



BILLING CODE: 4410-30

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[Docket No. EOIR 183; A.G. Order No. 4119-2018]

RIN 1125-AA79

Expanding the Size of the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Executive Office for Immigration Review (EOIR) regulations relating to the organization of the Board of Immigration Appeals (Board) by adding four additional Board member positions, thereby expanding the Board to 21 members.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Acting Chief of the Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1902, Falls Church, VA 20530, telephone (703) 305-0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Current Interim Rule

On June 3, 2015, the Department of Justice (Department) published an interim rule amending 8 CFR 1003.1 to increase the Board of Immigration Appeals (Board) from 15 to 17 members, with a request for comments. 80 FR 31461 (June 3, 2015). As explained in the interim rule, expanding the number of Board members is necessary to accomplish EOIR's

commitment to promptly provide Board appellate review of timely filed immigration case appeals. The interim rule provided two primary reasons for increasing the number of Board members from 15 to 17. First, EOIR was managing the largest caseload the immigration court system had ever seen. Second, the Department was in the process of hiring a substantial number of additional immigration judges, which the Department expected would increase the number of appeals filed with the Board.

The Department provided an opportunity for post-promulgation comment even though this was a rule of internal agency organization and therefore notice-and-comment rulemaking was not required. The Department received two comments by the deadline of August 3, 2015. For the reasons set forth below, the Department is finalizing the interim rule amending 8 CFR part 1003, and adding four additional Board members for a total of 21 Board members.

II. Background

EOIR administers the Nation's immigration court system. Generally, cases commence before an immigration judge when the Department of Homeland Security (DHS) files with the immigration court a charging document against an alien. *See* 8 CFR 1003.14(a). EOIR primarily decides whether foreign nationals whom DHS charges with violating immigration law pursuant to the Immigration and Nationality Act are removable as charged and, if so, whether they should be ordered removed from the United States, or should be granted protection or relief from removal and be permitted to remain in the United States. EOIR's Office of the Chief Immigration Judge administers the adjudications of the immigration judges nationwide.

Decisions of the immigration judges are subject to review by EOIR's appellate body, the Board, which is currently composed of 17 Board members. The Board is the highest administrative tribunal for interpreting and applying U.S. immigration law. The Board's

decisions can be reviewed by the Attorney General, as provided in 8 CFR 1003.1(g) and (h). Decisions of the Board and the Attorney General are subject to judicial review in the United States Courts of Appeals.

III. Expansion of Number of Board Members

EOIR's mission is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. This task includes the initial adjudication of aliens' cases in immigration courts nationwide, as well as appellate review by the Board when appeals are timely filed. In order to more efficiently accomplish the agency's commitment to promptly decide an increasing volume of cases, as well as to review appeals in those cases, this rule serves to finalize the interim rule, with the addition of four additional Board members.¹ This rule adopts a revision to the third sentence of 8 CFR 1003.1(a)(1). The remainder of paragraph (a)(1) is unchanged.

Expanding the number of Board members was necessary when the interim rule was published in 2015 because EOIR was experiencing an increased caseload. Since the interim rule's publication, EOIR's caseload has continued to grow; EOIR is currently managing the largest caseload the immigration court system has ever seen. At the end of FY 2016, there were 518,545 total cases pending before the immigration courts, marking an increase of 58,988 cases pending above those at the end of FY 2015. *See* 2016 EOIR Statistics Yearbook W1.² As of January 1, 2018, there were 667,292 total cases pending before the immigration courts. This total increase included an increase in the number of pending cases of detained aliens. EOIR's

¹ The Department previously expanded the number of Board members—from 11 to 15 members—on December 7, 2006, when it published in the Federal Register an interim rule amending 8 CFR 1003.1. 71 FR 70855 (Dec. 7, 2006). On June 16, 2008, the Department published a final rule adopting, without change, that interim rule. 73 FR 33875 (June 16, 2008).

² EOIR's FY 2016 Statistics Yearbook, prepared by EOIR's Office of Planning, Analysis, and Statistics, is available at <https://www.justice.gov/eoir/page/file/fysb16/download>.

highest priority is the efficient and timely adjudication of detained alien cases, and EOIR requires additional resources to handle the increased caseload.

The Department is taking steps to address the unprecedented pending caseload. The Department hired 64 additional immigration judges in FY 2017 and continues to hire new immigration judges. The Department expects that, as these additional immigration judges enter on duty, the number of decisions rendered by the immigration judges nationwide will increase, and the number of appeals filed with the Board will increase as a result. The Department is also taking a number of management steps to more efficiently address the pending caseload, which EOIR expects will result in an increase in immigration judge decisions and, in turn, an increase in the flow of appeals to the Board.³

Since January 2017, the Board has experienced a steady increase in appeals. For example, the number of appeals increased throughout FY 2017, from 2,618 in October 2016 to 3,035 in September 2017. This caseload is burdensome and, given current trends, may become overwhelming were the Board to maintain 17 members.

The interim rule modified the number of Board members to 17, and requested post-promulgation comment on the proposal to increase the number of Board members in light of the increased caseload. Keeping in mind the goal of maintaining cohesion and the ability to reach consensus, but recognizing the challenges the Board faces in light of its current and anticipated increased caseload, the Department has determined that four additional members should be added to the Board. The Department acknowledges the potential impact of the expansion to 21 members upon the Board's ability to provide coherent direction and to issue precedential

³ Statement of James McHenry, Acting Director, Executive Office for Immigration Review, United States Department of Justice, Before the Subcommittee on Immigration and Border Security, Committee on the Judiciary, United States House of Representatives, November 1, 2017.

decisions, which require approval of a majority of the Board, and will continue to consider means to improve the Board's operations over time. But the interim rule's logic—balancing efficiency with administrability—supports increasing the size of the Board in the final rule to 21. These changes will help support an efficient system of appellate adjudication in light of the increasing caseload.

IV. Public Comments

The interim rule was exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date because, as an internal delegation of authority, it is a rule of management or personnel and relates to a matter of agency organization, procedure, or practice. *See* 5 U.S.C. 553(a), (b), (d). Nonetheless, when promulgating the interim rule, the Department provided an opportunity for post-promulgation comment. The Department received two comments by the deadline, only one of which was responsive to the rule. The commenter stated that “[e]xpanding the Board of Immigration Appeals (BIA) to 17 members from 15 members is . . . a necessary action as the pending times for appeals has substantially increased as the docket of EOIR has expanded.”

In response, the Department appreciates this expression of support. EOIR has steadily hired new immigration judges, and continues to hire new immigration judges, to adjudicate EOIR's historically large caseload. As the number of immigration judges increases, so does the number of decisions rendered by immigration judges. In turn, the number of appeals filed with the Board also increases. Increasing the number of Board members will assist EOIR in accomplishing its mission of adjudicating appeals in a timely manner.

V. Regulatory Requirements

A. Administrative Procedure Act

As this rule is the finalization of an interim final rule, further request for comment is not required. Alternately, comment is unnecessary because this final rule is a rule of management or personnel as well as a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(a)(2), (b)(A). For the same reasons, this rule is not subject to a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (d).

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), “[w]henever an agency is required by section 553 of [the Administrative Procedure Act], or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.” 5 U.S.C. 603(a); *see* 5 U.S.C. 604(a). Such analysis is not required when a rule is exempt from notice-and-comment rulemaking under 5 U.S.C. 553(b). Because this is a rule of internal agency organization and therefore is exempt from notice-and-comment rulemaking, no RFA analysis under 5 U.S.C. 603 or 604 is required for this rule.

C. Unfunded Mandates Reform Act of 1995

This 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.

D. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule is limited to agency organization, management, or personnel matters and is therefore not subject to review by the Office of Management and Budget pursuant to section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects; distributive impacts; and equity. The benefits of this rule include providing the Department with an appropriate means of responding to the increased number of appeals to the Board. The public will benefit from the expansion of the number of Board members because such expansion will help EOIR better accomplish its mission of adjudicating cases in an efficient and timely manner. Overall, the benefits provided by the Board's expansion outweigh the costs of employing additional federal employees. Finally, because this rule is one of internal organization, management, or personnel, it is not subject to the requirements of Executive Order 13771.

E. Executive Order 13132 – Federalism

This 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 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 – Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

H. Congressional Review Act

This is not a major rule as defined by 5 U.S.C. 804(2). This action pertains to agency organization, management, and personnel and, accordingly, is not a “rule” as that term is used in 5 U.S.C. 804(3). Therefore, the reports to Congress and the Government Accountability Office specified by 5 U.S.C. 801 are not required.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, the interim rule amending 8 CFR part 1003, which was published at 80 FR 31461 on June 3, 2015, is adopted as a final rule, with the following change:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Amend § 1003.1 by revising the third sentence of paragraph (a)(1) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) * * * The Board shall consist of 21 members. * * *

* * * * *

Dated: February 20, 2018.

Jefferson B. Sessions III
Attorney General

[FR Doc. 2018-03980 Filed: 2/26/2018 8:45 am; Publication Date: 2/27/2018]