

U.S. Eases Policy on Immigration Settlements

New Federal Policy Lets Immigration Appeals Go Before Board

DECEMBER 21, 2005

By Sandra Hernandez

Los Angeles Daily Journal Staff Writer

LOS ANGELES - Facing mounting criticism from federal judges across the nation, the U.S. Justice Department is moving to ease problems that arose after the Bush administration tried to streamline the Board of Immigration Appeals.

A new policy allows Justice Department attorneys leeway in deciding whether to fight or mediate immigration appeals. Previously, government attorneys had little discretion to settle cases. That triggered a staggering increase in appeals by immigrants to federal circuit courts.

In February, the department quietly began a new policy that allows government attorneys to remand cases to the Board of Immigration Appeals instead of arguing them before federal appeals courts.

So far, about 400 cases were sent back to the board for review.

"As a matter of course we are always thinking of ways to improve the system where the system is flawed, especially when a federal judge has criticized the agency," said a department official speaking on condition of anonymity. "Recognizing there are so many cases out there, litigators have been screening out cases that aren't suitable for judicial review."

The Board of Immigration Appeals oversees immigration courts and provides administrative reviews of appeals.

Three years ago Attorney General John Ashcroft unveiled a sweeping plan to streamline the agency as a way to reduce the nearly 60,000 cases stuck in the immigration courts pipeline. He promised the changes would help immigrants with real claims and weed out cases that posed security threats.

The plan to end the bottleneck, however, also reduced the board's membership from 23 to 11 members, replaced three-member review panels with a single member and required decisions to be approved or denied quickly.

The board's backlog was reduced, but a new logjam emerged in federal courts. The 9th Circuit in California and 2nd U.S. Circuit Court of Appeals in New York courts saw the largest rise - in California, from 900 in 2001 to 6,000 in 2004.

Federal judges soon began reversing the board and rebuking immigration judges for flawed decisions.

Judge Richard Posner, a conservative member of the 7th U.S. Circuit Court of Appeals in Chicago, noted that the court had overturned "a staggering 40 percent of the 136 petitions."

In a recent decision Posner said the reversals reflected "that the adjudication of these cases at the administrative level had fallen below the minimum standards of legal justice."

Department officials said the new plan is a response to federal judges' concerns but cautioned it does not signal a larger change at the agency.

"We win about 90 percent of those [appeal] cases. You can't consider the system broken if you are winning that many cases," said the department official.

Moreover, officials blamed the flood of appeals on immigrants hoping to stall their deportations. "The aliens get the delay they are looking for in those [appeal] courts," the department official said.

The department's policy change is drawing a tepid response from immigrant advocates and attorneys who say it doesn't go far enough in fixing a broken system.

"This is positive, but you still have a long way to go to ensure these cases are properly reviewed," said Lucas Guttentag, director of the national immigrants rights program at the American Civil Liberties Union in Oakland. "The problem is there are still many worthwhile cases that are needlessly being litigated because of bad [board] decisions."

Indeed, attorneys such as Judy London point to cases like that of a Colombian family who fled their homeland after the father was threatened by rebels who killed several of his co-workers. The family arrived in Los Angeles and applied for asylum in 1997. An immigration judge denied their claim in 1998. The family appealed the case to the board, which upheld the judge's decision in 2003. Facing deportation orders, the family appealed the case to the 9th Circuit. In January, the case was sent back to the board, which ultimately granted the family asylum. The decision came after the family was exhausted emotionally and financially, London said.

"Even if the law is on your side, we assume it will end up in federal court because [the board] is committing so many errors," said London, an attorney with Public Counsel who initially handled the case.

Yet some attorneys said they are encouraged by the change because government attorneys are now providing explicit grounds for the board to reconsider their earlier decisions.

Robert Jobe is among those with clients whose cases benefited from the new policy.

Government attorneys suggested the board reconsider the case of one of Jobe's clients, a Chinese woman denied asylum in 2005 despite the fact she had a birth control device inserted against her will and was threatened with sterilization.

"It's good they are remanding the cases, but obviously this should be happening at the board," said Jobe, a San Francisco based lawyer. "When the board makes a mistake like this the impoverished immigrant has to go out and hire an attorney. And we have to file a brief. And it's all for what? For the government to say, 'Oops, we got it wrong?'"

The plan also is getting mixed reviews from groups who favor tighter immigration controls.

"I don't think streamlining has been a thumping success," said Mark Krikorian, of the Center for Immigration Studies, a Washington, D.C.-based group. "

But some experts say this narrow policy change won't ease the underlying problem: The board is forced to issue fast decisions.

In 1998, the board completed 29,000 cases. By 2005, it completed 46,300.

"The 2002 streamlining system went too far," said David Martin, a law professor and former general counsel to the formerly named Immigration and Naturalization Service. "I would like to see a change in course going back to the 1999 streamlining system, and expand the membership of the board."