



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals*

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Chairman

5107 Leesburg Pike, Suite 2400  
Falls Church, Virginia 22041

December 22, 2003

The American Bar Association  
Commission on Immigration Policy, Practice & Pro Bono  
740 15<sup>th</sup> St., NW  
Washington, DC 20005

Dear Sir or Madam:

On behalf of the Board of Immigration Appeals, I want to express my appreciation to the ABA Commission and to the many volunteers for Dorsey and Whitney who studied and reported on the recently promulgated Procedural Reforms to Improve Case Management at the Board of Immigration Appeals. I would like to respond briefly to certain findings of the Commission in regard to the Board's decisions under the new regulation.

The Commission suggests that "the procedural reforms may also [have] produced substantive changes in the quality and reliability of the [Board] decisions being made." Findings and Recommendations at p. 2. In so concluding, the Commission relies in part on the Dorsey & Whitney Study (Study) to assert that since the procedural reforms "decisions in favor of the appellant dropped from 1 in 4 to 1 in 10." As discussed below, these numbers are based on flawed data, and even if they were reliable, do not support a finding that the procedural reform regulations have affected the quality or correctness of the Board's decisions.

As an initial matter, the Study provides little support for concluding that there has been a reduction in the overall reliability or quality of Board decisions under the procedural reform regulations. The Study refers to five court of appeals decisions reversing the Board, asserts that the Immigration Judge's decision in each case contained "obvious" error, and characterizes these five decisions as "illustrative" of the problems of the summary affirmance procedure. In reply, we would note that the Board decided more than 60,000 cases in calendar year 2002 (the period most closely tracked by the study), about 40% were decided by summary affirmance. The selection of five reversals in summary affirmance cases (or about .02%) sheds little light on the quality of review in the vast majority of cases the Board decides, nor does it evidence systemic problems with the reform regulations.

The Study's comparison of numbers of appeals decided "favorably" to the alien per month also reveals little, if anything, about the quality, correctness, or consistency of the underlying decisions. First, the statistics the Study relies upon are based upon a January 2003 *Los Angeles*

*Times* article. Not only are the statistics unsubstantiated, they were published despite prior warnings to the writer that the data supplied could not be used to show that all Board are of questionable quality. In this respect, the Board does not track decisions by outcome, and sifting through the kinds of decisions rendered in an effort to develop this information will lead to inaccurate results. The statistic, therefore, that “one in ten appeals is granted” is erroneous on its face, and we question the Study’s unexamined reliance upon it.

A second reason to question the significance of the rate of appeals sustained is that the numbers relied upon by the Study cover only the first few months before and after implementation of the procedural reform regulations. During that period, the focus was on selecting and resolving those cases in the backlog most amenable to single-member review. In addition, the Board summarily affirms Immigration Judges’ decisions in cases appealed by the Department of Homeland Security as well as in cases appealed by aliens. Therefore, a summary affirmance or a dismissed appeal standing alone does not necessarily indicate that an alien has been denied relief.

Finally, a third problem with drawing conclusions from a gross comparison of the percentage of appeals sustained from one month to the next is that the mix of cases before the Board, and the law to be applied to them, is constantly changing. For example, in the months immediately following the United States Supreme Court’s decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Board quickly resolved hundreds of appeals which had been on “hold” status awaiting the Court’s decision. In addition, in the wake of the Immigration Reform and Control Act of 1996 (IIRIRA), the categories of offenses under the “aggravated felony” ground of removal were greatly expanded. That legislation also eliminated or dramatically curtailed previously available forms of relief. For all these reasons, the Study’s observations concerning the rate of appeals sustained have little, if any, bearing on the quality or correctness of the Board’s decisions.


We also believe that, in assessing the procedural reform regulations, the Study narrowly focuses on the function of the Board to the exclusion of the important role of the Immigration Judges in making the initial findings of fact and conclusions of law. The ultimate fairness of the procedure afforded aliens in immigration proceedings must be assessed in its entirety, including the full hearing and decision afforded by the Immigration Judge, the initial appeal to the Board, the opportunity to seek reconsideration to point out obvious error to the Board, and the fact that federal courts have jurisdiction over many of the issues in immigration proceedings. In this last respect, we feel that the study fails to give proper weight to the courts’ unanimous upholding of the summary affirmance process and the reform regulation itself, despite the vigorous challenges that have been made to those procedures.<sup>1</sup>

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<sup>1</sup> In particular, the Study appears to give short shrift to the findings of the court in the case upholding the promulgation of the reform regulation itself, *Capital Area Immigrant's Rights Coalition v. U.S. Dept. of Justice*, 264 F. Supp.2d 14, (D.D.C. 2003). In that case, the court rejected many of the arguments and statistics that the Study seems to endorse: “[A] reversal rate of roughly 17 percent (one in six) in one discrete category of cases does not place in doubt the Department's view that most decisions in cases in all categories are legally and factually correct.” *Id.* at 30. In addition, the court noted that: “[the] plaintiffs . . . have not pointed to anything beyond their conjecture to indicate that Board members will not decide cases fairly and in accordance with Board precedents.” 264 F. Supp.2d 14, 36, fn. 20.

In concluding, the Board Members and staff attorneys at the Board of Immigration Appeals are committed to applying the procedural reform regulations in a fair, consistent and conscientious manner. To the extent the ABA Commission Findings and Recommendations and the Dorsey and Whitney Study suggest that the Board is superficially reviewing large numbers of cases, they are simply wrong. The Board Members and staff attorneys are dedicated professionals who take their jobs very seriously, realize that much is at stake for aliens in the cases before them, and understand that the Board is often their last recourse before deportation.

Sincerely,

A handwritten signature in cursive script that reads "Lori Scialabba".

Lori Scialabba

Chairman, Board of Immigration Appeals