remainder of the crop year ending June 30, 2000, and subsequent crop years.

The Committee discussed alternatives to this rule, including making no change, but unanimously concluded that such alternatives would not be in the best interests of the industry.

This action relaxes the outgoing quality regulations imposed on all domestic peanut handlers and importers. It is applied uniformly on all peanut handlers and importers, and should tend to reduce their costs slightly since less lots will likely have to be remilled to meet outgoing quality requirements. Also, this relaxation may slightly reduce any reporting and recordkeeping burden on regulated persons. As with all Federal marketing agreement and order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meetings were widely publicized throughout the peanut industry and all interested persons were invited to attend the meetings and participate in deliberations on all issues. Like all Committee meetings, the February 2, 1999, and March 18, 1999, meetings were public meetings and all entities, both large and small, were able to express views on this issue. The Committee itself consists of 18 members of whom 9 represent handlers and 9 represent producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

This rule invites comments on a change to the outgoing quality control requirements currently prescribed under the Agreement, the Non-signers Program and the Import Regulation. Any comments received will be considered prior to finalization of this rule.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action relaxes the foreign material allowance for the three ''with splits'' categories of peanuts; (2) harvesting of the 1999–2000 crop year domestic peanuts is already underway and the rule should cover as much of the remainder of the crop year ending June 30, 2000, as possible; (3) all peanuts in the domestic and export markets must fully comply with all quality requirements under the Agreement; (4) the changes need to be effective before the 2000 Mexican peanut import quota opens January 3, 2000, so that all peanut importers are treated equally during 2000, as required by international trade agreements; (5) many signatory handlers, importers, and others in the industry are aware of this action, which was unanimously recommended by the Committee at a public meeting and interested parties had an opportunity to provide input; and (6) this interim final rule provides a 60-day comment period, and all written comments timely received will be considered prior to finalization of this rule.

List of Subjects

7 CFR Part 997

Food grades and standards, Peanuts, Reporting and recordkeeping requirements.

7 CFR Part 998

Marketing agreements, Peanuts, Reporting and recordkeeping requirements.

7 CFR Part 999

Dates, Food grades and standards, Hazelnuts, Imports, Nuts, Peanuts, Prunes, Raisins, Reporting and recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, 7 CFR parts 997, 998, and 999 are amended as follows:

1. The authority citation for 7 CFR parts 997, 998, and 999 continues to read as follows:

Authority: 7 U.S.C. 601–674, 7 U.S.C. 1445c–3, and 7 U.S.C. 7271.

PART 997—PROVISIONS REGULATING THE QUALITY OF DOMESTICALLY PRODUCED PEANUTS HANDLED BY PERSONS NOT SUBJECT TO MARKETING AGREEMENT NO. 146

2. In § 997.30, the ''MAXIMUM LIMITATIONS'' table is amended in the first column ''Type and grade category'', for the entries ''Runner with splits * * *'', ''Virginia with splits * * *'', and ''Spanish and Valencia with splits'' * * *, in the seventh column ''Foreign materials (percent)'', by removing the number ''.10'' and adding ''.20'' in its place.

PART 998—MARKETING AGREEMENT REGULATING THE QUALITY OF DOMESTICALLY PRODUCED PEANUTS

3. In § 998.200, the ''MAXIMUM LIMITATIONS'' table is amended in the first column, ''Type and grade category'', for the entries ''Runner with splits * * *'', ''Virginia with splits * * *'', and ''Spanish and Valencia with splits'' * * *, in the seventh column ''Foreign materials (percent)'', by removing the number ''.10'' and adding ''.20'' in its place.

PART 999—SPECIALTY CROPS; IMPORT REGULATIONS

4. In § 999.600, the ''MINIMUM GRADE REQUIREMENTS—PEANUTS FOR HUMAN CONSUMPTION'' table is amended in the first column, ''Type and grade category'', for the entries ''Runner with splits * * *'', ''Virginia with splits * * *'', and ''Spanish and Valencia with splits'' * * *, in the seventh column ''Foreign materials'' by removing the number ''.10%'' and adding ''.20%'' in its place.

Dated: October 12, 1999.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 99–27134 Filed 10–15–99; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF JUSTICE

8 CFR Part 3

[EOIR No. 122F; AG Order No. 2263–99]

RIN 1125–AA22

Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule establishes a streamlined appellate review procedure for the Board of Immigration Appeals. The final rule responds to an enormous and unprecedented increase in the caseload of the Board. The rule recognizes that in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal. In these cases, the rule authorizes a single permanent Board Member to review the record and affirm

the result reached below without issuing an opinion. This procedure will enable the Board to render decisions in a more timely manner, while concentrating its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new or significant issue is presented. In addition, the rule provides that a single Board Member may decide certain additional types of cases, motions, or other procedural or ministerial appeals, where the result is clearly dictated by statute, regulation, or precedential decision.

EFFECTIVE DATE: This rule is effective on October 18, 1999.

SUPPLEMENTARY INFORMATION:

Background

The mission of the Board of Immigration Appeals is to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws. Rapid growth in the Board's caseload has severely challenged the Board's ability to accomplish its mission and requires the adoption of new case management techniques.

In 1984, the Board received fewer than 3,000 new appeals and motions. In 1994, it received more than 14,000 new appeals and motions. In 1998, in excess of 28,000 new appeals and motions were filed. There is no reason to believe that the number of matters filed with the Board will decrease in the foreseeable future, especially as the number of Immigration Judges continues to increase.

As the number of appellate filings has increased, the need for the Board to provide guidance and uniformity to the Immigration Judges, the Immigration and Naturalization Service, affected individuals, the immigration bar, and the general public, has grown. The Board now reviews the decisions of more than 200 Immigration Judges. There were, in comparison, 69 Immigration Judges in 1990 and 86 Judges in 1994. Frequent and significant changes in the complex immigration laws over the last several years, including a major overhaul of those laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, heighten the need for the Board's authoritative guidance in the immigration area, particularly in view of the fact that the 1996 legislation drastically reduced aliens' rights to judicial review.

To meet its overriding objective of providing fairness in adjudicating appeals, the Board must achieve four goals. It must: (1) Promote uniformity in dispositions by Immigration Judges by providing authoritative guidance in high quality appellate decisions; (2) decide all incoming cases in a timely and fair manner; (3) assure that individual cases are decided correctly; and (4) eliminate its backlog of cases.

To accomplish these goals under current conditions, the Board must limit its use of three-Member panels to cases where there is a reasonable possibility of reversible error in the result below. The Department published a proposed rule on September 14, 1998, at 63 FR 49043 (Sept. 14, 1998), with written comments due by November 13, 1998. The proposed rule included a new provision, now designated as 8 CFR 3.1(a)(7),[1] designed to allow single permanent Board Members, selected by the Board Chairman, to affirm the results reached below without an opinion where (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) either (a) the issue on appeal was squarely controlled by existing Board or federal court precedent and did not involve the application of such precedent to a novel fact situation; or (b) the factual and legal questions raised on appeal were so insubstantial that three-Member review was not warranted.

Under the proposed rule, if the single permanent Board Member found the case to be appropriate for affirmance without opinion, that Board Member would sign a simple order to that effect, without additional explanation or reasoning. If the Board Member found affirmance without opinion to be inappropriate, the case would be assigned to a three-Member panel for review and decision. Thus, the proposed rule described an affirmance without opinion as a determination that the result reached below was correct and that the case did not warrant three-Member review. The proposed rule also authorized three-Member panels to affirm without opinion, where such a disposition was determined to be appropriate.

The proposed rule at 8 CFR 3.1(a)(5) (now 8 CFR 3.1(a)(7)) also included provisions that would authorize the Chairman to designate certain categories of cases as suitable for affirmance without opinion by a single permanent Board Member or by a three-Member panel. These categories could include, but would not be limited to, the following: (1) Cases challenging findings of fact where the findings below are not against the weight of the evidence; (2) cases controlled by precedents of the Board where there is no basis for overruling the precedent, or by precedents of the relevant United States Court of Appeals, or the United States Supreme Court; (3) cases seeking discretionary relief for which the appellant is clearly ineligible; (4) cases challenging discretionary decisions where the decision maker has neither applied the wrong criteria nor deviated from precedents of the Board or the controlling law from the United States Court of Appeals or the United States Supreme Court; and (5) cases challenging only procedural rulings or deficiencies that are not material to the outcome of the case.

The proposed rule also contained provisions that would authorize the Chairman to designate the permanent Board Members who would be authorized to affirm cases without opinion.

The proposed rule also suggested amendments to the regulation regarding motions to reconsider. Under proposed 8 CFR 3.2(b)(3), a motion to reconsider based solely on an argument that the case should not have been summarily affirmed—that a full opinion was required—would be barred. Otherwise, the standard motions to reconsider and/or reopen are allowed, but are subject to all the regular requirements and restrictions regarding motions, including the time and number limitations.

In addition to describing a new procedure for affirmance without opinion by a single Board Member, the proposed rule also included provisions that would empower a single Board Member or the Chief Attorney Examiner to rule on certain dispositive motions or to issue other orders disposing of appeals on procedural or ministerial grounds. Presently, the regulations allow a single Board Member to adjudicate unopposed motions or motions to withdraw an appeal. *See* 8 CFR 3.1(a). The proposed rule identified additional categories of cases that were deemed suitable for disposition by a single Board Member. Unlike the one-line affirmances by single Board Members that the proposed rule would authorize, these dispositions generally would not affirm a result below. Rather, in these cases, a single fact, easily identified in the record of proceedings, dictates the result through a straightforward, nondiscretionary application of a statute, a regulation, or a controlling precedent. Dispositions under this procedure are separate and

[1] This new provisions was cited in the proposed rule as 8 CFR 3.1(a)(5). Due to intervening changes in 8 CFR 3.1(a), is it now designated as 8 CFR 3.1(a)(7).

distinct from affirmances without opinions.

Under § 3.1(a)(1) of the proposed rule, a single Board Member would be authorized to issue orders (1) remanding an appeal from the denial of a visa petition where the Regional Service Center Director requests a remand for further consideration of the appellant's arguments or evidence raised on appeal; (2) remanding to correct for a defective or missing transcript; and (3) disposing of other procedural or ministerial matters designated by the Chairman (possible examples might include dismissal of an appeal as moot where the alien has since become a lawful permanent resident).

The proposed rule also set forth proposed amendments to the regulation regarding summary dismissals of appeals. This regulation, presently codified at 8 CFR 3.1(d)(1–a), generally provides for dismissals on grounds that do not go to the underlying merits of a case. The proposed revisions to this provision, redesignated as § 3.1(d)(2), would add to the existing rule's listing of the types of cases that are appropriate for summary dismissal, authorize a single Board Member to dispose of such cases, and empower the Chairman to designate who from among the Board Members may exercise this authority. Summary dismissal under proposed section 3.1(d)(2) would be separate and distinct from affirmance without opinion.

The proposed rule also would augment existing grounds for summary dismissals, authorizing dismissal of (1) cases in which the appeal or motion does not fall within the Board's jurisdiction; (2) cases in which jurisdiction over a motion lies with the Immigration Judge rather than with the Board; (3) untimely appeals and motions; and (4) cases in which it is clear that the right of appeal was affirmatively waived.

Comments

In response to the proposed rule, the Department received 24 comments pertaining to the proposed summary affirmance procedures. Because a number of these comments overlap or endorse the submissions of other commenters, the comments are addressed by topic rather than individually. Before describing the comments and the Department's responses, it is important to mention two changes that the Department has decided to make to the proposed rule for reasons not presented in the comments.

First, although the Department did not receive any comments criticizing our proposal to change the summary dismissal regulation, we have determined that an additional change is warranted. In particular, current 8 CFR 3.1(d)(1–a)(i)(D) will be deleted to avoid confusion in light of the new summary affirmance procedure. Current § 3.1(d)(1–a)(i)(D) allows summary dismissal when, ''[t]he Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in law or fact unless the Board determines that it is supported by a good faith argument for extension, modification or reversal of existing law.'' This summary dismissal authority is virtually never used by the Board, and retaining it could lead to confusion concerning the relationship between this provision and the new summary affirmance procedure. Accordingly, this part of the existing summary dismissal regulation will be deleted.

A second change that was not advocated by any commenter concerns the proposed rule's references to the Chief Attorney Examiner. Because that position was eliminated after publication of the proposed rule, references to the Chief Attorney Examiner will be eliminated from the final rule.

The Department has also concluded, in the course of preparing this streamlining rule, that the regulations governing BIA procedures have become unduly complex and that a complete reorganization of part 3 of 8 CFR is needed. The Executive Office for Immigration Review is presently working on such a reorganization. This final rule is being published in advance of that reorganization because of the overriding need to implement the streamlining procedures.

Single Board Member Summary Affirmance Without Opinion

Comments: Twenty-three commenters objected to the proposal to allow a single permanent Board Member to affirm the result reached below by issuing a form, one-line affirmance order. Most of the commenters recognized the difficulties the Board faces in managing its expanding caseload, and several offered alternatives for accomplishing that task. However, the commenters uniformly stated that an appellate body such as the Board should meaningfully address the issues before it by providing reasons for its decisions. A number of the commenters cited *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), as support for their contention that the Due Process Clause of the Fifth Amendment requires the Board to provide a rationale for its decisions. Some pointed out that several courts of appeals have criticized the Board when it did not provide an adequate rationale, suggesting that the proposed rule could therefore be struck down in court. Some suggested that, given the Board's caseload, there would be a temptation to avoid detailed review or consideration of complex issues.

Response and Disposition: The Department has carefully considered the comments regarding the proposal to allow one permanent Board Member to affirm a decision by issuing a one-line form order, and has decided to retain the regulation as proposed. To operate effectively in an environment where over 28,000 appeals and motions are filed yearly, the Board must have discretion over the methods by which it handles its cases. The process of screening, assigning, tracking, drafting, revising, and circulating cases is extremely time consuming. Even in routine cases in which all Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve. The Department has determined that the Board's resources are better spent on cases where there is a reasonable possibility of reversible error in the result reached below.

Appellants have a right to a reasoned administrative decision. In cases that are adjudicated by one Board Member, that right will be protected by a written decision by the Immigration Judge or the INS Director and a determination by the Board that the result below is correct. A permanent Board Member will review and consider every case. The decision rendered below will be the final agency decision for judicial review purposes. Under this new system of streamlined review, complex and significant cases will not be avoided, nor will they be adjudicated by one Board Member. Rather, they will be given additional time and consideration by three-Member panels of the Board. The most important of the three-Member panel cases may receive en banc review (either full or limited) by the Board.

The streamlined review process that the Board will follow is different from the ''leave to appeal'' and certiorari systems that some appellate courts and administrative tribunals use to control their dockets. These systems often look to a variety of factors apart from whether the decision for which appellate review is sought reached a correct result. In contrast, the summary affirmance system that the Department is adopting will continue to focus on the importance of correct results, even in

cases that do not present significant legal or factual issues or a question requiring guidance from the Board. The summary affirmance system represents a careful balancing of the need to ensure correct results in individual cases with the efficiencies necessary to maintain a viable appellate organization that handles an extraordinarily large caseload. The streamlining system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues.

In *Mathews* v. *Eldridge, supra,* the Supreme Court held that due process is a flexible concept and identified three factors that agencies and courts must consider in determining the administrative procedures that due process requires in a particular setting. Those factors are, ''[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'' 424 U.S. at 334–35.

In the case of immigration proceedings, the private interests at stake are undoubtedly very weighty, as many commenters have pointed out. However, the Department believes that the risk of erroneous decisions resulting from the streamlining of Board procedures is minimal. Most appellants will already have had a full evidentiary hearing before an Immigration Judge; some will have had their cases considered by an INS Director. The case will then be considered on its merits by a permanent Member of the Board. If that Board Member finds a reasonable possibility that the result reached below was incorrect, the case will be referred to a three-Member Panel, and a written decision will be provided. Only if the permanent Board Member determines, after review of the appeal, that the regulatory criteria are satisfied and, consequently, that there is no reasonable possibility that the result below was incorrect, will he or she issue a one-line, form order affirmance. The Department believes that appellants' rights are protected by these procedures.

Finally, as noted earlier, the Government's interests are also significant here. The number of appeals filed with the Board in recent years has exceeded the Board's capacity to give meaningful, three-Member consideration to each appeal, and to issue written decisions in every case. The summary affirmance process is a reasonable response to the current situation, because it allows the Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised in the appeal, while still providing assurances that correct results are achieved in all cases under the Board's appellate jurisdiction.

The Department is aware of one federal appeals court decision indicating that due process requires the Board to state reasons for its decisions. *See De la Llana-Castellon* v. *INS,* 16 F.3d 1093, 1098 (10th Cir. 1994) (due process ''requires that the decisionmaker actually consider the evidence and argument that a party presents''). In addition, several other appeals court decisions have struck down, on statutory grounds, Board decisions that were found to have lacked adequate explanations of the Board's reasoning. *See, e.g., Velerde* v. *INS,* 140 F.3d 1305, 1310–11 (9th Cir. 1998) (BIA abused its discretion by failing to provide reasoned basis for its decision); *Sanon* v. *INS,* 52 F.3d 648, 651 (7th Cir. 1995) (in reviewing BIA denials of asylum requests, court requires ''some proof that the Board has exercised its expertise in hearing a case.''); *Turri* v. *INS,* 997 F.2d 1306, 1308 (10th Cir. 1993) (to survive statutory review, Board decision must contain terms sufficient to demonstrate that the Board heard, considered, and decided the case); *Diaz-Resendez* v. *INS,* 960 F.2d 493, 495 (5th Cir. 1992) (Board decision will be reversed as arbitrary if it ''fails to address meaningfully all material factors'').

Notwithstanding these decisions, eight federal courts of appeals have rejected direct challenges to the Board's practice of affirming decisions of Immigration Judges, where appropriate, for the reasons given in those decisions. *See Giday* v. *INS,* 113 F.3d 230, 234 (D.C. Cir. 1997) (Board's summary affirmance of an Immigration Judge's decision for the reasons given by the Immigration Judge is ''not only common practice, but universally accepted by every other circuit that has squarely confronted the issue''); *Chen* v. *INS,* 87 F.3d 5, 7–8 (1st Cir. 1996) (''[I]f the Board's view is that the Immigration Judge ''got it right,'' the law does not demand that the Board go through the idle motions of dressing the Immigration Judge's findings in its own prose.''); *Prado-Gonzalez* v. *INS,* 75 F.3d 631, 632 (11th Cir. 1996); *Urokov* v. *INS,* 55 F.3d 222, 227–28 (7th Cir. 1995); *Alaelua* v. *INS,* 45 F.3d 1379, 1382 (9th Cir. 1995); *Maashio* v. *INS,* 45 F.3d 1235, 1238 (8th Cir. 1995); *Panrit* v. *INS,* 19 F.3d 544, 545–46 (10th Cir. 1994) (distinguishing Turri v. *INS*); *Arango-Aradondo* v. *INS,* 13 F.3d 610, 613 (2nd 1994). In addition, two other federal courts of appeals have treated summary affirmance by the BIA as a proper method of disposing of appeals, sustaining such summary affirmances against merits challenges after review of the reasoning set forth in the Immigration Judge decisions that the BIA affirmed. *See, e.g., Gomez-Mejia* v. *INS,* 56 F.3d 700, 702 (5th Cir. 1995) (court will review the Immigration Judge's decision where the Board affirms without any additional reasoning); *Gandarillas-Zambrana* v. *BIA,* 44 F.3d 1251, 1255 (4th Cir. 1995) (where the Board relies on the Immigration Judge's decision, the immigration Judge's reasoning will be the sole basis for the court review).

It is therefore well-established that the Board may decline to write a full decision in any given case, and may instead summarily affirm the Immigration Judge's decision. The summary affirmance procedure set forth in this streamlining rule makes clear that a summary affirmance does not necessarily indicate that the Board Member is adopting the Immigration Judge's or Service Officer's decision in it entirety, including all its reasoning; rather, it is a determination by the Board Member, upon review of the record, that the result reached below is correct. For purposes of judicial review, however, the Immigration Judge's decision becomes the decision reviewed.

In addressing any due process concerns, it is also important to point out that due process does not confer a right to appeal, even in criminal prosecutions. *See Ross* v. *Moffitt,* 417 U.S. 600, 611 (1974) (''[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.''); *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956) (plurality opinion) (noting that ''a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all'') (citation omitted). Indeed, one federal court has specifically stated that ''[t]he Constitution does not entitle aliens to administrative appeals * * *. The Attorney General could dispense with the Board and delegate her power to the immigration judge's, or could give the Board discretion to choose which cases to review.'' *Guentchev* v. *INS,* 77 F.3d 1036, 1037 (7th Cir. 1996).

It is true that the power to eliminate appeals does not carry with it the power to maintain a procedurally deficient appellate process. *See, e.g., Evitts* v. *Lucey*, 469 U.S. 387, 400–05 (1985) (although due process does not require that a state provide any appeal, it does require that a defendant receive effective assistance of counsel on the first appeal as of right, if such an appeal is provided); *Mayer* v. *Chicago*, 404 U.S. 189, 198 (1971) (if the Government chooses to provide for appeals, an impecunious defendant in a petty offense prosecution ''cannot be denied a record of sufficient completeness to permit proper (appellate) consideration of his claims'' (internal quotation marks omitted)); see also *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 117–124 (1996) (state cannot use parent's inability to pay record preparation fees as grounds for denying an appeal in a proceeding that could result in permanent termination of her parental rights). However, the omission of a case-specific statement of reasons for an appellate ruling does not represent a constitutional deficiency in appellate procedure.

In sum, appeals are not constitutionally required, and an endorsement of the result reached by the decision-maker below satisfies any conceivable due process requirement concerning justifications for the decisions made in any appellate process that the government decides to provide. The Department believes it is within the Attorney General's authority to provide for the streamlining of BIA procedures in appropriate cases as described in this final rule.

Single Board Member Adjudication on the Merits

Comments: In addition to objecting to a one-line, form order, most of the 23 commenters objected to allowing a single permanent Board Member to decide appeals on the merits. Commenters noted that appellate review by a single Board Member increases the risk of error resulting from the mistakes or prejudices of one person. Three-Member panels provide both a moderating influence and a check against possible undetected errors. Commenters also feared that review by a single Board Member would compromise consistency and thereby devalue the guidance that the Board provides.

Response and Disposition: After careful consideration, the Department has decided to retain the provision that allows a single Board Member to adjudicate certain routine appeals on the merits. While three-Member review can reduce the risk of error in complex cases, this process is extremely time and labor intensive and is of significantly less value in routine cases. The Department believes that single-Member review without appellate opinion represents an appropriate means of resolving routine appeals that do not present substantial legal issues or substantial arguments for reversal of the result reached below. The current requirement that three Board Members review such cases results in a serious misallocation of resources in an agency that receives over 28,000 appeals and motions per year. The Department believes that the Board Members' time will be more effectively used if they are able to concentrate on the more significant issues, and on cases where there is a reasonable possibility of reversible error in the result reached below. Authorizing a single permanent Board Member to adjudicate cases where there is no reasonable possibility of reversible error and no significant legal issues are presented will allow this more effective use of Board Member time. Single-Member review and summary affirmance in routine cases will actually preserve the ability of the Board to conduct three-Member review and prepare careful opinions in a significant number of more complex cases.

Single Board Member Adjudications for All Cases

Comments: Two commenters suggested that the Board adopt a system of single Board Member adjudication of most cases, but with reasons given in every case. One of these comments was signed by 52 individuals and organizations. These commenters acknowledged that under current conditions, the Board cannot continue to give full three-Member review to all cases, and further recognized that most cases do not require three-Member review. It was suggested that only a few cases per year would need to be considered by the en banc Board, and that single-Member review of the rest of the cases would be appropriate, so long as the reasons for the decisions were provided, even briefly. Several other commenters also referred to this comment with approval.

Response and Disposition: The Department carefully considered the option of moving to single-Member review of most cases, but has decided not to adopt that option at this time. The Department believes that single-Member review is appropriate in many cases coming before the Board. However, in cases where a significant issue is presented, or where there is a reasonable possibility that the result below was incorrect, three-Member adjudication is preferable for the reasons discussed above. Three-Member adjudication of such cases also provides an additional check, and provides more guidance to the Immigration Judges, the Service, the bar, and the public.

In addition, a move to single-Member adjudication of nearly all cases would make it more difficult to maintain the consistency of adjudication that the Board attempts to provide. Therefore, the Department has decided to adopt the system as proposed, under which some cases will be adjudicated on the merits by a single Board Member, while those presenting significant issues or a reasonable possibility of a change in the result reached below, will continue to be decided by three-Member panels. Of course, the Board also retains the authority to consider cases under its en banc or limited en banc procedures.

Expand Board To Handle Caseload

Comments: Several commenters noted the recent expansion of the Board and staff. Some questioned why these increases had not been adequate to handle all cases and several suggested that the Board should be further expanded as necessary to deal with current and incoming cases.

Response and Disposition: The Department has carefully considered these comments and has decided against further expansion of the Board at this time. The Attorney General has made significant efforts to aid the Board in handling its burgeoning caseload by increasing its size from 5 to 12 Members in 1995, from 12 to 15 in 1998, and by recently authorizing four additional permanent Board Members, which will bring the total to 19 Board Members. Significant staff increases have accompanied the expansion of the Board.

Board production has increased commensurately with these expansions. For example, in fiscal year 1998, more than 29,000 final dispositions were issued by the Board. However, this figure included some 6000 routine, form dispositions resulting from new legislation, including approximately 5000 cases that the Board remanded following enactment of the Nicaraguan Adjustment and Central American Relief Act. Moreover, while the Board was able to reduce its backlog by 1000 cases in 1998, the pending caseload at the Board is over 47,000 cases. The backlog must be reduced at a greater rate than 1000 cases per year.

Even with Board Member and staff increases, the Board is not currently able to adjudicate its pending caseload, to deal with its entire incoming caseload

on a timely basis, to meaningfully reduce its backlog, to position itself to deal with future increases in caseload, and to provide nationwide guidance through published precedents (most of which are issued by the full en banc Board) in a growing number of complex cases involving application of new statutory and regulatory provisions. Moreover, continued expansion of the Board and its staff would have significant institutional costs in terms of the collegiality of the Board's decision-making process, the uniformity of its decisions, and the administration and supervision of its staff.

Standards for Selecting Cases for Adjudication by a Single Board Member

Comments: Several commenters stated that the proposed rule contained inconsistent formulations of the standard for determining which cases would be adjudicated on the merits by a single Board Member. They pointed out that the Supplementary Information accompanying the proposed rule referred variously to one-Member review in cases where there is no ''realistic chance'' that three-Member review would change the result below, where the factual and legal questions raised on appeal are ''so insubstantial'' that three-Member review is not warranted, or where no legal or factual basis for reversal ''is apparent.'' In addition, the Supplementary Information also stated that an affirmance without opinion would not be issued if an appellant made a ''substantial argument for reversal.'' The commenters pointed out that the proposed regulation itself allows single-Member affirmance without opinion where, inter alia, the factual and legal questions raised were ''so insubstantial that three-Member review is not warranted.'' These commenters suggested that the Department adopt a realistic and consistent standard for determining which cases are subject to summary affirmance.

One commenter, responding to the proposed rule's statement that single Board Member review can be appropriate where the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of such precedent ''to a novel fact situation,'' suggested that virtually every case will present a novel fact situation.

Response and Disposition: The Department agrees that some of the language in the Supplementary Information of the proposed rule could have been clearer. However, the Department also recognizes that any standard adopted could be attacked as involving a subjective element. The Department believes that use of the three-part test set forth above—requiring determinations that the result below was correct, that any errors were harmless or immaterial, and either that the issues on appeal are controlled by precedent or that the factual or legal questions raised are insubstantial—will ensure that only cases where there is no reasonable possibility of changing the result reached below will be subject to single-Member summary affirmance. Moreover, the Department believes it is reasonable to require an appellant to make a substantial argument that the result reached below should be reversed.

The Department believes that the language regarding a ''novel fact situation'' requires clarification. The Department notes that while the facts of each case are different, the legally significant facts often fall into recognizable patterns, and that where this occurs, a novel fact situation may not be presented. As just one example, the Attorney General's decision in *Matter of Soriano* held that section 212(c) relief was no longer available to aliens in certain appeals pending before the Board. *See Matter of Soriano,* Op. Att'y Gen. (Feb. 21, 1997), overruling Interim Decision No. 3289 (BIA June 27, 1996) (en banc). That decision made the factual differences in a large number of those cases legally insignificant from the standpoint of the Board's appellate review. Such cases would be appropriate for single-Member affirmance even though each case presented a different set of facts.

Single Board Member Authority To Reverse or Remand

Comments: Several commenters suggested that the proposed rule was biased in favor of the Government because it would allow a single Board Member to affirm by summary decision but not to reverse or remand without referral to a three-Member panel. These commenters stated that in some cases an obvious error may appear that clearly warrants reversal or remand, without the necessity of three-Member review, and the regulation should allow single-Member reversals or remands in such cases.

Response and Disposition: The Department has considered these comments and has decided to retain the regulation as proposed on this point. The cornerstone of the new streamlining procedures is that summary affirmance by a single permanent Board Member is authorized only when the result reached below was correct. A reversal or remand will necessarily require some explanation, while an affirmance without opinion leaves the decision below as the final agency decision. The Department has determined that it is appropriate to allow the Board to affirm without opinion only when this disposition leaves intact correct results reached below. The Department also notes that a decision below that is unfavorable to the Government may also be summarily affirmed.

Chairman's Authority

Comments: Several commenters expressed concern about the authority given to the Chairman to select the Board Members who will be authorized to affirm cases without opinion. They stated that giving this authority to the Chairman could invite an abuse of authority and suggested that a more neutral or random selection process be established.

Response and Disposition: The Department has considered this comment and decided to retain the regulation as proposed. It is anticipated that all Board Members will be given the opportunity to participate in the streamlined adjudication process. However, the Chairman must have the flexibility to administer the program as he sees fit. The selection of Board Members for participation in the single Board Member affirmance process, and the process of selection, are internal Board matters and will remain so.

Fine Cases

Comment: One of the 24 comments came from an airline. It noted that there was a large backlog of airline fine cases, and suggested that the rule should specifically address the Board's handling of these cases.

Response and Disposition: Fine cases could potentially be handled under the procedures set forth in the new rule. The Department does not find it necessary to establish special streamlining procedures for fine cases at this time.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule will only affect individuals involved in immigration proceedings and transportation firms subject to fines under 8 CFR part 280. *See* 8 CFR 3.1(b)(4). This rule will not have a substantial economic impact on these firms because it will only change the procedures under which the BIA adjudicates appeals of such fines. These

procedural reforms are not expected to alter substantive outcomes except to the extent the BIA's redirection of its resources improves the consistency and uniformity of its adjudications and the quality of the legal guidance that the Board provides to Immigration Judges and the Service.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and accordingly has not been submitted to OMB for review.

Executive Order 12612

This final 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 12612, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

The final rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 8 CFR Part 3

Administrative practice and procedure, Immigration, Lawyers, Organizations and functions (Government agencies), Reporting and recordkeeping requirements.

Accordingly, part 3 of chapter 1 of title 8 of the Code of Federal Regulations is to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

2. Section 3.1 is amended by:

a. Adding two sentences at the end of paragraph (a)(1);

b. Adding a new paragraph (a)(7);

c. Redesignating paragraphs (d)(1–a), (2), and (3) as paragraphs (d)(2), (3), and (4), respectively;

d. Removing redesignated paragraph (d)(2)(i)(D);

e. Redesignating paragraph (d)(2)(i)(E) as paragraph (d)(2)(i)(D) and removing the word ''or'' at the end of that paragraph;

f. Redesignating paragraph (d)(2)(i)(F) as paragraph (d)(2)(i)(G);

g. Adding new paragraphs (d)(2)(i)(E) and (F);

h. Redesignating paragraph (d)(2)(ii) as paragraph (d)(2)(iii); and by

i. Adding a new paragraph (d)(2)(ii).

The additions to § 3.1 read as follows:

§ 3.1 General authorities.

(a)(1) *Organization.* * * * In addition, a single Board Member may exercise such authority in disposing of the following matters: a Service motion to remand an appeal from the denial of a visa petition where the Regional Service Center Director requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the Chairman. A motion to reconsider or to reopen a decision that was rendered by a single Board Member may be adjudicated by that Board Member.

* * * * *

(7) *Affirmance without opinion.* (i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: ''The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(a)(7).'' An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

* * * * *

(d) *Powers of the Board*—(1) * * *

(2) *Summary dismissal of appeals.* (i) *Standards.* * * *

(E) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(F) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

* * * * *

(ii) *Action by the Board.* The Chairman may provide for the exercise of the appropriate authority of the Board

to dismiss an appeal pursuant to paragraph (d)(2) of this section by a three-Member panel, or by a single Board Member. The Chairman may determine who from among the Board Members is authorized to exercise the authority under this paragraph and the designation may be changed by the Chairman as he deems appropriate. Except as provided in this part for review by the Board en banc or by the Attorney General, or for consideration of motions to reconsider or reopen, an order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board. If the single Board Member to whom the case is assigned determines that the case is not appropriate for summary dismissal, the case will be assigned for review and decision pursuant to paragraph (a) of this section.

* * * * *

3. Section 3.2 is amended by adding a new paragraph (b)(3) to read as follows:

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

* * * * *

(b) * * *

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

Dated: October 6, 1999.

Janet Reno,

Attorney General.

[FR Doc. 99–26887 Filed 10–15–99; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 3

[Docket No. 95–029–2]

Animal Welfare; Perimeter Fence Requirements

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Animal Welfare regulations to require that a perimeter fence be placed around outdoor housing facilities for marine mammals and certain other regulated animals. Although it has been our policy that such fences should be in place around outdoor housing facilities for such animals, there have been no provisions in the regulations specifically requiring their use. Adding the perimeter fence requirement to the regulations for these additional categories of animals will serve to protect the safety of the animals and provide for their well-being.

DATES: *Effective date:* November 17, 1999.

Compliance date: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Dr. Barbara Kohn, Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7833.

SUPPLEMENTARY INFORMATION:

Background

The Animal Welfare regulations contained in 9 CFR chapter I, subchapter A, part 3 (referred to below as the regulations), provide specifications for the humane handling, care, treatment, and transportation, by regulated entities, of animals covered by the Animal Welfare Act (the Act) (7 U.S.C. 2131, *et seq.*). The regulations in part 3 are divided into six subparts, subparts A through F, each of which contains facility and operating standards, animal health and husbandry standards, and transportation standards for a specific category of animals. These categories are: (A) Cats and dogs, (B) guinea pigs and hamsters, (C) rabbits, (D) nonhuman primates, (E) marine mammals, and (F) animals other than cats, dogs, guinea pigs, hamsters, rabbits, nonhuman primates, and marine mammals.

On May 6, 1997, we published in the **Federal Register** (62 FR 24611–24614, Docket No. 95–029–1) a proposal to amend the regulations in subparts E and F of the regulations by requiring that perimeter fences be placed around outdoor housing facilities for marine mammals and for other animals covered by the regulations, other than cats, dogs, guinea pigs, hamsters, and rabbits.

We proposed the following minimum perimeter fence heights:

Type of facility	Minimum perimeter fence height (feet)
Marine Mammals, other than Polar Bears	6
Polar Bears	8
Other Nondangerous Animals	6
Other Potentially Dangerous Animals	8

In our proposed rule, we stated that the perimeter fence would act as a secondary containment system for the animals in the facility when appropriate, reasonably restrict animals and unauthorized persons from entering the facilities or having contact with the animals, and prevent exposure to diseases. We intended these requirements to protect the safety and provide for the well-being of the animals.

We also proposed a minimum distance of 3 feet between the perimeter fence and any primary enclosure to prevent physical contact between animals inside the enclosure and animals and persons outside the perimeter fence.

We solicited comments concerning our proposal for 60 days ending July 7, 1997. We received 23 comments by that date. They were from exhibitors, exhibitor and trade associations, wildlife associations, animal parks, humane organizations, and a Federal government agency, among others. The comments are discussed below by topic.

Primary Enclosure and Perimeter Fencing

Several commenters opposed the installation of a perimeter fence around each primary enclosure. Some were concerned that the perimeter fence would obscure the public's view of the animals or detract from the aesthetic draw of the facilities and decrease the number of visitors. Another commenter stated that the perimeter fence would interfere with the ability of the public to have physical contact with animals in petting zoos. One commenter expressed concern that the perimeter fence would conflict with the Americans with Disabilities Act by impairing access to areas around the primary enclosures.

We believe these commenters misunderstood the proposal. The perimeter fence would surround the area or areas where the outdoor housing facilities are located. Each individual primary enclosure would not have to be surrounded by a second fence. Therefore, a perimeter fence would not obstruct the public's view of the animals, hinder the petting of the animals at petting zoos, or impair access to the primary enclosures by people with disabilities.

Height of the Perimeter Fence

One commenter asked how we determined that a perimeter fence should be 8 feet high for potentially dangerous animals and 6 feet high for marine mammals other than polar bears. This commenter stated that the required heights were arbitrary and had no scientific basis. Several commenters stated that an 8-foot fence would not provide security against the escape of large felines or the entry of unwanted animals or people and pointed out that certain animals and people would be