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Immigration Litigation Reform

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Margaret Mikyung Lee
Legislative Attorney
American Law Division

Immigration Litigation Reform

Summary

Beginning with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), legislation and administrative actions have focused on reducing immigration litigation by limiting and streamlining both administrative appeal and judicial review procedures and by rendering aliens in certain categories ineligible for certain types of relief from removal.

Despite these efforts, other changes made by the 1996 Acts increased litigation by expanding the scope of the grounds for inadmissibility and deportation and the definition of aggravated felony, which effectively further expanded the grounds for deportation. Increased enforcement efforts coupled with the increasing numbers of illegal aliens present in the country have also increased litigation as more aliens are placed in removal proceedings.

In 2002, then-Attorney General Ashcroft implemented procedural reforms in the Board of Immigration Appeals [BIA] intended to eliminate the existing BIA backlog of cases and to provide for current efficient disposition of cases. These changes have resulted in a shift of the backlog and the number of appeals to the federal appellate courts.

Changes proposed by H.R. 4437, S. 2454, S.Amdt. 3192, and S. 2611/S. 2612, among other bills, would continue the trend of streamlining procedures and limiting immigration litigation, appeals to the Board of Immigration Appeals and judicial review.

Contents

Background 1

Legislative Proposals 3
- Consolidation of Immigration Appeals 4
  - Current Law 4
  - Proposed Changes 4
- Additional Immigration Personnel 6
  - Current Law 6
  - Proposed Changes 6
- Board of Immigration Appeals Removal Order Authority 6
  - Current Law 6
  - Proposed Changes 7
- Judicial Review of Visa Revocation 7
  - Current Law 7
  - Proposed Changes 7
- Reinstatement of Removal Orders 8
  - Current Law 8
  - Proposed Changes 8
- Withholding of Removal 9
  - Current Law 9
  - Proposed Changes 9
- Certificate of Reviewability 9
  - Current Law 9
  - Proposed Changes 9
- Discretionary Decisions on Motions to Reopen or Reconsider 10
  - Current Law 10
  - Proposed Changes 10
- Fee/Costs Awards Bar for Judicial Review of Removal Orders 10
  - Current Law 10
  - Proposed Changes 10
- Waiver of Review in Nonimmigrant Visa Issuance 10
  - Current Law 10
  - Proposed Changes 11
- Review of Discretionary Relief Denials 11
  - Current Law 11
  - Proposed Changes 11
- Executive Office of Immigration Review (EOIR) 11
  - Current Law 11
  - Proposed Changes 11
- Immigration Injunction Reform 12
  - Current Law 12
  - Proposed Changes 12

List of Figures

Figure 1. BIA/INS Appeals to the U.S. Courts of Appeals, 1996-2005 2
Figure 2. Total Administrative Matters/Appeals Received, 1996-2005 3

Immigration Litigation Reform

Background

Beginning with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[1] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[2] legislation and administrative actions have focused on reducing immigration litigation by limiting and streamlining both administrative appeal and judicial review procedures and by rendering aliens in certain categories ineligible for certain types of relief from removal. Even when an alien may be considered for discretionary relief, judicial review of denials is restricted, as is review of removal orders issued to criminal aliens. Also, the REAL ID Act restricted habeas review and certain other non-direct judicial review in response to U.S. Supreme Court holdings that such review was still available after the 1996 acts.[3]

Despite these efforts, other changes made by the 1996 Acts increased litigation by expanding the scope of the grounds for inadmissibility and deportation and the definition of aggravated felony, which effectively further expanded the grounds for deportation. Increased enforcement efforts coupled with the increasing numbers of illegal aliens present in the country have also increased litigation as more aliens are placed in removal proceedings.

In 2002, then-Attorney General Ashcroft implemented procedural reforms in the Board of Immigration Appeals [BIA], the administrative body with jurisdiction to review decisions of immigration judges and, at times, other immigration officers.[4] These reforms were intended to eliminate the existing BIA backlog of cases and to provide for current, efficient disposition of cases.[5] Since the changes, there has been a shift of the backlog and the number of appeals to the federal appellate courts. The following charts indicate the increase in caseload in the U.S. Circuit Courts of

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[1] 110 Stat. 1214 (1996).

[2] 110 Stat. 3009-546 (1996).

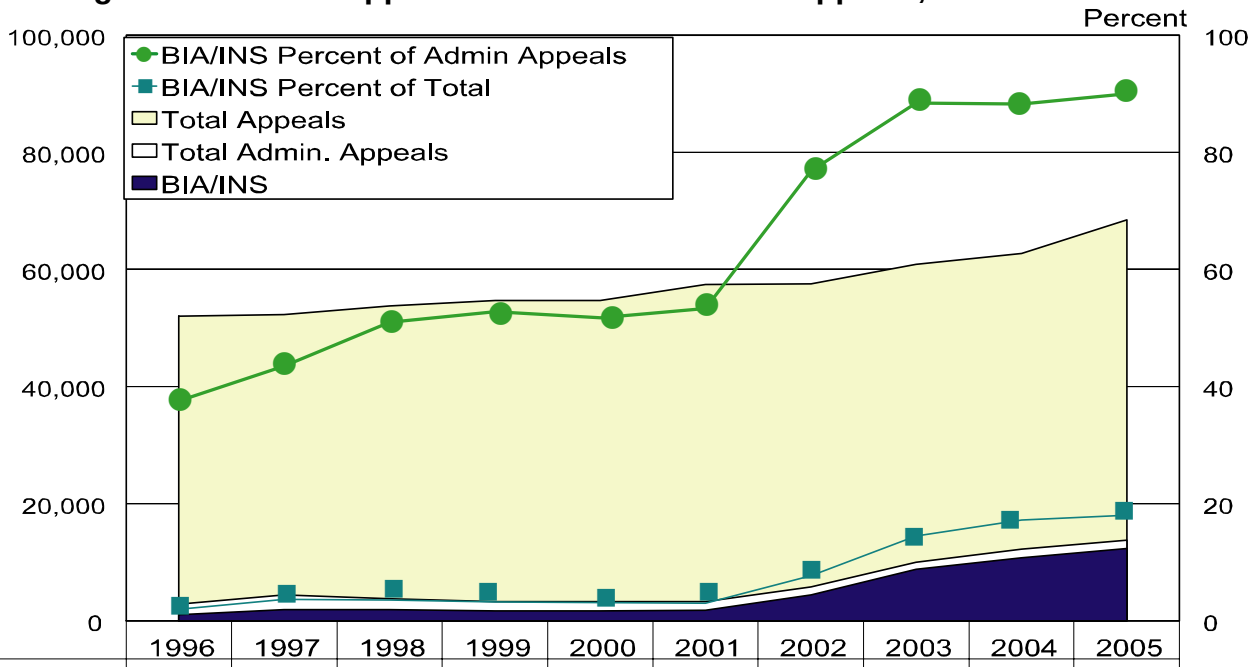
[3] In INS v. St. Cyr, 533 U.S. 289 (2001), and Calcano-Martinez v. INS, 533 U.S. 348 (2001), concerning the IIRIRA restrictions on judicial review, the Supreme Court held that there is a strong presumption in favor of judicial review of administrative actions; therefore, in the absence of a clear statement of congressional intent to repeal habeas corpus jurisdiction over removal-related matters, such review was still available after the 1996 changes. Furthermore, the Court also found that eliminating any judicial review, including habeas review, without any substitute for review of questions of law including constitutional issues, would raise serious constitutional questions. Therefore, it chose a statutory construction (habeas review was not eliminated) which would not raise serious constitutional questions.

[4] Ultimate administrative review lies with the Attorney General.

[5] 67 Fed. Reg. 54878 (2002).

Appeal and that the increase of matters in immigration courts and in the BIA cannot account entirely for the corresponding increase in the federal appellate courts.[6] The immigration appeals in the federal appellate courts account for 18% in 2005 vs. 2% in 1996, a nine-fold increase. By contrast, the immigration court caseload has only increased 40% and the BIA caseload 71% over the same period.

Figure 1. BIA/INS Appeals to the U.S. Courts of Appeals, 1996-2005

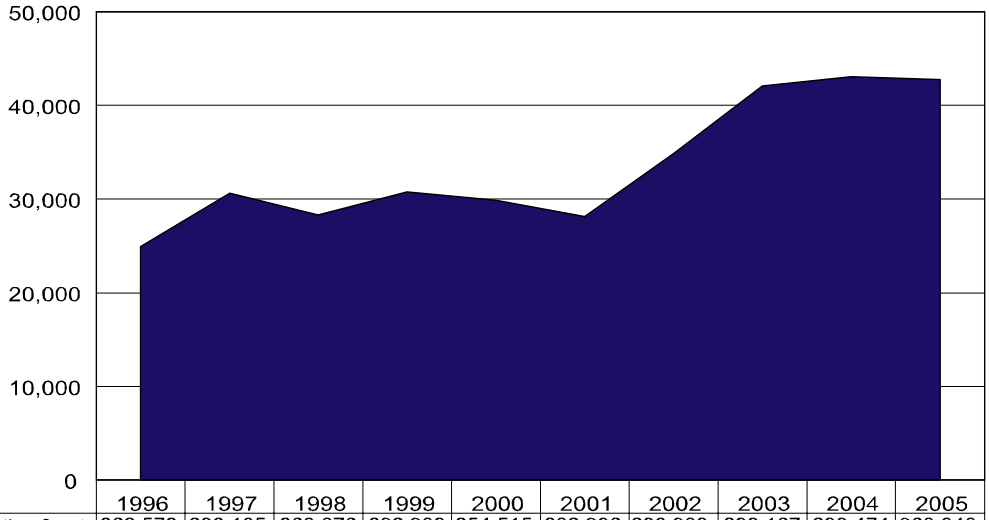


	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Total Appeals	51,991	52,319	53,805	54,693	54,697	57,464	57,555	60,847	62,762	68,473
Total Admin. Appeals	2,827	4,412	3,793	3,280	3,327	3,300	5,789	9,988	12,255	13,713
BIA/INS	1,063	1,921	1,936	1,731	1,723	1,760	4,449	8,833	10,812	12,349

Source: Administrative Office of the U.S. Courts, *Judicial Business*

[6] John R.B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions In Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1 (2005) examines this phenomenon.

Figure 2. Total Administrative Matters/Appeals Received, 1996-2005



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Immigration Court	262,572	290,105	268,876	232,389	254,515	282,396	290,389	299,167	299,474	368,848
BIA	24,919	30,626	28,320	30,759	29,847	28,148	34,834	42,043	43,075	42,734

Source: U.S. Department of Justice, Executive Office of Immigration Review, *Statistical Yearbooks.*

Other factors have also been perceived as contributing to increased litigation. The U.S. Court of Appeals for the Ninth Circuit has made holdings perceived by some as contributing to increased litigation at the administrative and judicial levels. The REAL ID Act established new statutory evidentiary standards for asylum claims to resolve inconsistent standards among the federal appellate courts and the BIA with the intent of decreasing litigation but these were not fully applied to withholding of removal.

Legislative Proposals

Several current major immigration bills contain provisions concerning immigration litigation reform, including Title V of S. 2454, the Securing America's Borders Act, introduced by Senate Majority Leader Frist on March 16, 2006; §§ 421-423 of S.Amdt. 3192 to S. 2454 (Chairman's (Senator Specter) mark reported by the Senate Judiciary Committee), proposed March 30, 2006; and §§ 421-423, 701-707 of S. 2611/S. 2612, the Comprehensive Immigration Reform Act of 2006 respectively introduced by Senator Specter and Senator Hagel on April 7, 2006 (generally known as the Hagel-Martinez compromise). H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 passed by the House of Representatives, does not contain broad litigation reform provisions, although it does contain amendments to resolve certain narrower judicial review issues. Title V of S. 2454 appears to incorporate some of the immigration litigation reduction provisions from Title VII of the initial Chairman's mark text considered in the Senate Judiciary Committee [hereinafter Chairman's mark] and some similar to those in Title VIII of H.R. 4437.[7]

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[7] Although these bills share several similar provisions, there are some differences, most of (continued...)

Consolidation of Immigration Appeals

Current Law. Judicial review of removal orders is available in the federal appellate court for the judicial circuit in which the removal proceedings were completed (Immigration and Nationality Act [INA] § 242(b)(2); 8 U.S.C. § 1252(b)(2)).[8] However, federal district courts do have a limited role. With regard to the treatment of U.S. nationality claims, if there is a genuine issue of material fact concerning whether the person appealing the removal order is a U.S. national, the federal appellate court transfers the proceeding to the federal district court in whose jurisdiction the appellant resides for a new hearing and a declaratory judgment on that issue as if brought under 28 U.S.C. § 2201 (INA § 242(b)(5)(B); 8 U.S.C. § 1252(b)(5)(B)). Judicial review of challenges to the validity of the system for expedited removal of certain inadmissible aliens under INA § 235(b)(1) (8 U.S.C. § 1225(b)(1)) lies in the District Court for the District of Columbia (INA § 242(e)(3); 8 U.S.C. § 1252(e)(3)). An appeal from the decisions described above would lie in the federal appellate court for the circuit in which the district court issuing the decision is located (28 U.S.C. §§ 1294, 1295, 2106, 2107).

Proposed Changes. Section 501 of S. 2454 would consolidate appeals regarding removal of aliens in the U.S. Court of Appeals for the Federal Circuit. It would increase the authorized number of judges on the Federal Circuit from 12 to 15 and would authorize sums necessary to implement these changes and the increased case load of the Federal Circuit for fiscal years 2007 to 2011. The effective date of these changes would be the date of enactment and they would apply to any final agency order or district court decision entered on or after the date of enactment.

This consolidation of appeals would remove pressure on the other federal appellate circuits from the dramatic increase in their caseload, largely resulting from immigration appeals[9]; it would basically add the equivalent of another 3-judge panel to the Federal Circuit. This provision would also eliminate future inconsistency among appellate circuits in interpretations of immigration law, which in the past may have increased litigation as different circuits considered an issue for the first time and as the U.S. Supreme Court may have had to resolve circuit differences. Differences among circuits also may have necessitated congressional action to clarify or establish statutory standards in response to inconsistent appellate circuit interpretations.[10]

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[7] (...continued)
which are noted below.

[8] If a district court finds that a removal order is invalid in a separate hearing before a criminal trial for refusal/failure to depart pursuant to a removal order, it shall dismiss the criminal indictment and the Federal Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days (INA § 242(b)(7)(C); 8 U.S.C. § 1252(b)(7)(C)).

[9] Administrative Office of the U.S. Courts, *Judicial Business*, 15-16 (2005).

[10] Some commentators find merit in the current system, *e.g.*, testimony of David A. Martin, Warner-Booker Distinguished Professor of International Law, University of Virginia, at the hearing before the Senate Judiciary Committee on Immigration Litigation Reduction, April
(continued...)

No similar provision is in H.R. 4437, S.Amdt. 3192, or S. 2611/S. 2612, although § 701 of the Chairman's mark was identical to § 501 of S. 2454. Several authorities were critical of the consolidation proposal,[11] leading Senator Specter, Chairman of the Senate Judiciary Committee, to exclude the entire litigation reduction Title VII from the Chairman's mark pending a hearing on judicial review of immigration matters on April 3, 2006, a week after the conclusion of the mark-up of the Chairman's Mark. It appears that upon further consideration, Senator Specter has decided to drop the consolidation provision and certain other judicial review provisions from current legislative proposals; S. 2611, which he introduced, does not contain these provisions, retaining only provision concerning reform of the Board of Immigration Appeals and the Immigration Courts.

At the hearing, Senator Specter expressed interest in a comprehensive, thorough examination of the issue of immigration review before proceeding with broad reforms.[12] Accordingly, in lieu of the judicial review provisions, § 707 of S. 2611/S. 2612 provides for a GAO study on the appellate process for immigration appeals, including a consideration of the consolidation of appeals into one U.S. Court of Appeals, whether in an existing circuit court or into a new centralized circuit court; reallocation of immigration caseloads from one circuit to another with a lower caseload; resources needed for such alternatives; case management techniques; impact on each circuit and on litigants; and the other reforms formerly in Title VII of the Chairman's mark, such as review of motions to reopen and reconsider and attorney fee awards.

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[10] (...continued)
3, 2006, written statement available at [http://judiciary.senate.gov/hearing.cfm?id=1845] and transcript available at FDCH Political Transcripts, *U.S. Senator Arlen Specter (R-PA) Holds a Hearing on Judicial Review of Immigration Matters*, April 3, 2006.

[11] *See, e.g.*, Letter to Senator Specter, Chairman of the Senate Judiciary Committee, from the Judicial Conference of the United States, March 23, 2006; Letter to Senator Frist, Senate Majority Leader, and Senator Specter, Chairman of the Senate Judiciary Committee, from the Intellectual Property Owners Association, March 23, 2006; Letters to Senator Frist, Senate Majority Leader, Senator Reid, Senate Minority Leader, and Senators Specter and Leahy, Chairman and Ranking Member, respectively, of the Senate Judiciary Committee, from the American Bar Association Section of Intellectual Property Law, March 30, 2006; and Letter to the Senate Judiciary Committee from the Harvard Immigration and Refugee Clinical Program of Harvard Law School, March 21, 2006.

[12] U.S. Senator Arlen Specter (R-PA) Holds a Hearing on Judicial Review of Immigration Matters, FDCH Political Transcripts (April 3, 2006) (available through Lexis.com).

Additional Immigration Personnel

Current Law. There is no specific directive in current authorizations or appropriations acts concerning litigation or adjudication personnel increases or restrictions for immigration-related agencies. The Intelligence Reform and Terrorism Prevention Act of 2004[13] and the Enhanced Border Security and Visa Entry Reform Act of 2002[14] appear to have been the most recent legislation to specify certain personnel increases for immigration-related agencies, but not for litigation or adjudication personnel.

Proposed Changes. Section 502 of S. 2454, § 701 of S. 2611/S. 2612, and § 702 of the Chairman's mark would mandate, for each fiscal year from 2007 to 2011, increases in the number of immigration-related litigation and adjudication personnel in the Department of Homeland Security (DHS), Department of Justice (DOJ), and the Administrative Office of the U.S. Courts to provide the personnel necessary to handle efficiently the increased caseload in administrative adjudication and judicial review. Increases in personnel would be subject to the availability of appropriations. The legislation authorizes appropriations necessary to implement the personnel increases for fiscal years 2007 to 2011 for the DHS and DOJ, but does not do so for the Administrative Office of the U.S. Courts, which would increase the number of attorneys in the Federal Defenders Program for criminal immigration defendants in the federal courts.

There is no similar provision in H.R. 4437 or S.Amdt. 3192.[15]

Board of Immigration Appeals Removal Order Authority

Current Law. "Order of removal" is not currently defined in the INA. "Order of deportation" is defined as the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation. The order becomes final upon the earlier of a determination by the Board of Immigration Appeals (BIA) affirming such order or the expiration of the deadline for appeals (INA § 101(a)(47)). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[16] substantially reformed enforcement adjudication procedures, replacing exclusion and deportation proceedings with

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[13] P.L. 108-458, §§ 5202-5203, 118 Stat. 3734.

[14] P.L. 107-173, § 101(a)(3), 116 Stat. 545.

[15] There are similar provisions in S. 1438 (Cornyn-Kyl, § 208), S. 1916 (Hagel, § 14), and S. 2377 (latest Nelson-Sessions, § 202). These latter are not identical to S. 2454 and the Chairman's mark (which appears to be a revised consensus version of the various Senate bills), since they variously would provide for increases in DHS investigative personnel, the establishment of the position of Assistant Attorney General for Immigration Enforcement to oversee immigration litigation, or different specific personnel increases, or do not provide for increases for the Administrative Office of the U.S. Courts.

[16] 110 Stat. 3009-546 (1996).

removal proceedings.[17] The absence of a definition of "order of removal" appears to have been a technical oversight.

As a separate procedural matter, the U.S. Court of Appeals for the Ninth Circuit held that the BIA must remand a case to the immigration judge for entry of an order of removal where it reversed the immigration judge's decision to not order removal.[18] In 2005, most BIA appeals were filed in the Ninth Circuit (53 percent).[19]

Proposed Changes. In response to the Ninth Circuit case law, § 503 of S. 2454 and § 703 of the Chairman's mark would amend the definition of "order of deportation" and would add a similar definition of "order of removal" to the INA to clarify that the BIA may directly enter an order of removal upon reversal of an immigration judge's decision to the contrary. This section would include the BIA in the list of those designated to enter removal/deportation orders, add the Secretary of Homeland Security as the delegating authority for removal orders, and expand the list of actions making the removal/deportation order final to include entry by the BIA and other actions. Conforming amendments would be made.

H.R. 4437 contains a similar provision, § 801. However, it would simply replace the definition of "order of deportation" with the new definition of "order of removal." This definition would apply to orders entered before, on, or after the date of enactment of the act. S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Judicial Review of Visa Revocation

Current Law. There is no judicial review (including review pursuant to 28 U.S.C. § 2241, or any other habeas corpus provision, and 28 U.S.C. §§ 1361 and 1651) of a visa revocation, except in the context of a removal proceeding if such revocation provides the sole ground for removal (INA § 221(i)).

Proposed Changes. Section 504 of S. 2454 and § 704 of the Chairman's mark would amend the current statute concerning visa revocation to clarify that, notwithstanding any other provision of law, no judicial review of such revocation is available in *any* context and that no court shall have jurisdiction to hear any claim arising from, or any challenge to, revocation, thereby facilitating efforts by the DHS to remove aliens whose incorrectly granted visas were revoked after they entered the United States.

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[17] However, litigation continues to occur with regard to deportation proceedings concluded before the effective date of the 1996 changes.

[18] See Molina-Camacho v. Ashcroft, 393 F. 3d 937 (9th Cir. 2004); Noriega-Lopez v. Ashcroft, 335 F. 3d 874 (9th Cir. 2003).

[19] Administrative Office of the U.S. Courts, *Judicial Business* 15 (2005).

H.R. 4437 contains a similar provision, § 802; however, this amendment would apply to revocations effected before, on, or after the date of enactment of the act.[20] S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Reinstatement of Removal Orders

Current Law. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed. Also, the alien is not eligible and may not apply for any relief under the INA, and the alien shall be removed under the prior order at any time after the reentry (INA § 241(a)(5)). Current law does not contain provisions specifically limiting judicial review of reinstatement of orders of removal, deportation, or exclusion (INA §242).

The U.S. Court of Appeals for the Ninth Circuit held that reinstatement of a previous order of removal against an alien who illegally reenters the United States necessitates a hearing before an immigration judge.[21]

Proposed Changes. In response to the case law in the Ninth Circuit, § 505 of S. 2454 and § 705 of the Chairman's mark would amend the current statute to clarify that, if the Secretary of Homeland Security finds that an alien has illegally reentered the United States after a prior removal or voluntary departure, then the order of removal, deportation, or exclusion may be reinstated without a hearing before an immigration judge. There would be no judicial review of the original removal order, but there could be limited review of certain factual determinations (that an alien had illegally reentered after prior removal) in individual reinstatement cases. These amendments would take effect as if enacted on April 1, 1997 (effective date of IIRIRA changes to the removal statute), and would apply to all orders reinstated on or after that date regardless of the date of the original order.

H.R. 4437 contains a similar provision, § 803; however, it would further provide for very limited judicial review under INA § 242 of the constitutionality and statutory consistency of the reinstatement statute.[22] S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

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[20] S. 1438 (Cornyn-Kyl) contains a similar provision, §205.

[21] Morales-Izquierdo v. Ashcroft, 388 F. 3d 1299 (9th Cir. 2004); this decision was subsequently vacated pending a rehearing en banc, Morales-Izquierdo v. Gonzales, 423 F. 3d 1118 (9th Cir. 2005).

[22] S. 1438 (Cornyn-Kyl, § 211) and S. 2377 (latest Nelson-Sessions, § 524) contain similar provisions.

Withholding of Removal

Current Law. The INA restricts the removal of an alien to a country where the alien's life or freedom would be threatened and provides that the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in INA § 208(b)(1)(B)(ii & iii) (INA § 241(b)(3)).

Proposed Changes. Section 506 of S. 2454 and § 706 of the Chairman's mark would amend the current statute to clarify that certain amendments made by the REAL ID Act with respect to evidentiary standards for asylum would also apply to determinations of withholding of removal, in addition to the ones already referenced. The burden of proof would be on the alien to establish that the alien's life or freedom would be threatened in the country for removal, and that race, religion, nationality, membership in a particular social group, or political opinion would be *at least one central reason* for such threat. The clarifying amendment would take effect as if enacted on May 11, 2005 (the effective date of the REAL ID Act amendments for withholding of removal).

H.R. 4437 contains a similar provision, § 804. S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Certificate of Reviewability

Current Law. No pre-screening process exists in the current provision governing judicial review of removal orders (INA § 242).

Proposed Changes. Section 507 of S. 2454 and § 707 of the Chairman's mark would amend the current statute to provide for a screening process under which an alien would submit a brief concerning a petition for judicial review within 40 days after the date on which the administrative record is available or face dismissal of the appeal; after the alien's brief is filed, the appeal would be assigned to one judge on the U.S. Court of Appeals for the Federal Circuit, who would review a case within 60 days of assignment; and a petition for review would be denied absent the issuance of a certificate of reviewability by the federal appellate judge or circuit justice. The certificate would only be granted if the petitioner establishes a prima facie case that a petition should be granted; the denial of a certificate would not be subject to further review.

H.R. 4437 contains a similar provision, § 805, but the standard for issuance of a certificate would be that the petitioner must make a substantial showing that the petition for review is likely to be granted. S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Discretionary Decisions on Motions to Reopen or Reconsider

Current Law. No similar provision is in the current statute except for one reference to the discretion of the Attorney General to waive the deadline for filing a motion to reopen (INA §240(c)).

Proposed Changes. Section 508 of S. 2454 and § 708 of the Chairman's mark would amend current law to clarify that motions to reopen or reconsider are discretionary decisions of the Attorney General and would establish a special rule for motions to reopen to provide safeguards from the removal of an alien to an alternate country not previously considered in removal proceedings. These amendments would apply to motions to reopen and reconsider that are filed on or after the date of enactment of this act in removal, deportation, or exclusion proceedings, regardless of whether a final administrative order is entered before, on, or after such date.

H.R. 4437 contains a similar provision, § 212. S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Fee/Costs Awards Bar for Judicial Review of Removal Orders

Current Law. Except as otherwise provided by statute, a judgment for costs not including the fees and expenses of attorneys, may be awarded to the prevailing party in any action brought by or against the United States. Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys to the prevailing party in any civil action brought by or against the United States (28 U.S.C. §2412).

Proposed Changes. Section 509 of S. 2454 and § 709 of the Chairman's mark would add a new subsection to current law to provide that, notwithstanding any other provision of law, a court may not award fees and expenses to an alien based on the alien's status as the prevailing party in proceedings related to a removal order unless the court of appeals finds that the determination of the Attorney General or Secretary of Homeland Security that the alien was removable was not substantially justified. This amendment would apply to proceedings related to a removal order issued on or after the date of enactment of this act, regardless of the date that such fees or expenses were incurred.

H.R. 4437 contains a similar provision, § 808, but it would only refer to determinations of the Attorney General, not the Secretary of Homeland Security, and would apply to fees or other expenses awarded on or after the date of enactment of this act. S.Amdt. 3192 and S. 2611/S. 2612 do not contain such a provision; this is one of the provisions dropped by Senator Specter, pending further study.

Waiver of Review in Nonimmigrant Visa Issuance

Current Law. There is no such provision in current law. Visa waiver program admittees only need waive this as a condition of admission to the United States without a visa pursuant to the program under INA § 217.

Proposed Changes. Section 806 of H.R. 4437 would make issuance of a nonimmigrant visa subject to a waiver by the alien of any right to review of an inadmissibility determination at a port of entry or to contest removal except for asylum claims. S. 2454, S.Amdt. 3192, and S. 2611/S. 2612 do not contain similar provisions.

Review of Discretionary Relief Denials

Current Law. Current law at INA § 242(a)(2)(B) currently restricts judicial review for denials of discretionary relief "regardless of whether the judgement, decision, or action is made in removal proceedings" and defining decision or action as being those taken by the Attorney General or Secretary of Homeland Security under authority specified under certain provisions of the INA. INA § 242(a)(2)(C) bars judicial review of removal orders against a alien removable on certain criminal grounds.

Proposed Changes. Section 807 of H.R. 4437 would clarify that bars on judicial review for individual determinations of denials of discretionary relief apply regardless of whether such determinations were made in removal proceedings and were guided by standards. It would further clarify that limits on judicial review of removal orders for criminal aliens would apply regardless of whether relief or protection from removal had been denied specifically on the basis of the alien's commission of a crime.

Executive Office of Immigration Review (EOIR)

Current Law. Procedural guidelines for EOIR, including guidelines for the Board of Immigration Appeals (BIA) and the immigration courts, are currently not expressly set out in the INA; they are set out in the regulations at 8 C.F.R. part 1003, subparts A to C, and § 1103.3 (1-1-06 Edition). In 2002, then-Attorney General Ashcroft implemented new BIA procedural reforms intended to eliminate the existing BIA backlog of cases and to provide for current efficient disposition of cases.[23] These included reducing the size of BIA, expanding single-member review of certain cases, and time limits for certain actions.

Proposed Changes. Section 510 of S. 2454, § 702 of S. 2611/S. 2612 and § 712 of the Chairman's mark contain similar provisions that would establish in statute the jurisdiction, procedures, and standards for the BIA. They would require that cases be heard by a 3-member panel, with certain exceptions permitting a single-member hearing, including summary dismissals of appeals in certain circumstances, the grant of an unopposed motion, and adjudications of certain motions to remand. Consideration or reconsideration of a case by the full BIA sitting en banc is authorized by a majority vote. The BIA may affirm cases without an opinion only in certain circumstances. Regulations shall be promulgated by the Attorney General within 180 days after the date of enactment of the act (§ 706 of S. 2611/S. 2612 and § 716 of the Chairman's mark provide that regulations shall be promulgated for the subtitle regarding administrative appeals). S. 2611/S. 2612 and the Chairman's mark

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[23] 67 Fed. Reg. 54878 (August 26, 2002).

each contain a subtitle that undertakes a more comprehensive statutory establishment and structuring of the Executive Office of Immigration Review (EOIR) than the provisions of S. 2454. This includes establishment of the composition, qualifications, appointment procedures and duties of the BIA members and Chair.

Section 703 of S. 2611/S. 2612 and § 713 of the Chairman's mark contain similar provisions concerning the qualifications, appointment procedures, and duties of immigration judges; S. 2611 contains simpler appointment guidelines. Section 704 of S. 2611/S. 2612 would provide that no immigration judge or BIA member may be removed or otherwise subject to disciplinary or adverse action for their exercise of independent judgment and discretion. Section 714 of the Chairman's mark would further provide that removal could only be for good cause by the Director of EOIR in consultation with the Chair of the BIA or the Chief Immigration Judge for the removal of a BIA member or immigration judge respectively.

Section 705 of S. 2611/S. 2612 and § 715 of the Chairman's mark would provide for the continuation of a legal orientation program for detainees and the expansion of the program to disseminate information regarding immigration court procedures nationwide.

Section 702 H.R. 1502 (Berman) includes a similar statutory establishment and structuring of EOIR, which it would rename the Immigration Review Commission. Former Representative Bill McCollum introduced similar legislation in several Congresses since the 97th Congress, most recently H.R. 185, the United States Immigration Court Act of 1999, in the 106th Congress. Various immigration authorities have advocated different proposals for restructuring the immigration courts over the years.

H.R. 4437 and S.Amdt. 3192 do not contain provisions regarding the statutory establishment of the EOIR.

Immigration Injunction Reform

Current Law. There are no provisions restricting judicially ordered injunctive relief regarding immigration actions.

Proposed Changes. The Fairness in Immigration Litigation Act of 2006, comprising §§ 421 to 423 of S. 2611/S. 2612 and S.Amdt. 3192 , would establish conditions limiting the granting of injunctive relief against the Federal Government in any civil action pertaining to the administration or enforcement of immigration laws.