

INTERIM MEMO FOR COMMENT

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This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

July 2, 2013

PM-602-0086

Policy Memorandum

SUBJECT: Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO)

Purpose

This policy memorandum (PM) and accompanying revisions to the Adjudicator's Field Manual (AFM) guide U.S. Citizenship and Immigration Services (USCIS) officers on the distinction between and proper use of precedent and non-precedent AAO decisions. This PM revises Subchapter 14.4 of the AFM; AFM Update AD13-07.

Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

8 CFR 103.3(c)

Background

The regulation at 8 CFR 103.3(c) provides a mechanism by which the Secretary of Homeland Security may, with the Attorney General's approval as to the lawfulness of the decisions, designate Service decisions to serve as precedents in all future proceedings involving the same issue(s). Except as modified or overruled by later precedent decisions, statutory changes, or regulatory changes, these precedent decisions are binding on various actors in the federal immigration sector in the administration of the Immigration and Nationality Act (the Act).

During the period between 1947 and 1998, the legacy Immigration and Naturalization Service (INS) published more than 370 precedent decisions in the bound volumes of the "Administrative Decisions Under Immigration and Nationality Laws of the United States."¹ Prior to the establishment of the AAO in 1983, the authority to issue precedent decisions was shared by the

¹ The frequency of precedent decision issuance has varied over the years. The legacy INS issued more than half of all precedent decisions, 190 in total, during the four-year period following the enactment of the Immigration and Nationality Act Amendments of 1965, the most complete overhaul of the Act since 1921. From 1975 to 1990, the INS issued an average of 6.6 precedent decisions per year. In more recent years, even fewer precedent AAO decisions have been issued.

INS Commissioner, the four Regional Commissioners, and the District Directors. Upon creation of the AAO, all legacy INS precedent decisions were published under the authority of the INS Commissioner and the Associate Commissioner for Examinations. In 2003, with the creation of DHS, the authority to designate precedent decisions was vested in the Secretary of Homeland Security.

Like many administrative appellate entities, the AAO issues the vast majority of its appellate decisions in the form of non-precedent decisions.² Currently, the AAO issues on average more than 1,000 non-precedent decisions per month. While USCIS strives to issue more precedent decisions to guide both officers and the public, non-precedent decisions are and will remain the predominant vehicle for resolving the majority of appeals.³

Precedent vs. non-precedent decisions.

This PM guides officers on the proper role and use of precedent and non-precedent AAO decisions.

Precedent decisions:

Pursuant to 8 CFR 103.3(c), AAO decisions may be designated by the Secretary of Homeland Security, with the Attorney General's approval as to the lawfulness of the decisions, to serve as precedents in future proceedings. Precedent decisions may announce new legal interpretations or agency policy, or may reinforce existing law and policy by demonstrating its application to a unique factual record. Like the designated decisions of the Board of Immigration Appeals (BIA) or the Attorney General, designated AAO decisions shall serve as a binding legal authority for determining later cases involving the same issue(s). Unless modified or overruled by a later statute, regulation, or precedent decision, officers and the public may rely upon and cite a designated AAO precedent decision as authority in subsequent cases involving the same issue(s).⁴

² The AAO uses the term "non-precedent" instead of "unpublished" to avoid confusion regarding the status of non-precedent decisions that are discussed in immigration periodicals or available in electronic format on government and non-government websites.

³ The AAO also reviews decisions through the certification process. See "Certification of Decisions to the Administrative Appeals Office (AAO)," PM-602-0087 (July 2, 2013). Because decisions certified to the AAO generally present unusually complex or novel issues of law or fact, the AAO carefully considers whether such issues warrant guidance through the issuance of a precedent decision. The AAO will entertain requests to re-issue a non-precedent decision as a precedent decision pursuant to 8 CFR 103.3(c), but such requests are granted sparingly.

⁴ While 8 CFR 103.3(c) provides that designated Service decisions are binding "on all *Service* employees in the administration of the Act" (emphasis added), the Department of Justice (DOJ) regulation at 8 CFR 1003.1(g) states "[s]elected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security . . . shall serve as precedents in all proceedings involving the same issue or issues." Accordingly, precedent decisions designated by the Secretary of Homeland Security are uniformly binding on various actors in the federal immigration sector.

The DHS and DOJ regulations both provide that precedent decisions may be modified or overruled by a subsequent precedent decision. *Id.* A precedent decision also may be overruled or modified by subsequent statute or regulation. See, e.g., 52 Fed. Reg. 5741 (Feb. 26, 1987) (overturning *Matter of Thompson*, 18 I&N Dec. 169 (Comm'r 1981)).

Non-precedent decisions:

Non-precedent AAO decisions apply existing law and policy to a unique factual record in an individual case. The decision is binding on the parties to the case but does not create or modify agency guidance or practice. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.⁵ Thus, non-precedent decisions do not provide a basis for applying new or alternative interpretations of law or policy. A USCIS officer may not rely upon, nor cite to, a non-precedent decision as guidance or legal authority in other decisions. A USCIS officer may, however, read a non-precedent decision for instructional value regarding the issue(s) in that same case.

On the transmittal page of non-precedent decisions, the AAO will include similar text to guide both officers and the public on the proper role and use of non-precedent decisions.

Distinguishing precedent and non-precedent decisions in practice.

Precedent decisions may be recognized and ultimately located by their unique citation format. Precedent decisions are generally designated using the phrase “Matter of,” followed by the name of the affected party, in an italicized font. All precedent decisions are collected and published in the “Administrative Decisions Under Immigration and Nationality Laws of the United States,” which is indicated as “I&N Dec.” and accompanied by volume and page number. Proper citations conclude with a parenthetical statement to indicate the office that authored the decision and the year of publication. The following are examples of proper precedent decision citations:

- *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012);
- *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791 (Comm’r 1988); and
- *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

Although non-precedent decisions are frequently discussed in immigration periodicals or on websites, such decisions are not considered “published” as that term is used at 8 CFR 103.3(c). These publications often reference non-precedent decisions by A-number or receipt, frequently in a citation format similar to an official precedent decision. To reduce confusion, effective upon issuance of this PM, AAO non-precedent decisions will clarify that the decision is not a precedent.

⁵ On issues of policy, including mixed issues of law and policy, the AAO defers to the USCIS Senior Policy Council to prescribe agency policy. On issues of law, the AAO relies upon the USCIS Office of Chief Counsel for guidance in matters of legal interpretation. If an officer nonetheless believes that a non-precedent decision appears to depart from or create new law or policy, the officer is encouraged to raise the matter through his or her chain of command. Also, officers are encouraged to consult with counsel if they have questions related to the legal requirements as stated in the decision.

Policy

USCIS officers will follow the policy stated in the AFM, as amended by this PM, in weighing the precedential value of precedent and non-precedent decisions of the AAO.

Implementation

The AFM is revised as follows:

☞ 1. Subchapter 14.4 is revised to read as follows:

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14.4 Decisions of Administrative Appellate Bodies.

(a) Administrative appellate bodies may issue precedent and non-precedent decisions. Each type of decision has a distinct role, as follows:

Precedent decisions:

Designated DHS, BIA, and Attorney General precedent decisions shall serve as binding legal authority for determining later cases involving the same issue(s). Unless modified or overruled by a later statute, regulation, or precedent decision, officers and the public may rely upon and cite a designated precedent decision as authority in subsequent cases involving the same issue(s).

Non-precedent decisions:

Non-precedent decisions apply existing law and policy to a unique factual record in an individual case. The decision is binding on the parties to the case but does not create or modify agency guidance or practice. A USCIS officer may not rely upon, nor cite to, a non-precedent decision as guidance or legal authority in other decisions. A USCIS officer may, however, read a non-precedent decision for instructional value regarding the issue(s) in that same case.

Precedent decisions may be recognized and located by their unique citation format. Precedent decisions are generally designated using the phrase “Matter of,” followed by the name of the affected party, in an italicized font. All precedent decisions are collected and published in the “Administrative Decisions Under Immigration and Nationality Laws of the United States,” which is indicated as “I&N Dec.” and accompanied by volume and page number. Proper citations conclude with a parenthetical statement to indicate the office that authored the decision and the year of publication. The following are examples of proper precedent decision citations:

- *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012);
- *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791 (Comm’r 1988); and

- *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

Although non-precedent decisions are frequently discussed in immigration periodicals or on websites, such decisions are not considered “published” as that term is used at 8 CFR 103.3(c).

(b) There are three primary administrative appellate bodies that review DHS immigration decisions:

(1) The Board of Immigration Appeals (BIA) is an appellate body within the Department of Justice. Located in Falls Church, Virginia, the BIA has the authority to designate BIA decisions as precedent. Such precedent decisions are binding on various actors in the immigration sector unless modified or overruled by the Attorney General or a Federal court.

The majority of appeals reaching the BIA involve orders of removal and decisions on applications for relief from removal. Other appellate matters within the BIA’s jurisdiction include the following: exclusion of aliens applying for admission to the United States; visa petitions to classify alien relatives for the issuance of an immigrant visa (Form I-130 or I-360 widow(er) petitions); fines imposed upon carriers for the violation of immigration laws; and motions for the reopening and reconsideration of decisions previously rendered. Certain decisions may be certified to the BIA by other immigration officials. BIA precedent decisions can be found at http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html. Section 1003.1 of 8 CFR, “Organization, jurisdiction, and powers of the Board of Immigration Appeals,” discusses the organization of the BIA and its authority.

(2) Many cases not appealable to the BIA are appealable internally to the USCIS Administrative Appeals Office (AAO). The immigration benefit types within the AAO’s jurisdiction are listed in their entirety by both subject matter and immigration form at <http://www.uscis.gov/aao>.

The AAO’s jurisdiction includes most employment-based immigrant and nonimmigrant visa petitions (Forms I-129 and I-140), immigrant petitions by alien entrepreneurs (Form I-526), applications for Temporary Protected Status (Form I-821), fiancé(e) petitions (Form I-129F), applications for waiver of ground of inadmissibility (Form I-601), applications for permission to reapply for admission after deportation (Form I-212), certain special immigrant visa petitions (Form I-360 except for Form I-360 widower appeals, which are appealable to the BIA), orphan petitions (Forms I-600/800 and I-600A/800A), T and U visa petitions (Forms I-914 and I-918), and applications to preserve residence for naturalization purposes (Form N-470).

Pursuant to 8 CFR 103.3(c), AAO decisions may be designated by the Secretary of Homeland Security, with the Attorney General’s approval as to the lawfulness of the decisions, to serve as precedents in all future proceedings involving the same issues.

Along with the designated decisions of the BIA or the Attorney General, AAO precedent decisions can be found at http://www.justice.gov/eoir/vll/intdec/ao_comm.html. The AAO may also submit decisions to the BIA for certification, which may, in turn, be designated by the BIA as a precedent decision and published.

NOTE

The AAO issues the vast majority of its appellate decisions in the form of non-precedent decisions. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. Thus, non-precedent AAO decisions do not provide a basis for changing adjudication standards. **USCIS officers may not rely upon, nor cite to, non-precedent AAO decisions as legal authority in other decisions.** Non-precedent AAO decisions carry a header or other annotation to clarify that the decision is not a precedent.

(3) The Office of the Chief Administrative Hearing Officer (OCAHO) hears cases regarding certain fines and penalties. Directives issued by the OCAHO designated with a “P” following their file number and issued in the form of memoranda and cables are binding on USCIS employees, as are other OCAHO policy materials.

☞ 2. The AFM Transmittal Memoranda table is updated as follows:

AD13-07 7/2/2013	Subchapter 14.4	Guides USCIS officers on the distinction between and proper use of precedent and non-precedent AAO decisions
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Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.