



**Homeland  
Security**

## **Recommendation from the CIS Ombudsman to the Director, USCIS**

To: Robert Divine, Acting Deputy Director, USCIS  
Cc: Michael P. Jackson, Deputy Secretary, Department of Homeland Security  
From: Prakash Khatri, CIS Ombudsman  
Date: December 6, 2005  
Re: Recommendation to USCIS that the Administrative Appeals Office make available to the public through publication of a regulation or otherwise the appellate standard of review, the process under which cases are deemed precedent decisions, the criteria under which cases are selected for oral argument, and the statistics on decision making by the Administrative Appeals Office.

### **I. RECOMMENDATION**

Recommendation to USCIS that the Administrative Appeals Office (“AAO”) make available to the public through publication of a regulation or otherwise the appellate standard of review, the process under which cases are deemed precedent decisions, the criteria under which cases are selected for oral argument, and the statistics on decision making by the Administrative Appeals Office.

### **II. BACKGROUND**

#### **A. AAO Jurisdiction**

The AAO has jurisdiction over approximately 55 petitions and applications filed with USCIS. 8 CFR §103.1(f)(3)(iii). The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).

The AAO exercises appellate jurisdiction over the matters described in 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions: (1) petitions for approval of schools and the appeals of denials of such petitions are the responsibility of Immigration and Customs Enforcement; and (2) applications for S nonimmigrant status are the responsibility of the Office of Fraud Detection and National Security of U.S. Citizenship and Immigration Services. According to AAO data provided to the Ombudsman, in 2004 the most commonly reviewed petitions and applications were the Form I-821 Application for Temporary

Protected Status (5,407 receipts), Form I-129 Petition for Nonimmigrant Worker (H-1B) (3,264 receipts), and Form I-140 Immigrant Petition for Alien Worker (2,183 receipts).<sup>1</sup>

Approximately 90% of the cases reviewed by the AAO are from the five USCIS service centers (National Benefits Center in Missouri, California Service Center, Nebraska Service Center, Texas Service Center and the Vermont Service Center). The AAO received 20,121 cases in 2004. The backlog for AAO cases ranges from current to 14 months, and the AAO is actively working to reduce processing times for backlogged appeals. The AAO has authorization to increase its staff and is working to complete hiring of new appeals adjudication officers.

### ***B. AAO Internal Organization***

The AAO office is divided into subject matter teams. Individual officers review and draft decisions, which are then reviewed and signed off on by supervisors prior to the issuance of an AAO decision.

### ***C. Standard of Review***

The technical standard of review under which the AAO reviews cases is not codified in statute or regulation or published on the public AAO website. The AAO reviews all cases on a *de novo* basis, pursuant to Second and Ninth Circuit Court of Appeals decisions (See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *Spencer Enterprises Inc. v. US*, 229 F.Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff.'d.* 345 F.3d 683 (9th Cir. 2003)). This standard of review and case law authority is stated in AAO decisions, and was provided to this office in response to a formal Ombudsman's query submitted to the AAO.

### ***D. AAO Precedent Decisions***

Historically, AAO decisions were deemed precedent decisions or non-precedent decisions. 8 CFR §103.3(c). Precedent decisions are published by the U.S. Government Printing Office in bound volumes titled "Administrative Decisions Under Immigration and Nationality Laws of the United States," and are available through the private on-line legal databases (Lexis/Nexis and WestLaw), as well as other sources. Non-precedent decisions are made available in reading rooms of the USCIS Freedom of Information Act (FOIA) Central Office (8 CFR §103.9(b)), and the immigration bar and private immigration law publications re-print and report on cases. These non-precedent decisions have no binding authority on other USCIS adjudications.

The process under which AAO decisions are deemed precedent decisions is not codified in statute or promulgated in regulation or published on the AAO website. According to the AAO response to an inquiry from the CIS Ombudsman, decisions are deemed precedent when it is a "novel issue of law or fact and when it is necessary to provide clear and uniform guidance concerning the proper implementation and administration of the statute and regulations where

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<sup>1</sup> This data and the statistics in the following paragraph were provided to the CIS Ombudsman by the AAO in response to interrogatories submitted by the Ombudsman, Sept. 9, 2005.

applicable regulations are unclear or silent.” This information currently is not available to the public from any USCIS or AAO source. Precedent decisions must be reviewed and approved by DHS and the Department of Justice. 68 Fed Reg. 9824 (Feb. 28, 2003). There has not been an AAO precedent decision issued since *Matter of N.Y. State Department of Transportation*, 22 I&N Dec. 215, (Acting Assoc. Comm, Aug. 7, 1998). As such, no AAO decisions issued over the past seven years have been binding on subsequent USCIS adjudications.

Recently, the AAO began publishing “USCIS Adopted Decisions,” a new designation meant to convey that the reasoning in those AAO decisions is binding policy guidance on USCIS personnel and must be followed in all cases involving similar issues. The CIS Ombudsman applauds this new approach to AAO decisions and believes that it will improve standardization in decision-making by the service centers. Several questions remain such as what the criteria are for the AAO to deem a decision a “USCIS Adopted Decision,” and how this information will be relayed to adjudicators in the field.

#### ***E. Oral Argument before the AAO***

Regulations generally govern oral arguments before the AAO. 8 CFR 103.3(b). Affected parties desirous of the opportunity for oral argument must explain in writing specifically why oral argument is necessary. USCIS has sole authority to grant or deny a request for oral argument. The rules under which the AAO would grant oral argument are not codified in statute or regulation or available on the AAO website. According to the AAO response to an inquiry from the Ombudsman, the AAO grants oral argument where the branch chief and director or deputy director determine that the case “involved unusually complex or novel questions of law or fact that cannot be adequately expressed in writing.”

#### ***F. AAO Statistics***

Statistics on AAO decision making are not regularly published by the AAO but are available to the public via a FOIA request. The AAO maintains detailed data on, among other matters, the number of receipts received by month and year, the number of decisions issued by month and year, and the number of sustains and denials by the AAO.

### **III. JUSTIFICATION**

USCIS customers, both foreign nationals and employers, rely on the availability of meaningful review of USCIS decisions to ensure integrity and consistency in the immigration benefits adjudication process. The purpose of this recommendation is to help ensure the integrity of the administrative review process by providing for greater transparency in AAO operations, procedures, and appellate rules. Due to the recent lack of issuance of precedent decisions and the lack of clear standards and procedures, stakeholders have raised concerns about: (1) how the AAO determines which cases become precedent decisions, and (2) generally, how the AAO interacts with USCIS service centers and district offices to ensure that like cases are adjudicated in like manner. These issues may be addressed, in part, by the recent issuance of USCIS Adopted Decisions.

The Ombudsman supports publication online and if necessary by expeditious administrative rule making of: (1) clear legal standards for review of decisions; (2) clear standards for issuance of USCIS Adopted Decisions and how information on new decisions is relayed to adjudicators in the field; and (3) monthly or quarterly publication of statistics on receipts and the number of cases affirmed and denied.

Providing the basic legal administrative appellate rules and statistics on decision making to the public is critical to the customer's sense of integrity of the process. Employers and individuals should not have to speculate as to the standard of review, how a case becomes a precedent decision, or the percentage of appeals affirmed by the AAO. Transparency in the process of immigration benefits adjudication at the administrative appeals level is a basic element of good government.

The legal standards and procedures for the AAO should be spelled out in regulation or at minimum in detailed policy guidance, where not addressed in statute. The lack of published information on AAO standards and procedures leads customers and stakeholders to question the integrity of the AAO decision-making process. In this regard, the AAO website is an under-utilized tool that could enhance customers' and stakeholders' sense of integrity and reliability of the process.

Data on AAO decisions, similar to statistics on USCIS district office and service center adjudications, should be published on a regular basis – monthly or quarterly. The AAO maintains this information, and currently it is available to the public through a FOIA request. The FOIA process is significantly backlogged, and customers would have to wait months for a response to such a FOIA inquiry. Regular publication of AAO statistics would add little additional resource burden to the AAO, and publishing statistics on AAO decisions would make the administrative review process more transparent.

#### **IV. BENEFITS**

##### ***A. Customer Service:***

Customers, both individual foreign nationals and employers, would benefit by knowing the standards and rules for AAO review and statistics regarding decision-making. Customers would be able to determine whether filing an appeal with the AAO is an appropriate course of action based on clear and transparent standards and data.

##### ***B. USCIS Efficiency:***

By providing information on AAO decision making rules and data, customers would be in a better position to assess the merits of the case contemplated for AAO review. USCIS would receive fewer inquiries from customers and Congress on cases before the AAO, and confidence in the AAO decision making process would be bolstered.

***C. National Security:***

This recommendation poses no risks to national security. Providing information to the public on AAO legal appellate rules and data on decision making would have no detrimental impact on national security screening of foreign nationals.