

## PREFACE

This manual is written in large part as a result of developments over the past 12 years—the enactment in 1996 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). Since then, litigating immigration cases has become more prevalent for the following reasons: The Immigration Service (formerly INS, now DHS) has become dysfunctional. There are unjustifiable delays in the adjudication of applications. The positions taken by the government are often unjustifiable. And the actions taken by DHS have become more harmful to people living in the United States (including U.S. citizen and permanent resident families).

So the need for litigation has increased; yet in many ways, litigating immigration cases has become more difficult, in light of statutory provisions purporting to restrict or eliminate judicial review. It is in response to the latter developments that this manual is written.

In 1992, Lory Rosenberg authored *The Fair Hearings Pleadings Manual*, and in 2001, Charles Kuck and Lynn Calder produced *AILA's Immigration Litigation Toolbox*. These manuals provide very helpful sample pleadings that can be used in immigration cases. They do not, however, address the threshold questions of how to get into federal court—that is, when and where resort to the federal courts is appropriate. That is where this book comes in. These are the questions of exhaustion of administrative remedies (when can a lawsuit be filed) and federal court jurisdiction (where should the complaint be filed). In light of the amendments made by AEDPA and IIRAIRA, these issues have become increasingly important and increasingly complex. Even if there is no substantial justification for the government's underlying conduct, government attorneys typically and aggressively pursue motions to dismiss for failure to exhaust administrative remedies and for lack of jurisdiction. This manual attempts to provide some guidance in responding to these motions.

In addition, this newly revised and expanded Second Edition attempts to provide an overview of some important administrative law principles that have recently become very important in immigration cases. The government often relies on the principle of *Chevron* deference in arguing that courts should not interfere with the agency's decisions. A more recent development is the Board of Immigration Appeals's (BIA) invocation of *Brand-X* in refusing to comply with circuit court case law. And there are important administrative law issues concerning whether and to what extent an agency can apply new rules retroactively. In spite of the arguments sometimes made by the government, administrative agencies (including DHS and the BIA) do not have generally unreviewable powers and are not entitled to any sort of "super-deference." Under general administrative law principles, courts must review agency decisions to ensure that agency action is in accordance with the law, and this has important implications in immigration cases.

You will find this manual helpful in establishing that, in spite of the arguments made by administrative agencies to the contrary, our federal courts still maintain the authority to oversee and correct unlawful government conduct.

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