AMERICAN IMMIGRATION LAWYERS ASSOCIATION

February 4, 2020

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via www.regulations.gov
Docket ID No. USCIS-2008-0027

Re: OMB Control Number 1615–0095
USCIS 60-Day Notice of Comment Period: Revision of a Currently Approved Collection
Form I-290B, Notice of Appeal or Motion

Dear Ms. Deshommes:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to the above-referenced 60-day notice and request for comments on proposed revisions to Form I-290B, Notice of Appeal or Motion and its instructions published in the Federal Register on December 6, 2019.[1] This comment supplements a joint comment that AILA submitted on February 4, 2020, alongside the American Immigration Council, ASISTA Immigration Assistance, Catholic Legal Immigration Network, Inc. (CLINIC), the Immigrant Legal Resource Center (ILRC), Kids in Need of Defense (KIND), and the Tahirih Justice Center. This supplemental comment offers feedback on the agency's proposed change to the treatment of requests to appeal Adam Walsh Child Protection and Safety Act "no risk" determinations to the Administrative Appeals Office (AAO). While the joint comment mentioned above briefly touches on the agency's proposed change to the treatment of Adam Walsh Act risk determinations, this supplemental comment is provided by AILA to further expand on that specific proposal.

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form I-290B and its instructions, and believe that our members' collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

[1] 84 Fed. Reg. 66924 (Dec. 6, 2019).

Comments on the AAO's Appellate Jurisdiction Over "No Risk" Determinations Under the Adam Walsh Act

By way of background, section 402(a)(2) and (a)(3) of the Adam Walsh Act Child Protection and Safety Act of 2006 (AWA) bars approval of family-based petitions filed by U.S. citizens and lawful permanent residents (LPRs) who have been convicted of a specified offense against a minor unless the Secretary of Homeland Security, in his or her "sole and unreviewable discretion," determines that the U.S. citizen or LPR poses "no risk" to the beneficiary of the petition.[2]

In the *Federal Register* notice, USCIS claims that the AAO does not have appellate jurisdiction over "no risk" determinations under the AWA.[3] As justification for why USCIS believes that the AAO does not have appellate jurisdiction over such determinations, USCIS states in the notice that the DHS Secretary has not "yet" delegated appellate authority over AWA "no risk" determinations to the AAO by revising the Delegation 0150.1(U) or through other means provided by 8 CFR 2.1.[4]

Yet for years, the AAO has been exercising appellate jurisdiction over AWA "no risk" determinations. In fact, since at least 2010, USCIS has accepted appeals by affected parties of AWA risk determinations, and the AAO, in turn, has exercised appellate jurisdiction and issued non-precedent decisions over such AWA risk determinations.[5] USCIS has published and maintained several of such non-precedent decisions on its public-facing website.[6]

In addition, USCIS's website has publicly stated since as far back as 2017 that the AAO has appellate jurisdiction over AWA risk determinations. As an example, please see below a screen shot of the USCIS's AAO website from 2017 which publicly proclaims the AAO's appellate jurisdiction over these determinations and states that such authority is based on a delegation to USCIS from the Secretary of the Department of Homeland Security (DHS):

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[2] Pub. L. 109-248, 120 Stat. 587 (2006).
[3] *See* 84 Fed. Reg. at 66926.
[4] *Id*.
[5] *See e.g.*, *Matter of P-L-W*, ID# 15051 (AAO Feb. 4. 2016) (involving an appeal to the AAO of an I-129F petition that had been denied by the Vermont Service Center based on an AWA risk determination); *Matter of P-M-S*, ID# 10522 (AAO Mar. 9, 2017) (involving an appeal to the AAO of an I-130 petition that had been denied by the National Benefits Center based on an AWA risk determination); *Matter of C-L-W*, ID# 109944 (AAO May 26, 2017) (involving an appeal to the AAO of an I-129F petition that had been denied by the Vermont Service Center based on an AWA risk determination); *Matter of D-M*, ID# 14789 (AAO Jan. 12, 2016). AILA is aware of at least 30+ additional non-precedent AAO decisions dating back to at least May 2010 that are publicly available on the internet. In the interest of protecting the affected parties' privacy, and recognizing that the AAO has access to all the decisions it has issued, AILA has refrained from sharing links to these AAO decisions in our public comment.
[6] *See AAO Non-Precedent Decisions*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/legal-resources/aao-non-precedent-decisions (last updated December 20, 2019).

Jurisdiction

Under authority that the Secretary of the Department of Homeland Security (DHS) has delegated to USCIS, we exercise appellate jurisdiction over approximately 50 different immigration case types. Not every type of denied immigration benefit request may be appealed, and some appeals fall under the jurisdiction of the Board of Immigration Appeals (BIA), part of the U.S. Department of Justice. Our jurisdiction is listed by both subject matter and form number and includes the following categories:

- Most employment-based immigrant and nonimmigrant visa petitions (Forms I-129 and I-140);
- Immigrant petitions by alien entrepreneurs (Form I-526);
- Applications for Temporary Protected Status (TPS) (Form I-821);
- Fiancé(e) petitions (Form I-129F);
- Applications for waiver of ground of inadmissibility (Form I-601);
- Applications for permission to reapply for admission after deportation (Form I-212);
- Certain special immigrant visa petitions (Form I-360, except for Form I-360 widower appeals, which are appealable to the BIA);
- Orphan petitions (Forms I-600 and I-600A);
- T and U visa applications and petitions (Forms I-914 and 1-918) and the related adjustment of status applications;
- Applications to preserve residence for naturalization purposes (Form N-470);
- Immigration and Customs Enforcement (ICE) determinations that a surety bond has been breached; and
- Adam Walsh Act risk determinations (may arise in several form types, such as Forms I-129F and I-130).

A complete copy of this 2017 screen shot, as well as a similar screen shot from the agency's website in 2018 is attached as **Exhibit A**.

Furthermore, the AAO Practice Manual, which is publicly posted on the USCIS website, has long stated that the AAO has jurisdiction for Adam Walsh Act risk determinations, including those arising out of Form I-129F and Form I-130. Please see a screen shot of Chapter 1 of the AAO Practice Manual taken on July 6, 2018.

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The USCIS website lists the AAO's jurisdiction by both subject matter and form number, and includes the following case types:

- Most employment-based immigrant and nonimmigrant visa petitions (Forms I-140 and I-129);
- EB-5 immigrant investor petitions (Form I-526) and Regional Center applications (Form I-924);
- Temporary Protected Status applications (Form I-821);
- Fiancé(e) petitions (Form I-129F);
- Applications for a waiver of inadmissibility (Form I-601);
- Applications for permission to reapply for admission after removal (Form I-212);
- Certain special immigrant visa petitions (Form I-360, except for Form I-360 widower appeals, which are appealable to the Board);
- Orphan petitions (Forms I-600/I-600A and I-800/I-800A);
- T visa applications for victims of human trafficking (Form I-914), U visa petitions for victims of criminal activity (Form I-918), and the related adjustment of status applications (Form I-485); [11]
- Applications for certificates of citizenship (Form N-600) and applications to replace certificates of naturalization and citizenship (Form N-565);
- Applications to preserve residence for naturalization purposes (Form N-470);
- Immigration and Customs Enforcement determinations that a surety bond has been breached; and
- Adam Walsh Act risk determinations (may arise in several form types, such as Forms I-129F and I-130).

The AAO also has jurisdiction to review USCIS field office decisions revoking the approval of certain petitions.[12]

A complete copy of Chapter 1 of the AAO Practice Manual from 2018 is attached as **Exhibit B**.

Over the course of nearly a decade, by accepting appeals of AWA risk determinations, reviewing such appeals and issuing appellate decisions, sharing such decisions with the public on its public facing website, and informing stakeholders of the AAO's appellate jurisdiction through its website and practice manual, USCIS has established a pattern and practice of accepting and adjudicating appeals of AWA "no risk" determinations.

USCIS has also created a serious reliance interest in such appellate jurisdiction among U.S. citizens and LPRs impacted by AWA as well as their qualifying foreign relatives who have been, or are being sponsored, through the family-based visa petition process. Since at least 2010, the AAO has issued dozens of appellate decisions on AWA risk determinations. In situations where the AAO sustained the appeal and overturned an unfavorable AWA risk determination, U.S. citizens or LPRs have relied on that decision to complete the immigration process for their foreign spouse, fiancé(e), unmarried child, unmarried son or daughter over 21 years of age, parent, etc. In some cases, this has involved uprooting their family member(s) from abroad to immigrate to the United States based on a reliance that the immigration process has been successfully completed for their foreign relative.

Starting in the spring/summer of 2018, USCIS began quietly scrubbing from its public-facing resources reference to the AAO's appellate jurisdiction over AWA risk determinations, such as from the AAO website and AAO Practice Manual. In addition, USCIS started preventing affected parties from submitting an appeal of an AWA risk determination to the AAO by rejecting such appeals. In a comment AILA submitted to USCIS in October 2019, AILA expressed deep concerns about these agency actions, in particular, the agency's lack of public notice and comment regarding what appeared to be an attempt by USCIS to eliminate the AAO's appellate jurisdiction over AWA risk determinations.[7]

USCIS is now attempting to eliminate the AAO's appellate jurisdiction over AWA risk determinations through the Paperwork Reduction Act (PRA) process, by way of proposing revisions to Form I-290B and its instructions, as if this change is simply a technical form change.[8] This is not the case. The proposed revision is a significant and substantive policy change disguised as a form and instruction revision. The *Federal Register* notice incorrectly states that this proposed change is exempt from the notice and comment procedures under the Administrative Procedure Act (APA).[9] Although the notice claims that the proposed change is either a "procedural rule" or an "interpretive" rule within the meaning of 5 USC §553(b)(3)(A), it is neither. The notice's pronouncement that the AAO does not have appellate jurisdiction over AWA "no risk"

[7] *See AILA Submits Comment on Proposed Revisions to Form I-290B, Notice of Appeal or Motion,* AM. IMMIGRATION LAWYERS ASS'N (Oct. 8, 2019), published on AILA InfoNet at Doc. No. 19101000.
[8] *See* 84 Fed. Reg. at 66924.
[9] *See* 84 Fed. Reg. at 66926.

determinations is substantive as it substantially affects the "rights or interests of parties"[10] by removing a previously available appellate process. Such an appellate process is particularly crucial to U.S. citizens and LPRs impacted by the AWA given that some federal courts have held that AWA risk determinations are not reviewable by federal courts.[11] Contrary to the assertion in the notice, the agency's determination as to AWA appeals does "change substantive standards" related to those appeals—by precluding them altogether.

The change that USCIS is proposing would also undo nearly a decade of established USCIS pattern and practice, which has engendered serious reliance interests, in particular among individuals who are subject to the AWA and the qualifying foreign relatives who have been, or are being sponsored, through the family-based immigration process. U.S. citizens and LPRs who have received a favorable appellate decision from the AAO on an AWA risk determination have relied on that decision in order to the complete the immigration process for their foreign relative. USCIS has failed to provide a reasoned analysis or explanation for the agency's substantial departure from nearly a decade of an established pattern and practice of accepting appeals from affected parties and exercising appellate jurisdiction over such determinations, particularly as this pattern and practice has engendered serious reliance interests that must be taken into account.[12]

In short, the *Federal Register* notice is procedurally defective because the agency's proposed changes to the AAO's appellate jurisdiction over AWA risk determinations must undergo full notice and comment under the APA before it takes effect. For further discussion regarding why this proposed change is subject to notice and comment under the Administrative Procedure Act, please see Section III of the joint comment that AILA and 6 other organizations submitted to USCIS on February 4, 2020.

USCIS Should Provide a Grace Period to Allow Individuals Who have been Harmed by its Failure to Provide Notice and Comment and its "Inconsistent" AWA Information to Resubmit Form I-290B.

Until USCIS completes the proper rulemaking procedure to effectuate this proposed change, the AAO should continue exercising appellate jurisdiction over such appeals. For USCIS stakeholders who have had their Form I-290B appeal of an AWA risk determination rejected by USCIS, based on the agency's purported claim that the AAO lacks appellate jurisdiction over such matters,

[10] *See Electronic Privacy Information Center v. U.S. Department of Homeland Security,* 653 F.3d 1. 5-7 (D.C. Cir. 2011).
[11] *See e.g., Roland v. United States Citizenship and Immigration Services*, 850 F.3d 625 (4th Cir. 2017); *Bourdon v. DHS*, 940 F.3d 537 (11th Cir. 2019).
[12] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (instructing that when an agency reverses a prior decision, it must provide a reasoned explanation for the change that addresses the facts and circumstances that underly or were engendered by the prior policy, including any serious reliance interests*).*

USCIS should provide these stakeholders with a grace period to resubmit their Form I-290B appeal request to the AAO.[13]

Assuming arguendo that the AAO lacks appellate jurisdiction over AWA risk determinations and that DHS has met its notice-and comment rulemaking requirements for this proposed change, points that AILA does not concede, at a minimum, USCIS should provide impacted stakeholders a grace period to re-submit any appeals that are or were rejected prior to the finalization of this form revision as a request for a motion to reopen or reconsider. USCIS acknowledges in its notice that it has "posted inconsistent information on the USCIS website" regarding its AWA jurisdiction. Since at least 2018, USCIS stakeholders have been negatively impacted by the "inconsistent information" posted by USCIS, as this information has led some stakeholders to submit requests for an appeal of an AWA risk determination to the AAO, only to have such appeal rejected by USCIS, on the basis that it lacks jurisdiction. To make matters worse, stakeholders who have had their appeal rejected have often been foreclosed from the opportunity to request a motion to reopen/reconsider as often the 30-day window for filing such a motion has lapsed by the time USCIS rejects and returns the appeal request to the affected party. Based on considerations of fundamental fairness, USCIS should provide stakeholders who relied on USCIS's demonstrated past practice and "inconsistent" AWA information and who had their appeal rejected by the AAO, a grace period to re-submit Form I-290B directly to USCIS as a motion to reopen or reconsider. USCIS should also provide such a grace period to stakeholders who have received erroneous instructions from USCIS in denial notices instructing those seeking to file an appeal of the AWA risk determination to appeal the decision to the Board of Immigration Appeals (BIA) using Form EOIR-29. AILA has provided specific case examples of this issue to the CIS Ombudsman and previously raised this issue to the USCIS in a comment that AILA submitted to USCIS in October 2019.[14]

Conclusion

We appreciate the opportunity to comment on the agency's proposed revisions to Form I-290B and instructions and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[13] AILA has received reports from stakeholders who have had Form I-290B rejected on this basis and has provided case examples to the CIS Ombudsman.
[14] *See AILA Submits Comment on Proposed Revisions to Form I-290B, Notice of Appeal or Motion,* AM. IMMIGRATION LAWYERS ASS'N (Oct. 8, 2019), published on AILA InfoNet at Doc. No. 19101000.

EXHIBIT A

U.S. Citizenship and Immigration Services

The Administrative Appeals Office (AAO)

Leadership

Ron Rosenberg is the chief of the Administrative Appeals Office.

What We Do

Petitioners and applicants for certain categories of immigration benefits may appeal a negative decision to the AAO. We conduct administrative review of those appeals to ensure consistency and accuracy in the interpretation of immigration law and policy. We generally issue "non-precedent" decisions, which apply existing law and policy to the facts of a given case. After review by the Attorney General, we may also issue "precedent" decisions to provide clear and uniform guidance to adjudicators and the public on the proper interpretation of law and policy.

Jurisdiction

Under authority that the Secretary of the Department of Homeland Security (DHS) has delegated to USCIS, we exercise appellate jurisdiction over approximately 50 different immigration case types. Not every type of denied immigration benefit request may be appealed, and some appeals fall under the jurisdiction of the Board of Immigration Appeals (BIA), part of the U.S. Department of Justice. Our jurisdiction is listed by both subject matter and form number and includes the following categories:

- Most employment-based immigrant and nonimmigrant visa petitions (Forms I-129 and I-140);
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- Applications for waiver of ground of inadmissibility (Form I-601);
- Applications for permission to reapply for admission after deportation (Form I-212);
- Certain special immigrant visa petitions (Form I-360, except for Form I-360 widower appeals, which are appealable to the BIA);
- Orphan petitions (Forms I-600 and I-600A);
- T and U visa applications and petitions (Forms I-914 and 1-918) and the related adjustment of status applications;
- Applications to preserve residence for naturalization purposes (Form N-470);
- Immigration and Customs Enforcement (ICE) determinations that a surety bond has been breached; and
- Adam Walsh Act risk determinations (may arise in several form types, such as Forms I-129F and I-130).

We also have jurisdiction to review decisions by the USCIS service centers to revoke certain previously approved petitions.

How to File

If we deny your benefit, we will send a letter to the petitioner or applicant that explains the reason for the denial and, if applicable, how to file a motion or appeal. Most appeals must be filed on Form I-290B (with a fee) within 30 days of the initial denial. Some immigration categories have different appeal requirements, so please carefully review the denial letter and the USCIS website for specific and current instructions.

AAO for appellate review. The initial field review should be completed within 45 days. The appellate review should be completed within six months of when the AAO receives the appeal.

Non-Precedent Decisions

We generally issue non-precedent decisions. These apply existing law and policy to the facts of a given case. A non-precedent decision is binding on the parties involved in the case, but does not create or modify agency guidance or practice. We do not announce new constructions of law nor establish agency policy through non-precedent decisions. As a result, non-precedent decisions do not provide a basis for applying new or alternative interpretations of law or policy.

Please see the AAO's non-precedent decisions.

Adopted Decisions

We occasionally "adopt" an AAO non-precedent decision as binding policy guidance for USCIS personnel. Please see the AAO's adopted decisions.

Precedent Decisions

The Secretary of DHS may, with the Attorney General's approval, designate AAO or other DHS decisions to serve as precedents in all future proceedings involving the same issue or issues. These precedent decisions are binding on DHS employees except as modified or overruled by later precedent decisions, statutory changes, or regulatory changes. AAO precedent decisions may announce new legal interpretations or agency policy, or they may reinforce existing law and policy by demonstrating how it applies to a unique set of facts.

Please see the AAO's precedent decisions, located in the Virtual Law Library of the Department of Justice's Executive Office for Immigration Review (EOIR).

History of the AAO

The Immigration and Naturalization Service (INS) established the Administrative Appeals Unit (AAU) in 1983 to centralize the review of administrative appeals. Prior to 1983, responsibility for the adjudication of administrative appeals and the issuance of precedent decisions was shared by the INS commissioner, four regional commissioners and three overseas district directors.

The INS later established the Legalization Appeals Unit to adjudicate appeals of denied Legalization and Special Agricultural Worker applications under the Immigration Reform and Control Act of 1986. In 1994, INS consolidated the two units to create the AAO. The Homeland Security Act of 2002 separated the INS into three components within the new DHS, and on March 1, 2003, the AAO became a part of USCIS.

Last Reviewed/Updated: 05/17/2017

U.S. Citizenship and Immigration Services

The Administrative Appeals Office (AAO)

Leadership

Barbara Q. Velarde is the chief of the Administrative Appeals Office.

What We Do

Petitioners and applicants for certain categories of immigration benefits may appeal a negative decision to the AAO. We conduct administrative review of those appeals to ensure consistency and accuracy in the interpretation of immigration law and policy. We generally issue "non-precedent" decisions, which apply existing law and policy to the facts of a given case. After review by the Attorney General, we may also issue "precedent" decisions to provide clear and uniform guidance to adjudicators and the public on the proper interpretation of law and policy.

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- Adam Walsh Act risk determinations (may arise in several form types, such as Forms I-129F and I-130).

We also have jurisdiction to review decisions by the USCIS service centers to revoke certain previously approved petitions.

How to File

If we deny your benefit, we will send a letter to the petitioner or applicant that explains the reason for the denial and, if applicable, how to file a motion or appeal. Most appeals must be filed on Form I-290B (with a fee) within 30 days of the initial denial. Some immigration categories have different appeal requirements, so please carefully review the denial letter and the USCIS website for specific and current instructions.

Appeal Process

Initially, the USCIS office that denied the benefit will review the appeal and determine whether to take favorable action and grant the benefit request. If that office does not take favorable action, it will forward the appeal to the AAO for appellate review. The initial field review should be completed within 45 days. The appellate review should be completed within six months of when the AAO receives the appeal.

Non-Precedent Decisions

We generally issue non-precedent decisions. These apply existing law and policy to the facts of a given case. A non-precedent decision is binding on the parties involved in the case, but does not create or modify agency guidance or practice. We do not announce new constructions of law nor establish agency policy through non-precedent decisions. As a result, non-precedent decisions do not provide a basis for applying new or alternative interpretations of law or policy.

Please see the AAO's non-precedent decisions.

Adopted Decisions

We occasionally “adopt” an AAO non-precedent decision as policy guidance for USCIS personnel. Please see the AAO's adopted decisions.

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The Secretary of DHS may, with the Attorney General’s approval, designate AAO or other DHS decisions to serve as precedents in all future proceedings involving the same issue or issues. These precedent decisions are binding on DHS employees except as modified or overruled by later precedent decisions, statutory changes, or regulatory changes. AAO precedent decisions may announce new legal interpretations or agency policy, or they may reinforce existing law and policy by demonstrating how it applies to a unique set of facts.

Please see the AAO's precedent decisions, located in the Virtual Law Library of the Department of Justice’s Executive Office for Immigration Review (EOIR).

History of the AAO

The Immigration and Naturalization Service (INS) established the Administrative Appeals Unit (AAU) in 1983 to centralize the review of administrative appeals. Prior to 1983, responsibility for the adjudication of administrative appeals and the issuance of precedent decisions was shared by the INS commissioner, four regional commissioners and three overseas district directors.

The INS later established the Legalization Appeals Unit to adjudicate appeals of denied Legalization and Special Agricultural Worker applications under the Immigration Reform and Control Act of 1986. In 1994, INS consolidated the two units to create the AAO. The Homeland Security Act of 2002 separated the INS into three components within the new DHS, and on March 1, 2003, the AAO became a part of USCIS.

Last Reviewed/Updated: 05/14/2018

EXHIBIT B

U.S. Citizenship and Immigration Services

Chapter 1. The Administrative Appeals Office

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Chapter 1. The Administrative Appeals Office

1.1 Practice Manual

This Practice Manual describes rules, procedures, and recommendations for practice before the Administrative Appeals Office (AAO).

This Practice Manual is provided for the information and convenience of the public and parties that appear before the AAO. It does not replace or modify any legal authority or U.S. Citizenship and

Immigration Services (USCIS) policy.[1]

The AAO will update this Practice Manual periodically. The current version is posted on the AAO's home page within the USCIS website at www.uscis.gov/aao.

The AAO welcomes and encourages the public to provide comments and propose improvements to this Practice Manual.[2]

1.2 AAO Overview

The AAO conducts administrative appellate review of USCIS officers' decisions regarding immigration benefit requests under its jurisdiction in order to promote consistency and accuracy in the interpretation of immigration law and policy.

While the AAO exercises independent, *de novo* appellate review[3] of USCIS officers' decisions, the AAO is not independent of its parent agency, USCIS.[4] The AAO applies USCIS policies and legal interpretations to matters before it.

For more information about the AAO, please visit www.uscis.gov/aao.

1.3 AAO History

The Immigration and Naturalization Service (INS) established the Administrative Appeals Unit (AAU) in 1983 to centralize the review of administrative appeals.[5] Before 1983, the INS commissioner, four regional commissioners, and three overseas district directors shared responsibility for the adjudication of administrative appeals and the issuance of precedent decisions.

The INS later established the Legalization Appeals Unit (LAU) to adjudicate appeals of denied Legalization and Special Agricultural Worker applications under the Immigration Reform and Control Act of 1986. In 1994, the INS consolidated the AAU and the LAU to create the AAO.[6]

The Homeland Security Act of 2002 dismantled the INS and separated the former agency into three components within the Department of Homeland Security (DHS). On March 1, 2003, USCIS officially assumed responsibility for the immigration service functions of the federal government, with the AAO as one of its offices.

1.4 Jurisdiction and Types of Cases

The AAO adjudicates three primary categories of cases: appeals, motions, and certifications. Each category serves a different function and has distinct requirements that are covered in more detail below.

Only a person or entity with legal standing in a proceeding (an "affected party") may file an appeal or motion, or submit a brief in response to a Notice of Certification (Form I-290C).[7] Affected parties may include petitioners, self-petitioners, applicants, or, in the case of bond breach appeals, bond obligors. For simplicity, this Practice Manual refers to all affected parties as "appellants."

(a) Appeals

When a USCIS field office[8] issues an unfavorable decision for an application or petition that falls under the AAO's jurisdiction, the appellant may appeal the decision to the AAO.

Under the authority that the Secretary of DHS delegated to USCIS, the AAO exercises appellate jurisdiction over approximately 50 different immigration case types.[9]

Not every type of denied immigration benefit request may be appealed, and some appeals fall under the jurisdiction of the Board of Immigration Appeals (the Board), which is a part of the U.S. Department of Justice (DOJ).[10]

The USCIS website lists the AAO's jurisdiction by both subject matter and form number, and includes the following case types:

- Most employment-based immigrant and nonimmigrant visa petitions (Forms I-140 and I-129);
- EB-5 immigrant investor petitions (Form I-526) and Regional Center applications (Form I-924);
- Temporary Protected Status applications (Form I-821);
- Fiancé(e) petitions (Form I-129F);
- Applications for a waiver of inadmissibility (Form I-601);
- Applications for permission to reapply for admission after removal (Form I-212);
- Certain special immigrant visa petitions (Form I-360, except for Form I-360 widower appeals, which are appealable to the Board);
- Orphan petitions (Forms I-600/I-600A and I-800/I-800A);
- T visa applications for victims of human trafficking (Form I-914), U visa petitions for victims of criminal activity (Form I-918), and the related adjustment of status applications (Form I-485); [11]
- Applications for certificates of citizenship (Form N-600) and applications to replace certificates of naturalization and citizenship (Form N-565);
- Applications to preserve residence for naturalization purposes (Form N-470);
- Immigration and Customs Enforcement determinations that a surety bond has been breached; and
- Adam Walsh Act risk determinations (may arise in several form types, such as Forms I-129F and I-130).

The AAO also has jurisdiction to review USCIS field office decisions revoking the approval of certain petitions. [12]

For more information about appeals to the AAO, see Chapter 3.

(b) Motions to Reopen and Motions to Reconsider

The AAO has jurisdiction over motions to reopen and motions to reconsider its own decisions. [13] If the AAO issues an unfavorable decision, the appellant may file a motion to reopen or a motion to reconsider that decision. The AAO may also reopen or reconsider one of its prior decisions on its own motion. [14]

A motion to reopen is based on documentary evidence of *new facts*. Alternatively, a motion to reconsider is based on a claim of *incorrect application of law or policy* to the prior decision. [15]

For more information about motions on AAO decisions, see Chapter 4.

(c) Certifications

USCIS officers may ask the AAO to review an initial decision for a case that has an unusually complex or novel issue of law or fact. This administrative procedure is known as "certification."

Except for case types that fall under the BIA's appellate jurisdiction, USCIS officers may certify any decision type to the AAO, including decisions that do not convey appeal rights. [16]

For more information about certifications to the AAO, see Chapter 5.

1.5 Non-Precedent, Adopted, and Precedent Decisions

The AAO generally issues non-precedent decisions that apply existing law and policy to the facts of an individual case. Non-precedent decisions are binding on the parties involved in the case, but do not create or modify USCIS policy or practice. The AAO does not announce new interpretations of law or establish agency policy through non-precedent decisions. As a result, non-precedent decisions do not provide a basis for applying new or alternative interpretations of law or policy. Non-precedent decisions are available for review at the AAO Non-Precedent Decisions webpage on the USCIS website.

USCIS may also "adopt" an AAO non-precedent decision to provide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits. Adopted AAO decisions are available for review at the Adopted AAO Decisions webpage on the USCIS website.

On occasion, the Secretary of DHS may, with the Attorney General's approval, designate AAO decisions to serve as precedents in all future proceedings involving the same issue(s). These precedent decisions, except as modified or overruled by later precedent decisions or statutory or regulatory changes, must be followed by DHS employees. AAO precedent decisions may announce a new legal interpretation or agency policy, or may reinforce an existing law or policy by demonstrating how it applies to a unique set of facts. AAO precedent decisions are available online through the Precedent Decisions webpage on the USCIS website.

For more information about non-precedent, adopted, and precedent decisions, see Chapter 3.15.

1.6 The Board of Immigration Appeals

The Board and the AAO are separate administrative appellate entities that have jurisdiction over different types of immigration cases. The Board is located within the DOJ's Executive Office for Immigration Review (EOIR).

The majority of appeals to the Board involve decisions that EOIR immigration judges made in removal proceedings. The Board also reviews USCIS decisions on immigrant petitions for alien relatives (Form I-130). The Board's appellate jurisdiction is enumerated at 8 C.F.R. § 1003.1(b).[17]

The Board has the authority to designate its decisions as precedent. Board precedent decisions are binding on immigration judges and DHS employees in cases involving the same issue(s).

EOIR publishes all AAO and Board precedent decisions in bound volumes entitled *Administrative Decisions Under Immigration and Nationality Laws of the United States*. Precedent decisions can also be found online at EOIR's Virtual Law Library.

In addition, the Board is responsible for recognizing organizations and accrediting representatives who wish to practice before the Immigration Courts, DHS, and the Board. The Board is also an important part of EOIR's program that disciplines attorneys and accredited representatives who violate rules of professional conduct while practicing before the Immigration Courts, DHS, and the Board.

Footnotes

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[1] [^] This Practice Manual does not create any enforceable right or benefit, substantive or procedural, in any proceeding. It does not constitute legal advice, nor is it a substitute for legal advice.

[2] [^] Please mail or fax any comments or suggestions to the AAO with "AAO Practice Manual" in the subject line. See Chapter 6.1 for the AAO's contact information.

[3] [^] For more information about the AAO's standard of review, see Chapter 3.4.

[4] [^] USCIS oversees lawful immigration to the United States by adjudicating immigration benefit requests. For more information about USCIS, see www.uscis.gov.

[5] [^] Powers and Duties of Service Officers; Availability of Service Records, 48 Fed. Reg. 43,160 (Sept. 22, 1983).

[6] [^] Implementation of Internal Reorganization of the Immigration and Naturalization Service, 59 Fed. Reg. 60,065, 60,066 (Nov. 22, 1994). The current USCIS regulations refer to both the AAU and the AAO.

[7] [^] 8 C.F.R. § 103.3(a)(1)(iii)(B). See Chapter 3.7(a) for more information about persons or entities eligible to file an appeal.

[8] [^] For the purposes of this Practice Manual, the AAO uses the term “field office” broadly to include USCIS field offices, international offices, Service Centers, and the National Benefits Center. The contact information for the various USCIS offices is available at the Find a USCIS Office webpage.

[9] [^] The Secretary of DHS may delegate any authority or function to administer and enforce the immigration laws to any official, officer, or employee of DHS pursuant to 6 U.S.C. § 112(b)(1) and 8 C.F.R. § 2.1. The Secretary of DHS’s delegation of appellate jurisdiction to USCIS is DHS Delegation Number 0150.1(U) (effective March 1, 2003).

[10] [^] The Board has appellate jurisdiction over USCIS decisions on family-based immigrant petitions (Form I-130), except for petitions on behalf of certain orphans and Adam Walsh Act "no risk" determinations. The Board also has appellate jurisdiction over petitions for widowers (Form I-360). See Chapter 1.6 for more information about the Board.

[11] [^] In most cases, there are no administrative appeal rights for denied Form I-485 applications. See the USCIS webpage *When to Use Form I-290B, Notice of Appeal or Motion* for information about the types of Form I-485 applications that may be appealed.

[12] [^] 8 C.F.R. § 205.2(d).

[13] [^] 8 C.F.R. § 103.5(a)(1)(ii).

[14] [^] 8 C.F.R. § 103.5(a)(5).

[15] [^] 8 C.F.R. § 103.5(a)(2)-(3).

[16] [^] Since the AAO’s *certification* jurisdiction is broader than its *appeal* jurisdiction, some of the case types listed on the AAO Non-Precedent Decisions webpage are not appealable to the AAO but have been included because the AAO has issued decisions upon certification for those case types.

[17] [^] The regulations outlining EOIR’s role and authority are located at 8 C.F.R. §§ 1001-1337.

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