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PRACTICE ADVISORY

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HOW TO CHALLENGE AN AFFIRMANCE WITHOUT OPINION BY A BIA MEMBER

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This practice advisory discusses arguments that challenge a Board of Immigration Appeals (Board or BIA) Member's use of the "affirmance without opinion" (AWO) procedure to deny an appeal. Currently, 8 C.F.R. § 3.1(a)(7) authorizes a single Board Member to summarily affirm the result of a decision by an immigration judge, without providing any reasons for the affirmance without opinion.

The Department of Justice has just issued new final regulations restructuring the entire appeal process before the Board. *See* Board of Immigration Appeals; Procedural Rules to Improve Case Management; Final Rule, 67 Fed. Reg. 54878 (August 26, 2002). **These new regulations are effective on September 25, 2002.** The new regulations retain the AWO procedure, although it has been moved to newly created 8 C.F.R. § 3.1(e)(4). The new regulations do make several changes to the current AWO procedure. This Practice Advisory will discuss the AWO process as it currently exists, but will also describe the changes that have been made by the new regulations.

The information in this advisory is accurate and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, the cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits. You should research the case law in your own circuit to insure that there is no conflicting precedent and to find additional support.

What is an affirmance without opinion (AWO)?

An AWO is a three-sentence decision by a single Board Member that affirms, without explanation, the results of the decision reached by the IJ in a case. Under the current regulation, an AWO decision is a decision on the merits of the appeal. Because it is a decision on the merits of the appeal, an AWO is different from a summary *dismissal* of

an appeal under current 8 C.F.R. § 3.1(d)(2).¹ When a case is summarily dismissed, the Board never makes a decision on the merits.

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy *all* of the required criteria, then the current regulations direct that the appeal be referred to a three-Member panel of the Board for full review and decision. 8 C.F.R. § 3.1(a)(7)(iv).

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is prohibited by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain *only* the following three sentences: "The Board affirms without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 3.1(a)(7)."²

The new regulations largely keep this process intact. The primary difference is that, under the new regulations, a case that does not satisfy the AWO criteria will most likely not be sent to a three-Member panel of the Board for review and decision. Rather, the regulations expand the power of a single Board Member by creating a new category of cases that can be decided by a single Member. 67 Fed. Reg. at 54903 creating new 8 C.F.R. § 3.1(e)(5). In this new category of cases, the single Board Member will have the authority to issue a brief order affirming, modifying, or remanding a case. Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. *Id.* Moreover, the new regulations now limit the types of cases that will be reviewed by a three-Member panel of the Board. 67 Fed. Reg. at 54903 creating new 8 C.F.R. § 3.1(e)(6). Under these new regulations, three-Member panels of the Board will truly become the exception, rather than the predominant method for deciding cases.

In recent months, the Board has accelerated its use of the AWO procedure. Thousands of these decisions have already been issued in all types of cases, including asylum appeals. An informal study of recent decisions by AILF indicates that half of the decisions issued by the Board are AWO decisions; this means that there may be over 100 AWO decisions on any given day. Under the new regulations, an even larger number of AWO decisions is likely, because the AWO process – which currently is discretionary – will be mandatory for all cases that satisfy the criteria.

Because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing *every* appeal to ensure that it meets

¹ The summary dismissal regulation has also been amended, effective September 25, 2002. See 67 Fed. Reg. 54902 revising 8 C.F.R. § 3.1(d)(2).

² After the new regulations become effective, the decision will cite the new AWO regulation, 8 C.F.R. § 3.1(e)(4).

all of the requirements for an AWO decision.³ For this reason, it is important for attorneys to monitor the decisions in their own cases and to challenge AWO decisions when it appears that an appeal did not satisfy the requirements for an AWO.

In what forum can you challenge the use of AWO?

- A. **BIA Appeal:** The safest course of action is always a preventive one. Thus, in all appeals filed with the Board you should include an argument that the AWO procedure cannot be applied to the appeal because the case does not satisfy the criteria for the use of this procedure. By demonstrating why the case is not appropriate for summary affirmance under the regulations, you may be able to prevent the Board from using this shortcut to dispose of your client's appeal. *See also* AILF's practice advisory entitled "How to Prevent the BIA Summary Dismissal of Your Appeal" (www.ailf.org/lac/2002/032202c.htm) (March 19, 2002).

It is important to include the argument with the Notice of Appeal itself, rather than saving it to include in the brief. For cases in which the Notice of Appeal is already filed, you can either supplement the Notice of Appeal or include these arguments in your brief.

Note: in appeals that are currently pending or that are filed before the effective date of the new regulations, you may also want to submit an argument that the case is appropriate for three-Member panel review under the new regulation at 8 C.F.R. § 3.1(e)(6). The new regulations apply to all cases that are pending as of the effective date. Under these regulations, three-Member panel review is limited to cases that meet certain specific criteria. *See* new 8 C.F.R. § 3.1(e)(6). The regulations specifically allow a party to submit a brief or statement in pending cases explaining why the case satisfies the new requirements for review by a three-Member panel. This brief or statement must be submitted on or before the effective date of the new regulations or with the appeal brief, whichever date is later. 8 C.F.R. § 3.3(f). Additionally, from this point on, if you wish to have a three-Member panel of the Board decide a case,

³ For example, in *Farjardo v. INS*, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"—and prejudicial—errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones.

Similarly, in the precedent case *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally—and erroneously—used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, *en banc*, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

you must explain in the Notice of Appeal (and again in the brief if you file one) why the case satisfies the criteria for such review.

- B. Motion for Reconsideration:** Note: a motion for reconsideration is *not* required prior to filing a federal court appeal of an adverse BIA decision. Additionally, the filing of a motion to reconsider *does not stay the deadline for filing a Petition for Review in the Court of Appeals*. A Petition for Review *must* be filed within 30 days of the date of the BIA’s decision – including AWO decisions – whether or not you have also filed a motion to reconsider. For procedures for filing a Petition for Review, *see* AILF’s Practice Advisory entitled “How to File a Petition For Review” (www.ailf.org/lac/2002/061002a.pdf) (June 2002).

The regulations on motions for reconsideration prohibit a motion that is based “*solely* on the argument that the case should not have been affirmed without opinion.” 8 C.F.R. § 3.2(b)(3) (emphasis added). Thus, you cannot file a motion for reconsideration to challenge the use of AWO unless there are other issues you want the Board to reconsider. For example, if you claim that the crime your client was convicted of is not an aggravated felony, you can seek reconsideration on this issue as an error of law. Additionally, you could also challenge the use of the AWO procedures by arguing, for example, that your client’s conviction is factually distinguishable from all existing precedent and therefore does not satisfy the criteria for AWO.

All motions for reconsideration must comply with the regulations, including the time (30 days) and number (usually one) limitations on such motions. *See* 8 C.F.R. § 3.2. Moreover, the same single Board Member who issued the AWO decision is allowed to adjudicate the motion to reconsider. 8 C.F.R. § 3.1(a)(1). Unfortunately, this makes reconsideration of an incorrect AWO decision less likely.

- C. Petition for Review to the Court of Appeals or Habeas Corpus Petition:** These arguments also can be used in a Petition for Review of an AWO decision or, where there is no jurisdiction for a Petition for Review in the Court of Appeals, in a habeas corpus petition in federal district court. For procedures on filing a Petition for Review, *see* AILF’s Practice Advisory entitled “How to File a Petition For Review” (www.ailf.org/lac/2002/061002a.pdf) (June 2002) . **All Petitions for Review must be filed within 30-days of the date of the BIA’s AWO decision. This 30-day deadline is jurisdictional, which means that if you miss the deadline, you cannot file it later.** INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

The argument that the AWO procedures were misapplied in your client’s case will have most force when you have reasons to object to the decision of the IJ on the merits. If a court were to find that a three-Member panel would have reached the same decision on the merits, it might also find that the use of the AWO procedure was harmless error.

What arguments can you make as to why the AWO procedure should not have been used in the case?

A. An AWO is never appropriate when there are new arguments or evidence.

A Board Member should never use the AWO process when new arguments are raised for the first time in the appeal to the Board, or when new evidence is submitted with the appeal. When it issued the current regulations, the Department of Justice's (DOJ) justified the legality of the AWO process based upon the premise that the IJ already reviewed all issues and evidence in the case. *See* Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999). The DOJ reasoned that because the IJ would have already discussed the issues and evidence, it is permissible for a Board Member to summarily affirm without further explanation. When an argument or evidence is presented for the first time to the Board, the IJ obviously could not have already discussed it. Thus, anytime a case raises new arguments/evidence in the appeal to the Board, the following argument against the AWO procedure can be made:

1. First, an agency is required to explain the reasons behind a decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1946) (calling the requirement a “fundamental rule of administrative law”); *see also Guentchev v. INS*, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a “norm of administrative law”). Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. *See, e.g., Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994) *quoting Turri v. INS*, 997 F.2d 1306, 1310 (10th Cir. 1993) (noting that Board has an obligation to “articulate a reasoned basis for its decision”); *Mousa v. INS*, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and “give careful, individualized, rational explanations for its decisions”); *Guentchev v. INS*, 77 F.3d at 1038 (citation omitted) (Board “must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted”); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a ‘comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner’s case received individualized attention’); *Vargas v. INS*, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) (“Board’s decision stands or falls on its express findings and reasoning”); *Tukhowinich v. INS*, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).
2. The three-sentence AWO decision does not contain any reasons or explanation as to why the decision was reached. In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a “right to a reasoned administrative decision.” Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64

FR 56135, 56137(1999). The DOJ's entire justification for why the AWO procedure does not violate the requirement for a "reasons statement" is that reasons for the decision are provided in the IJ's decision.

3. When an issue is raised for the first time in the appeal before the Board, the IJ will not already have considered or addressed it. If the Board were allowed to summarily affirm the IJ decision in this situation, there would not be any explanation of the agency's decision on the particular issue. For this reason, courts have implied that a summary affirmance would not be appropriate where new issues are raised before the Board. *See Maashio v. INS*, 45 F.3d 1235, 1238 (8th Cir. 1995) (upholding BIA's summary adoption of the reasoning of the IJ because no new issues were raised on appeal); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994) (upholding BIA's summary adoption of the reasoning of the IJ by distinguishing cases in which BIA was the first forum to rule on the issues).
4. Additional support for this argument can be found in decisions in which courts have required the Board to respond to all arguments that are made to it. *See, e.g., De La Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (due process requires that a decision-maker actually consider the evidence and arguments that a party presents); *Hengan v. INS*, 79 F.3d 60, 64 (7th Cir. 1996) (agencies must respond to arguments made to them); *see also Lwin v. INS*, 144 F.3d 505 (7th Cir. 1989) (Board erroneously failed to consider claim of social group for asylum).
5. Similarly, courts have ruled that the Board is required to respond to new evidence that is submitted to it.⁴ *See, e.g., Panrit v. INS*, 19 F.3d 544, 545 (10th Cir. 1994) (even under a limited abuse of discretion standard, court can review to ensure that BIA "actually considered all of the evidence cited by the petitioner"); *Cortes-Castillo v. INS*, 997 F.2d 1199, 1203 (7th Cir. 1993) (adoption of IJ decision insufficient when new evidence required a re-examination of the equities and an explanation from the Board). Even when the Board rejects the submission of new evidence, it must explain its reasons for doing so. *Ubau-Moreno v. INS*, 67 F.3d 750 (9th Cir. 1995).

B. AWO can be used only if the case satisfies all of the criteria in the regulation.

1. Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(a)(7)(ii) (after September 25, 2002, 8 C.F.R. § 3.1(e)(4)(i)).

⁴ **NOTE: under the new regulations, the board is prohibited from considering any new evidence. 67 Fed. Reg. 54903 creating new 8 C.F.R. § 3.1(d)(3)(iv).** Instead, the regulations provide that a party asserting that the Board cannot resolve a case without further factfinding must submit a motion to the Board requesting a remand to the IJ for the consideration of the new evidence. *Id.* Whether Board Members will issue AWO decisions under the new regulations when a motion to remand has been filed remains to be seen. In the interim, though, this argument remains viable in federal court appeals that are currently pending, since these appeals are all challenging the current regulatory practice.

Specifically, the case must satisfy *both* of the requirements listed in sections (a) and (b) below, *and* one of the two alternate requirements listed in section (c):

- a. the result reached by the IJ must be correct; *and*
 - b. any errors in the decision below must be harmless or nonmaterial; *and* either
 - c. (i) the issue on appeal must be squarely controlled by existing Board or federal court precedent *and* cannot involve the application of precedent to a novel fact situation; *or*

(ii) the factual and legal questions raised on appeal must be so insubstantial that three-Member Board review is not warranted.⁵
2. As an initial matter, the Board Member cannot use the AWO process if the result ordered by the IJ below was not correct. To argue that the decision below was not correct – and that AWO is therefore inappropriate in the case – you essentially will need to argue the merits of the case.
 3. Additionally, the Board Member cannot use the AWO process – even if he or she believes the result of the decision below is correct – *unless* the errors committed by the IJ were either harmless or nonmaterial ones. The regulation does not define what a “nonmaterial” error is or how such an error would differ from a harmless one.

The standard for harmless error varies somewhat in different federal circuits. You will need to determine what the standard is in your own circuit in order to make this argument. Examples of cases that discuss the harmless error issue include: *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998) (finding IJ’s refusal to allow witnesses to testify was prejudicial); *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); *Colemenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was “so clearly denied a full and fair hearing”).

Moreover, several errors – each of which alone might be harmless – can have a combined effect that is prejudicial. *See, e.g., Vargas-Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

⁵ The new regulation changes the “so insubstantial” test to a “not so substantial” test. *See* 67 Fed. Reg. at 54903 creating new 8 C.F.R. § 3.1(e)(4)(i)(B).

4. The Board Member also cannot issue an AWO decision unless one of two alternatives is established. 8 C.F.R. § 3.1(a)(7)(ii)(A) and (B) (after September 25, 2002, 8 C.F.R. § 3.1(e)(4)(i)(A) and (B)). The first of these actually contains two sub-tests, *both* of which must be satisfied. 8 C.F.R. §3.1(a)(7)(ii)(A) (after September 25, 2002, 8 C.F.R. § 3.1(e)(4)(i)(A)). First, the case must be “*squarely*” controlled by Board or federal court precedent. (Emphasis added) A case is not squarely controlled by precedent if there are differences in the factual or legal issues that require some extension of the precedent – even a minor one. For instance the respondent’s case in *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA 2002), was not squarely controlled by the Board’s earlier DWI decisions because the Massachusetts’ law involved in *Ramos* differed from the state law involved in the Board’s earlier cases.⁶ See *supra* footnote 1.

The second prong of this test allows the use of AWO only if the case does not involve the application of precedent to a novel fact situation. Thus, even in cases in which the legal issues are similar to those found in Board or federal court precedent, AWO cannot be used if there are factual distinctions that make your client’s case “novel.” In the preliminary comments to the current AWO regulation, DOJ indicated its intent that cases *not* involving a “novel” fact situation are limited to certain situations in which “legally significant facts [] fall into recognizable patterns.” 64 FR at 56140. It then cited the *Soriano* cases as examples of cases involving legally significant facts that fall into certain recognizable patterns. In these cases, because § 212(c) relief was no longer available to aliens in certain appeals pending before the Board, the factual differences in their cases were legally insignificant. The majority of cases will not be so clear-cut, however, and thus there will be room to argue that even minor variations in facts are “novel.”

5. The alternative test to that described in section 4 above, requires that all factual and legal questions be “so insubstantial” that review by a three-Member panel of the Board is not warranted. 8 C.F.R. §3.1(a)(7)(ii)(B) (after September 25, 2002, 8 C.F.R. § 3.1(e)(4)(i)(B)).⁷ Because this test is an alternative one, a Board Member could use the AWO procedure if he or she determined that the issues met the “so insubstantial” test even if the case did not satisfy the requirements in section 4, above. Thus, a Board Member might determine that the requirements of section 4 were not satisfied because there was no precedent on point and/or the facts were novel ones. Despite this, the Board Member could still use the AWO process if he or she determined that

⁶ In fact, the Board initially reopened the case because it determined that its earlier precedent was not controlling for this reason. *Ramos*, 23 I. & N. Dec. 336 (BIA 2002). Subsequently, it reopened the case a second time, and overruled the earlier precedent. *Id.*

⁷ The new regulations change this standard by requiring that the factual and legal issues be “not so substantial” as to warrant the issuance of a written opinion. 67 Fed. Reg. at 54903 creating new 8 C.F.R. § 3.1(e)(4)(i)(B).

the factual and legal issues were “so insubstantial” that three-Member panel review was not necessary.

The regulation provides no guidance about what would make a factual or legal issue so insubstantial that three-Member review would not be warranted. However, to satisfy this alternative, the regulation requires that *both* the factual *and* the legal issues be “so insubstantial.” Thus, it is important to argue the strength of both your factual and your legal issues, for if you convince the Board or the court that either one does not meet the insubstantiality test you will have demonstrated that the case does not satisfy this criteria.