



BIA Proposed Regulations Outline

- A. Briefing Extensions (Modifying 8 CFR 1003.3(c))
 - Maximum time = 14-day extension
 - No right to extension
 - ⇒ only for good cause
 - **Impact to practice?**
 - ⇒ Only have 21 days from receipt of briefing notice to file brief
 - Appeal 30 days from IJ decision
 - Wait for briefing notice (undetermined amount of time? See changes in section L below)
 - 21 days
 - ⇒ Have to start writing appeal immediately
 - problematic with heavy case loads

- B. Simultaneous Briefing (Modifying 8 CFR 1003.3(c)(1))
 - DHS Brief + Respondent brief due at same time
 - **Impact to practice?**
 - ⇒ Puts non-appellant at a disadvantage, only have Notice of Appeal to go on
 - ⇒ Everything should be in the Notice of Appeal [is this true?]
 - ⇒ Efficient & even footing

- C. BIA remands for security checks (Modifying 8 CFR 1003.3(c)(1))
 - BIA no longer has to remand to get these done if grant is sustained, or appeal is sustained
 - **Impact to practice?**
 - ⇒ positive from efficiency standpoint

- D. Finality of BIA decisions & Voluntary Departure Authority (Modifying 8 CFR 1003.1(d)(7), proposed changes 8 CFR 1003.1(d)(7)(i), (d)(7)(iv))
 - BIA has authority to issue final orders
 - BIA can review IJ's decision on V.D. de novo
 - ⇒ Give advisals to client in writing
 - ⇒ No need for BIA to remand to IJ
 - Have to ask for V.D. at the IJ level, if don't it is deemed waived & not appealable, so IJ should have done all requisite fact finding, BIA can review under clearly erroneous standard
 - **Impact to practice?**
 - ⇒ 2 reasons for appeal based on V.D.
 - 1) IJ denied request for V.D.
 - 2) IJ failed to give proper advisals so client did not know what they were agreeing to
 - ⇒ In scenario #1 IJ should have developed factual record enough to make determination, so BIA looking to see if IJ was clearly erroneous either in interpretation of facts or lack of development of facts.
 - if interpretation is wrong, BIA can now grant V.D., which can be helpful for client because it is faster
 - If IJ did not develop facts BIA will remand **[see below, cannot!]**

- ⇒ In scenario #2, BIA can now give advisals so client can choose whether or not to accept
 - what happens if client does not accept [at either IJ or BIA level]

E. Prohibition on Consideration of New Evidence, Limitations on Motions to Remand, Factfinding by the BIA, and the Standard of Review (Modifying 8 CFR 1003.1(d)(3)(iv) and (d)(7), proposed changes 8 CFR 1003.1(d)(3)(iv)(A)-(D), (d)(3)(v), (d)(7)(ii)(B)-(E), (d)(7)(v))

- Limit motions to remand that BIA can consider
- BIA can't consider new evidence
- BIA can't remand to IJ to consider new evidence
- BIA can't consider a motion to remand based on new evidence
- 3 exceptions
 - 1) New evidence that comes from a security check
 - 2) New evidence of inadmissibility or deportability
 - 3) New evidence that IC doesn't have jurisdiction
 - Person is USC
 - DHS has jurisdiction (UC's)
- Can submit new evidence w/ motion to re-open
- BIA can take administrative notice of undisputed facts
 - 1) must give notice if facts are outside the record
- BIA cannot remand based on "totality of the circumstances"
- **Impact to practice?**
 - 1) Huge impact on *pro se*/non represented
 - IJ has no incentive to properly develop the record
 - ⇒ Had TA from Pro Bar where kid was in MPP, unrepresented, Pro Bar got it at BIA stage, IJ didn't develop record for child
 - How do *pro se* respondents know to raise everything?
 - only clearly erroneous
 - what about changes in law that would require more facts?
 - 2) "Totality of the circumstances"
 - I've never seen one of these but it would seem like a fail-safe if the judge did a poor job, like in above scenario
 - BIA couldn't remand even if there was a change in law

F. Scope of Board Remand (Modifying 8 CFR 1003.1(d)(7), proposed changes 8 CFR 1003.1(d)(7)(iii))

- BIA can limit scope of remand without retaining jurisdiction
 - ⇒ IT cannot consider anything beyond that state limit
- **Impact to practice?**
 - ⇒ what if new form of relief becomes available after BIA remands? IJ can't consider?

G. Immigration Judge Quality Assurance certification of BIA decision (Modifying 8 CFR 1003.1, adding 8 CFR 1003.1(k))

- If BIA reopens and remands or remands an IJ's case, the IJ can certify case to the Director if they allege BIA made an error.
- supposed to be limited to 4 situations
 - 1) BIA decision has typo or clerical error that impacts outcome of case
 - 2) BIA decision is clearly contrary to law



- 3) BIA decision is vague, ambiguous, internally inconsistent, or did not resolve the basis for appeal
 - 4) BIA did not consider a "material factor pertinent" to the issues
 - Not supposed to be used as a basis to express disapproval or disagreement
 - 1003.1(k)
 - **Impact to practice?**
 - ⇒ undermines independence of the BIA.
 - ⇒ certifies case to a political appointee [AG is also political appointee]
 - ⇒ situations 3+4 are very broad/"vague"
 - ⇒ seems to undermine §(k)(4)
- H. Administrative closure (Modifying 8 CFR 1003.1(d)(1)(ii) [BIA] and 8 CFR 1003.10(b) [IJ])
- BIA precedent says only 3 avenues available for cases
 - ⇒ order of termination
 - ⇒ order of removal
 - ⇒ order of relief/protection
 - No authority for IJ or BIA to administratively close immigration cases under 8 CFR 1003.1(d)(1)(ii)/1003.10(b)/1240
 - "Consequently, the practice of administrative closure does not reduce the overall pending caseload, and the strain on immigration courts due to the volume of cases is the same, regardless of whether administrative closure is available."
 - ⇒ [I would doubt this]
 - **Impact on practice?**
 - ⇒ Codifies *Castro-Tum*
 - ⇒ Doesn't allow for provisional waivers for people in removal proceedings, not overly relevant for UC's
 - I have answered TA on this issue while at CILA though
 - ⇒ Taking into account the "remoteness" issues that are now being considered by IJ's when adjudicating motions for continuance, lack of administrative closure renders SIJS status & U visas not viable forms of relief for children in immigration proceedings. UC's are the "particularly vulnerable" type of population that these forms of relief were intended to help.
 - ⇒ Valid point that specific provisions allow for admin closure [VAWA?]
 - ⇒ Not familiar enough with Federal Litigation to know if admin closure is a tool the district courts can use
- I. *Sua Sponte* Authority (Modifying 8 CFR 1003.2(a), (c)(3), 8 CFR 1003.23(b)(1), (b)(4); adding 8 CFR 1003.2(c)(3)(v)-(vii), 8 CFR 1003.23(b)(4)(v)-(vi))
- AG is no longer delegating *sua sponte* authority to IJs/BIA
 - BIA & IJs can only re-open for typographical errors
 - ⇒ would limit re-openings to one time within 90 days
 - **Impact to practice?**
 - ⇒ Huge impact! Re-opening rules don't account for huge adjudication delays, visa availability backlogs & IJs not being allowed to admin close & being severely restricted on continuances.
 - ⇒ Adding this to all the other proposed changes, regulations are cutting off all avenues



- ⇒ *Sua sponte* is often the only way to get a case in front of the judge when new relief comes to light; especially difficult when dealing with UCs because they have little control, especially when decisions are made by adults
- ⇒ Usually you try to fit your motion to re-open within the categories laid out and ask for the judge to exercise their discretion if they don't feel it meets the level necessary.
 - Agree that motions flat out asking for *sua sponte* and only that are inappropriate but the scenario mentioned above doesn't seem like it. It's not "frivolous" or anything to make a motion like mentioned above, especially given equitable tolling.
- ⇒ Questions:
 - 1) Do these changes allow for Lozada/IAC claims still?
 - 2) With equitable tolling, diligence issue -- when client finds out they are eligible for new kind of relief, do they have to do motion within a reasonable time from when they learn they may be eligible or from when they get approval? If former you run into the same issues of adjudication delays, visa wait times, no admin closure & difficulty getting continuances
 - clutters up docket unnecessarily

J. Certification Authority (Modifying 8 CFR 1003.1(c))

- Likens "certification authority" to "*sua sponte*" authority says it is inconsistent
- Revokes BIA's ability to certify cases to itself, but others can still certify cases to BIA
- **Impact to practice?**
 - ⇒ Lack of flexibility?
 - In reality, not a huge impact--never seen it used

K. Timeliness of Adjudication of BIA Appeals (Modifying 8 CFR 1003.1(e)(1), (e)(8))

- Screening panel review completed in 14 days
- Interlocutory appeal not referred to 3 member panel must be reviewed in 30 days
- Transcript ordered by 7 days after screening panel review
 - ⇒ If no transcript required briefing schedule issued by 7 days after screening
- Briefing schedule issued by 7 days of the transcript being provided
- Assigned to Board member for merits review by 7 days after completion of appellate record, including briefs & motions
- Aforementioned Board member must decide if they are going to assign case to 3 member panel by 14 days after receiving case
- Individual Board members must "dispose" of appeal by 90 days after appellate record is completed
- 3 Member panels have 180 days from completion of appellate record
- Cases can be held if a Supreme Court case or *en banc* BIA decision will determine the outcome but only by 120 days.
- any case pending for longer than 335 days from when the appeal was filed shall be referred to the Director
- **Impact on practice?**
 - ⇒ Minimum of 79 days to brief (approx. 2.5 months)
 - ⇒ Depends on how long it takes to get transcript
 - see next section



- L. Forwarding the Record on Appeal (Modifying 8 CFR 1003.5)
 - ITS no longer review transcripts
 - ⇒ 7-14 day delay unnecessary
 - ⇒ E OIR uses reliable tech so recordings are clear
 - Director shall determine most effective way to transcribe
 - **Impact on practice?**
 - ⇒ continuing truncation of amount of time to brief
 - ⇒ More important than ever to make sure things are on audio record
 - any muttering/hesitant or quiet speech by client
 - "Your honor I'd like to note for the record that..."
 - ⇒ client is crying
 - ⇒ [describe client body language]
 - ⇒ other non-obvious clues to client's state of mind/ answers

