a single Board member for merits review under paragraph (e)(3) of this section within seven days of the completion of the record on appeal, including any briefs or motions. The single Board member shall then determine whether to adjudicate the appeal or to designate the case for decision by a three-member panel under paragraphs (e)(5) and (6) of this section within 14 days of being

assigned the case. The single Board member or three-member panel to which the case is assigned shall issue a decision on the merits consistent with this section and with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, subject to concurrence by the Director, or as provided in paragraph (d)(6) of this section or as provided in § 1003.6(c) and § 1003.19(i), 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 of completion of the record on appeal for all appeals assigned to a three-member panel (including any additional opinion by a member of the panel).

* * * * *

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or an impending *en banc* Board decision may substantially determine the outcome of a group of cases pending before the Board, the Chairman, subject to concurrence by the Director, may hold the cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8). The length of such a hold shall not exceed 120 days.

* * * * *

(v) * * * The Chairman shall notify the Director of all cases in which an extension under paragraph (e)(8)(ii) of this section, a hold under paragraph (e)(8)(iii) of this section, or any other delay in meeting the requirements of this paragraph (e)(8) occurs. For any case still pending adjudication by the Board more than 335 days after the appeal was filed and not otherwise subject to an extension under paragraph (e)(8)(ii) or a hold under paragraph (e)(8)(iii), the Chairman shall refer that case to the Director for decision. For a case referred to the Director under this paragraph (e)(8)(v), the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, including the authority to issue a precedential decision and the authority to refer the case to the Attorney General for review, either on his own or at the direction of the Attorney General. The Director may not further delegate this authority.

* * * * *

(k) *Quality assurance certification.* (1) In any case in which the Board remands a case to an immigration judge or reopens and remands a case to an immigration judge, the immigration judge may forward that case by certification to the Director for further review only in the following circumstances:

(i) The Board decision contains a typographical or clerical error affecting the outcome of the case;

(ii) The Board decision is clearly contrary to a provision of the Act, any other immigration law or statute, any applicable regulation, or a published, binding precedent;

(iii) The Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or

(iv) A material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the decision.

(2) In order to certify a decision under paragraph (k)(1) of this section, an immigration judge must:

(i) Issue an order of certification within 30 days of the Board decision if the alien is not detained and within 15 days of the Board decision if the alien is detained;

(ii) In the order of certification, specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and

(iii) Provide notice of the certification to both parties.

(3) For a case certified to the Director under this paragraph, the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, except as otherwise provided in this paragraph, including the authority to issue a precedent decision and the authority to refer the case to the Attorney General for review, either on the Director's own or at the direction of the Attorney General. For a case certified to the Director under this paragraph, the Director may dismiss the certification and return the case to the immigration judge or the Director may remand the case back to the Board for further proceedings. In a case certified to the Director under this paragraph, the Director may not issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal.

(4) The quality assurance certification process shall not be used as a basis solely to express disapproval of or disagreement with the outcome of a Board decision unless that decision is alleged to reflect an error described in paragraph (k)(1) of this section.

■ 3. Amend § 1003.2 by:

■ a. Revising the first sentence of paragraph (a);

■ b. Removing the second and third sentences of paragraph (b)(1);

■ c. Adding paragraphs (c)(3)(v) through (vii); and

■ d. Removing and reserving paragraph (c)(4).

The revisions and additions read as follows:

§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) * * * The Board may at any time reopen a case in which it has rendered a decision on its own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. In all other cases, the Board may only reopen or reconsider any case in which it has rendered a decision solely pursuant to a motion filed by one or both parties. * * *

* * * * *

(c) * * *

(3) * * *

(v) For which a three-member panel of the Board agrees that reopening is warranted when the following circumstances are present, provided that a respondent may file only one motion to reopen pursuant to this paragraph:

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen;

(vi) Filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national; or

(vii) Filed by DHS in removal proceedings pursuant to section 240 of the Act or in proceedings initiated pursuant to § 1208.2(c).

* * * * *

■ 4. Amend § 1003.3 by revising paragraphs (a)(2) and (c) to read as follows:

§ 1003.3 Notice of appeal.

(a) * * *

(2) *Appeal from decision of a DHS officer.* A party affected by a decision of a DHS officer that 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 DHS officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer (Form EOIR–29) directly with DHS in accordance with the instructions in the decision of the DHS officer within 30 days of the service of the decision being appealed. An appeal

is not properly filed until it is received at the appropriate DHS office, together with all required documents, and the fee provisions of § 1003.8 are satisfied.

* * * * *

(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. In all cases, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. The Board, upon written motion and a maximum of one time per case, may extend the period for filing a brief or, if permitted, a reply brief for up to 14 days for good cause shown. If an extension is granted, it is granted to both parties, and neither party may request a further extension. Nothing in this paragraph shall be construed as creating a right to a briefing extension for any party in any case, and the Board shall not adopt a policy of granting all extension requests without individualized consideration of good cause. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. 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 DHS officer.* Briefs in support of or in opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. Upon written request of the alien and a maximum of one time per case, the DHS officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for up to 14 days for good cause shown. After the forwarding of the record on appeal by the DHS officer the Board may, solely in its discretion, authorize the filing of supplemental briefs directly with the Board and may provide the parties up to a maximum of 14 days to simultaneously file such briefs. 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 DHS office, shall include proof of service on the opposing party.

* * * * *

■ 5. Revise § 1003.5 to read as follows:

§ 1003.5 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 promptly forwarded to the Board upon the request or the order of the Board, unless the Board already has access to the record of proceeding in electronic format. The Director, in consultation with the Chairman and the Chief Immigration Judge, shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges. The Chairman and the Chief Immigration Judge shall take such steps as necessary to reduce the time required to produce transcripts of those proceedings and to ensure their quality.

(b) *Appeal from decision of a DHS officer.* If an appeal is taken from a decision of a DHS officer, the record of proceeding shall be forwarded to the Board by the DHS officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs, unless the DHS officer reopens and approves the petition.

§ 1003.7 [Amended]

■ 6. Amend § 1003.7 by removing the word ''Service'' each place that it appears and adding in its place the word ''DHS''.

■ 7. Amend § 1003.10 in paragraph (b) by removing ''governing standards'' and adding in its place ''governing standards set forth in paragraph (d) of this section'' and by adding two sentences at the end.

The additions read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * Nothing in this paragraph nor in any regulation contained in 8 CFR part 1240 shall be construed as authorizing an immigration judge to administratively close or suspend adjudication of a case unless a regulation promulgated by the Department of Justice or a previous judicially approved settlement expressly authorizes such an action. Only the Director or Chief Immigration Judge may direct the deferral of adjudication of any case or cases by an immigration judge.

* * * * *

■ 8. Amend § 1003.23 by revising the first sentence of, and adding a new second sentence to, paragraph (b)(1), and adding paragraphs (b)(4)(v) and (vi) to read as follows:

§ 1003.23 Reopening or reconsideration before the immigration court.

* * * * *

(b) * * *

(1) * * * Unless jurisdiction is vested with the Board of Immigration Appeals, an immigration judge may at any time reopen a case in which he or she has rendered a decision on his or her own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. Unless jurisdiction is vested with the Board of Immigration Appeals, in all other cases, an immigration judge may only reopen or reconsider any case in which he or she has rendered a decision solely pursuant to a motion filed by one or both parties. * * *

* * * * *

(4) * * *

(v) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed when each of the following circumstances is present, provided that a respondent may file only one motion to reopen pursuant to this paragraph:

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen.

(vi) The time limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national.

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 9. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 10. Amend § 1240.26 by:

■ a. Redesignating paragraph (j) as paragraph (l);
■ b. Adding and reserving a new paragraph (j); and
■ c. Adding paragraph (k).

The additions read as follows:

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

* * * * *

(j) [Reserved]

(k) *Authority of the Board to grant voluntary departure in the first instance.* The following procedures apply to any request for voluntary departure reviewed by the Board:

(1) The Board shall not remand a case to an immigration judge to reconsider a request for voluntary departure. If the Board first finds that an immigration judge incorrectly denied an alien's request for voluntary departure or failed to provide appropriate advisals, the Board shall consider the alien's request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) The Board shall not grant voluntary departure under section 240B(a) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the alien timely appealed;

(ii) The alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) The Board shall not grant voluntary departure under section 240B(b) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the alien timely appealed;

(ii) the alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the alien's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. The Board shall advise the alien in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (c), (d), (e), (h), and (i) (other than paragraph (c)(3)(ii)) of this section. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the alien in writing of such conditions. The alien may accept or decline the grant of voluntary departure and may manifest his or her declination either by written notice to the Board within five days of receipt of its decision, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the alien of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The alien may decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

Dated: August 20, 2020.

William P. Barr,

Attorney General.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 87 and 1030

[EPA–HQ–OAR–2018–0276; FRL–10013–21–OAR]

RIN 2060–AT26

Public Hearing for Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of public hearing.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a virtual public hearing to be held on September 17, 2020, on its proposed greenhouse gas (GHG) emission standards for airplanes and airplane engines, which was published on August 20, 2020.

DATES: EPA will hold a virtual public hearing on September 17, 2020. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: The virtual public hearing will be held on September 17, 2020. The hearing will begin at 10 a.m. Eastern Time (ET) and end when all parties who wish to speak have had an opportunity to do so. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Bryan Manning, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734–214–4832; email address: *manning.bryan@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA is proposing GHG emission standards applicable to certain classes of engines used by certain civil subsonic jet airplanes and by certain civil larger subsonic propeller-driven airplanes with turboprop engines 85 FR 51556, August 20, 2020. These proposed standards are equivalent to the airplane CO_2 standards adopted by the International Civil Aviation Organization (ICAO) in 2017.

Participation in virtual public hearing. Please note that EPA is deviating from its typical approach because the President has declared a national emergency. Because of current recommendations from the Centers for Disease Control and Prevention (CDC), as well as state and local orders for social distancing to limit the spread of COVID–19, EPA cannot hold in-person public meetings at this time.

The virtual public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposal (the official version of which was published 85 FR 51556, August 20, 2020, and a copy of which is available at *https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-aircraft*). EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. EPA recommends submitting the text of your oral comments as written comments to the rulemaking Docket ID No. EPA–HQ–OAR–2018–0276, which can be found at *https://www.regulations.gov.* Written comments must be received on or before October 19, 2020.