**25 Proposed Reforms to the Administrative Appellate Process**

**within U.S. Citizenship and Immigration Services**

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Administrative appellate relief within U.S. Citizenship and Immigration Services (USCIS) cannot be considered in a vacuum. Examining only the justice-delivery system administered by USCIS's Administrative Appeals Office, a self-styled tribunal within a component of the Department of Homeland Security, is insufficient. Rather, reform of the entire process, beginning from the initial adjudication below, through and including each step at every administrative appellate level, is required.

Here are 25 suggestions of a veteran immigration practitioner to consider:

1. Multiple legal interests are at stake in the adjudication of requests for immigration benefits. All parties with a legal interest in the outcome of the adjudication should be entitled to legal standing, i.e., the right to be heard, and the right to be represented by an attorney or accredited representative of his, her or its choice at no expense to the government.

2. The adjudicator below should have the authority to grant additional time to submit evidence or legal argument where good cause is shown in cases involving a request for additional evidence, a notice of intent to deny or a notice of intent to revoke a petition or application.

3. To affected individuals seeking an immigration benefit allowed by law, the denial of a right of administrative appeal forecloses relief unjustly, even in cases where legal error or a disregard of evidence submitted occurs in the initial adjudication. Thus, administrative appeals should be allowed for the denial of a change or extension of status and denial of adjustment of status.

4. When denying a request for immigration benefits, the adjudicator below must provide a written decision that addresses all evidence presented and all legal arguments offered. The decision so rendered must provide a degree of specificity sufficient for the administrative appellate body and the party taking the appeal to understand all factual and legal bases for the decision.

5. Decisions by the adjudicator below and by the Administrative Appeals Office shall have the name(s) of the officer(s) rendering the decision affixed to it. If for reasons of personal privacy or security, the use of personal names is not appropriate, then such decisions shall instead have affixed a number or other identifying reference (e.g., "Adjudicator 27"). This requirement is necessary so that the public and organizations such as TRAC can better understand patterns of decision(s) by particular officer(s), as is done with the Immigration Judges.

6. Preservation of the underlying status quo should be allowed during the pendency of all non-frivolous appeals. Frivolous appeals, however, may be summarily rejected by the administrative appellate body.

7. A non-frivolous petition by an entity or an application by an individual who has maintained nonimmigrant visa status and who timely files an application for a change or extension of status should automatically extend the existing nonimmigrant status (and any incidental legal rights such as employment authorization or study) during the pendency of the appeal. Without preservation of the status quo, in order to appeal an erroneous decision, the petitioner or applicant must risk that the beneficiary will incur unlawful presence under Immigration and Nationality Act § 212(a)(9). This is simply unjust and allows erroneous adjudications to go uncorrected.

8. If the requested relief is denied on appeal, the individual should be given 30 days within which to depart the United States so that the beneficiary may avoid visa voidance and the three or ten year bars.

9. Extension of the underlying status quo should also be allowed and a 30-day departure period when the adjudicator below certifies an immigration benefits request to the Administrative Appeals Office.

10. Motions to reconsider should be allowed the same 30-day period within which to submit a legal brief, as is the case with motions to reopen.

11. The Administrative Appeals Office should no longer possess authority to make *de novo* findings of fact and should only be allowed to reverse and remand where factual findings of the adjudicator below involve clear error. This is the same standard used by the Board of Immigration Appeals.

12. Only attorneys in good standing as members of a state bar or the bar of the District of Columbia may sit on the Administrative Appeals Office. Any such attorney should be subject to an appropriate set of canons of judicial ethics.

13. Administrative Appeals Office decisions may be made by a single administrative judge, but a procedure should be allowed for *en banc* AAO review.

14. A method of publishing statements of legal issues presented (redacted to remove private or otherwise confidential information) in pending AAO appeals and certifications should be established so that *amici curiae* may submit legal briefs or statements of legal interpretation to facilitate the issuance of legally correct decisions.

15. The Administrative Appeals Office should not be a policy-making body but rather solely an adjudicative appellate body rendering decisions on legal questions. Policy-making should be the exclusive authority of the USCIS Director or appropriate delegatees.

16. The USCIS Director and his delegate shall have authority to reverse or revise AAO decisions, whether the reversal be based on grounds of law or policy.

17. The Attorney General shall have authority to reverse or revise AAO decisions, the USCIS Director and his delegate on grounds of law, in keeping with the Attorney General's statutory authority to interpret the immigration laws.

18. The Administrative Appeals Office should not address a new legal issue that was not ruled upon by the adjudicator below without first providing the appellant with a reasonable opportunity to be heard.

19. The Administrative Appeals Office should adopt detailed rules of appellate procedure that are published in the Federal Register after notice and an opportunity to be heard in accordance with the Administrative Procedure Act.

20. *Ex parte* communications, whether directly or indirectly, between the Administrative Appeals Office and the adjudicator below or in the same USCIS field Office or Regional Service Center concerning the subject matter of any appeal pending before the AAO should be strictly prohibited. Violations of the ban on *ex parte* communications should subject the responsible parties to discipline including termination of employment and civil liability under the existing federal statutes.

21. Unless an AAO decision is designated as a precedent decision, it shall not bind any party but the appellant. It shall be treated the same as a Private Letter Ruling issued by the Internal Revenue Service.

22. Appeals and certifications to the Administrative Appeals Office and motions to reopen and reconsider in employment-based cases should be eligible for the USCIS Premium Processing Service. Where employment authorization is an inherent right in a family-based immigration case, were the case to be approved on appeal or motion, such cases should also be eligible for the USCIS Premium Processing Service.

23. Oral argument at the AAO should be allowed in person or by videoconference, Skype call, audio-conference or webinar. In such cases a digital recording of the oral argument shall be maintained by the AAO and all interested parties shall be permitted to receive a copy or make a transcript of the oral argument at no expense to the government.

24. Online or electronic submission of pleadings and legal briefs to the AAO should be allowed in place of or as an alternative to the submission of paper filings.

25. If the adjudicator below or the AAO, the Director, his delegate or the Attorney General, determines that a petitioner, applicant or appellant is not entitled to the particular immigration benefit sought but believes that the party may be entitled on the facts presented to another comparable or appropriate immigration benefit, the official shall be authorized to refrain from issuing a denial immediately, and may be instead authorized to hold the denial in abeyance for a reasonable time pending submission by the affected party or parties of such other comparable or appropriate immigration benefit. The purpose of this authority is to minimize the instances in which a person or entity denied relief under one category my avoid a violation of the immigration laws or attain a suitable alternative remedy while maintaining compliance with such laws.