



OOD  
PM 20-01

Effective: October 1, 2019

To: All of EOIR  
From: James R. McHenry III, Director *JRM*  
Date: October 1, 2019

## CASE PROCESSING AT THE BOARD OF IMMIGRATION APPEALS

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PURPOSE: Memorializes EOIR policy regarding the processing of cases at the Board of Immigration Appeals

OWNER: Office of the Director

AUTHORITY: 8 C.F.R. §§ 1003.0(b), 1003.1

CANCELLATION: None

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### I. Background

EOIR has witnessed significant improvements beginning in FY 2017, after seven years of declining or stagnant case completion productivity at the immigration court level. Case completion levels in immigration court are the second-highest in EOIR's history, and EOIR continues to make great strides in restoring its reputation as a fully-functioning, efficient, and impartial administrative court system capable of rendering timely decisions consistent with due process. Nevertheless, as immigration court productivity has significantly increased in the past three fiscal years, EOIR must remain vigilant to ensure that the improved productivity at the immigration court level is not subverted by inefficient practices and procedures at the administrative appellate level, the Board of Immigration Appeals (Board).

Overall Board productivity in adjudicating appeals has declined significantly since FY 2008 and has stagnated in recent years. Perhaps most disconcertingly, Board management has taken few clear steps to address that situation even as the Board has increased adjudicators. For example, although the Board operated with between 16 and 21 adjudicators for all of FY 2018, adjudications of case proceeding appeals actually *fell* by roughly 1,500 from FY 2017 when it operated with only 16 adjudicators for most of the Fiscal Year. This decline in Board productivity is unacceptable and, coupled with a significant increase in the number of appeals filed since FY 2016, threatens to erode EOIR's progress over the past three Fiscal Years.

To ensure that improvements to immigration court efficiency are not undermined by subsequent bottlenecks at the Board—and to ensure that Board management takes timely and appropriate

action to avoid increasing the Board’s backlog—it is critically important to make certain that all appeals are processed in a timely manner.

The Board Chairman is required to establish a case management system to manage the Board’s caseload. 8 C.F.R. 1003.1(e). The Chairman, under the supervision of the Director, is responsible for the success of the case management system. *Id.* The Director is further authorized, *inter alia*, “to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by the Board.” 8 C.F.R. § 1003.0(b)(1)(ii).

Although the Board has implemented a case management system pursuant to regulation, that system does not fully provide for clear internal deadlines for all phases of the pre-adjudicatory process.<sup>1</sup> Similarly, although the regulations evince a clear directive for prompt processing and disposition by the Board, they do not provide specific deadlines for case processing prior to completion of the appellate record. Moreover, as the Department of Justice Office of the Inspector General has previously noted, the regulatory deadlines for the adjudication of appeals exclude a significant amount of pre-adjudicatory processing time, skewing the Board’s reported achievements of its goals for appeals and impeding the effective management of the appeals process. U.S. Dep’t of Justice, Office of the Inspector General, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* (Oct. 2012), <https://oig.justice.gov/reports/2012/e1301.pdf>.

To ensure the success of the Board’s case management system and to better manage the appeals process so that cases are adjudicated promptly, it is appropriate to clearly state EOIR’s expectations regarding the timely processing of appeals.<sup>2</sup> To that end, it is important to have clear deadlines for the movement of cases throughout the entire appellate process, and not just for the adjudication at the end of the process. Accordingly, EOIR now issues the following guidance regarding the case management system for appellate adjudications by the Board.<sup>3</sup>

## **II. Case Processing**

All case appeals are referred to the screening panel for review, and appeals subject to summary dismissal “should be promptly dismissed.” 8 C.F.R. § 1003.1(e)(1). To ensure prompt initial

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<sup>1</sup> The pre-adjudicatory process includes, *inter alia*, screening of notices of appeal, requesting Records of Proceedings (ROPs), ordering transcripts, serving a briefing schedule, and assigning a case for merits review once the record is complete.

<sup>2</sup> Although the importance of timely adjudication applies to all types of appeals at the Board, the specific provisions of this PM do not apply to the processing of appeals of decisions involving administrative fines and penalties, decisions on visa petitions, decisions on the exercise of discretion by the Department of Homeland Security pursuant to INA § 212(d)(3), and decisions in practitioner discipline proceedings.

<sup>3</sup> For timeframes that are not currently being met, EOIR understands that Board leadership recently changed and that it may take time to adjust Board practices. Nevertheless, the agency is also cognizant that the Board recently hired six new permanent Board members and is also hiring additional support staff. Consequently, EOIR expects that the Board will address inefficiencies in its appellate processing as soon as possible.

screening, all cases should be referred to the screening panel within 14 days of the filing of the notice of appeal to determine whether the appeal is subject to summary dismissal. Appeals subject to summary dismissal, particularly appeals subject to summary dismissal under 8 C.F.R. § 1003.1(d)(2)(i)(G) for being untimely filed, should be dismissed within 30 days of referral to the screening panel.

In any case that has not been summarily dismissed, the Board “shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule.” 8 C.F.R. § 1003.1(e)(3). Thus, to ensure prompt completion of the record for case appeals that have not been summarily dismissed, the Board should order the ROP<sup>4</sup> if it was not previously ordered and, if appropriate, request a transcript within 14 days of referral to the screening panel.<sup>5</sup> If a case does not require the preparation of a transcript and is not subject to summary dismissal, the Board should set and serve a briefing schedule within 14 days of referral to the screening panel. If a case requires neither the preparation of a transcript nor the service of a briefing schedule—*e.g.* a motion to reopen filed directly with the Board—the Board should forward the case for merits review within three days of the receipt of the ROP.

Every appeal that requires a transcript should be sent to a vendor for transcription within 14 days of referral to the screening panel. The only exceptions are situations in which there is no vendor with available capacity or if there is no available funding for further transcription.<sup>6</sup>

Upon receipt of the transcript, the Board should set and serve a briefing schedule within three days if the immigration judge’s decision was rendered in writing. If the immigration judge’s decision was rendered orally, the Board should provide the transcript of the oral decision to the immigration judge within three days of receipt of the transcript. The immigration judge “shall review the transcript and approve the decision within 14 days of receipt, or within seven days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location.” 8 C.F.R. § 1003.5(a). The Board should then set and serve a briefing schedule within three days of the immigration judge’s review and approval.

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<sup>4</sup> It is crucial that immigration courts promptly comply with requests for the ROP by the Board, and the Board may remand a case for recovery of the record if an immigration court does not forward the ROP promptly. The Board should decide whether such a remand is appropriate within 21 days of an immigration court’s failure to forward the ROP following the Board’s request. Such a remand will not be counted against an immigration judge for purposes of evaluating that judge’s performance. The Chairman shall promptly notify the Chief Immigration Judge and the Director of any immigration court that has not complied with a request for the ROP within 21 days of that request.

<sup>5</sup> Unless the ROP contains cassette tapes requiring transcription, ordering the ROP and requesting transcription should occur concurrently within 14 days of referral to the screening panel. Transcripts are not normally prepared for the following types of appeals: bond determinations; denials of motions to reopen (including motions to reopen in absentia proceedings); denials of motions to reconsider; and interlocutory appeals. Board of Immigration Appeals Practice Manual, § 4.2(f)(ii).

<sup>6</sup> The Chairman is directed to immediately notify the Director and the Assistant Director for the Office of Administration in any situation in which it appears that funding for transcription of all cases relative to vendor capacity is insufficient to meet the goals of this PM. Similarly, the Chairman is directed to notify the Director and the Assistant Director for the Office of Administration of any additional resource needs in order to meet the goals of this PM.

“In the interest of fairness and the efficient use of administrative resources, extension requests [of briefing schedules] are not favored.” Board of Immigration Appeals Practice Manual, § 4.7(c)(i). Because extension requests are not favored, they should not be granted as a matter of course, and there is no automatic entitlement to an extension of the briefing schedule by either party. Extension requests filed the same day as a brief is due are particularly disfavored and should be granted only in the most compelling of circumstances.

The case should be forwarded for merits review within three days after the expiration of the briefing schedule or the filing of briefs by both parties, whichever occurs earlier. A single Board member may summarily dismiss an appeal after completion of the record. 8 C.F.R. § 1003.1(e)(3). An appeal subject to summary dismissal because a party indicated that it would file a brief and failed to do so, 8 C.F.R. § 1003.1(d)(2)(i)(E), should be dismissed within 21 days of expiration of the briefing schedule.

The single Board member should determine the appeal on the merits as provided in paragraph 8 C.F.R. § 1003.1(e)(4) or (e)(5), unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of 8 C.F.R. § 1003.1(e)(6). The single Board member should determine whether the case should be referred to a three-member panel within 14 days of referral of the case for merits review, and the Board should assign the case to a three-member panel within three days of the single Board member’s determination.<sup>7</sup> If a case is assigned to a three-member panel, a decision must be made within 180 days of assignment. 8 C.F.R. § 1003.1(e)(8)(i). If a case is not assigned to a three-member panel, the single Board member shall adjudicate the appeal within 90 days of completion of the record on appeal. *Id.*

The Chairman may grant an extension of the 90 and 180-day deadlines of up to 60 days in exigent circumstances. 8 C.F.R. § 1003.1(e)(8)(ii).<sup>8</sup> “In rare circumstances,” the Chairman may hold a case or cases and suspend the 90 and 180-day deadlines to await an impending decision by the Supreme Court, a U.S. Court of Appeals, or an *en banc* Board decision or to await impending Department regulatory amendments. 8 C.F.R. § 1003.1(e)(8)(iii).<sup>9</sup> The Chairman shall provide a monthly report of all cases in which an extension was granted due to exigent circumstances and all cases being held pursuant to 8 C.F.R. § 1003.1(e)(8)(iii).

Any appeal not adjudicated within the regulatory time frames shall be handled in accordance with 8 C.F.R. § 1003.1(e)(8)(ii). The Chairman shall provide a monthly report of all cases which have exceeded these time frames.

Overall, absent an exception or unique circumstance provided for by regulation or this PM, no appeal assigned to a single Board member should remain pending for longer than 230 days after

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<sup>7</sup> A single Board member retains the ability to later decide that a case should be assigned to a three-member panel if circumstances arise that were unknown at the time of the initial determination that such assignment was not warranted.

<sup>8</sup> Additionally, the 90 and 180-day deadlines do not apply to cases in which the Board holds an adjudication of the appeal while awaiting the results of identity, law enforcement, or security investigations or examinations. 8 C.F.R. §§ 1003.1(d)(6) and (e)(8)(i).

<sup>9</sup> As a matter of policy, the Chairman may also defer adjudication of appeals under 8 C.F.R. § 1003.1(a)(2)(i)(C) to await an impending decision by the Attorney General.

filing of the notice to appeal, and no appeal assigned to a three-member panel should remain pending for longer than 335 days after filing the notice of appeal. The Chairman shall track the progress of appellate adjudications and shall provide a monthly report of all cases which exceed those parameters.

Finally, EOIR does not have a policy restricting or prohibiting the use of summary dismissals of appeals, nor does it have a policy restricting or prohibiting the use of affirmances without opinion. Any appeals amenable to those procedures should be adjudicated consistent with the regulatory requirements for them, 8 C.F.R. §§ 1003.1(d)(2) and (e)(4), and this PM.

### **III. Interlocutory Appeals**

The regulations do not expressly address interlocutory appeals. “The Board does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges.” Board of Immigration Appeals Practice Manual, § 4.14(c).

The Board does not normally issue briefing schedules for interlocutory appeals, nor do most interlocutory appeals require transcription. Board of Immigration Appeals Practice Manual, §§ 4.2(f)(ii), 4.14(e). Consequently, interlocutory appeals are not subject to the same processes as typical case appeals on the merits. Nevertheless, it is the policy of EOIR to adjudicate interlocutory appeals promptly and efficiently.

To that end, interlocutory appeals should be reviewed by the screening panel within 14 days of filing. The screening panel should then either decide the interlocutory appeal within 30 days of filing or forward it for merits review.

### **IV. Assignment and Performance**

Regulations authorize the Chairman to designate a screening panel and other merits panels as appropriate. It is the policy of EOIR that panel assignments shall occur no less frequently than the beginning of each fiscal year.

Finally, “[t]he Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.” 8 C.F.R. § 1003.1(e)(8)(v). Notification pursuant to this regulation should occur no later than 30 days after the Chairman determines that a Board member has failed to meet these standards. The Chairman shall prepare the annual report required by this regulation at the conclusion of each fiscal year.

## V. Conclusion

In December 2017, Attorney General Sessions provided a list of principles to which EOIR is expected to adhere, including the principle that “[t]he timely and efficient conclusion of cases serves the national interest.” Memorandum to the Executive Office for Immigration Review, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 6, 2017), <https://www.justice.gov/eoir/file/1041196/download>. That principle applies to cases at the Board no less than it applies to cases in immigration courts, and EOIR remains committed to ensuring that all immigration cases at both the immigration court and appellate levels are adjudicated efficiently and fairly consistent with due process.

Responsibility for the Board’s case management system and the duty to ensure the efficient disposition of pending cases fall on the Chairman, and Board members themselves are ultimately responsible for the adjudication of individual cases. Accordingly, nothing in this PM is intended to require—or should be construed as requiring—a change in the conditions of employment of any bargaining unit employees at the Board.

The Board maintains a goal developed under the Government Performance and Results Act (GPRA) of completing 90% of detained appeals within 150 days of filing. The instant PM does not alter that goal, and in all cases, it remains EOIR policy that the Board “shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.” 8 C.F.R. § 1003.1(e)(8).

This PM supersedes any prior guidance issued by EOIR regarding the timely processing of cases on appeal.

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Further, nothing in this PM should be construed as mandating a particular outcome in any specific case.

Please contact your supervisor if you have any questions.

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