DEPARTMENT OF JUSTICE

8 CFR Parts 1, 3, 103, 208, 212, 242, and 246

[EOIR No. 102F; AG Order No. 2020–96]

RIN 1125–AA01

Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule streamlines motions and appeals practice before the Board of Immigration Appeals (''Board''), and establishes a centralized procedure for filing notices of appeal, fees, fee waiver requests, and briefs directly with the Board. The rule establishes time and number limitations on motions to reconsider and on motions to reopen and makes certain changes to appellate procedures, in great measure, to reflect the statutory directives of section 545 of the Immigration Act of 1990. The new 30-day period for filing appeals and the provisions for filing appeals directly with the Board apply to Immigration Judge decisions issued on or after the effective date of the final rule.

EFFECTIVE DATE: July 1, 1996.

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SUPPLEMENTARY INFORMATION: Under the final rule, parties will have the opportunity to file only one motion to reopen and one motion to reconsider during the administrative adjudication process. In most instances, the motion to reopen must be filed not later than 90 days after the date on which the final administrative decision was rendered or on or before September 30, 1996, whichever is later. Generally, a motion to reconsider must be filed not later than 30 days after the date on which the final administrative decision was rendered on or before July 31, 1996 whichever is later. The rule also provides that a notice of appeal will be timely if filed within 30 days of the issuance of an Immigration Judge's decision. The Department notes that the new 30-day period for filing appeals and the provisions for filing appeals directly with the Board apply to Immigration Judge decisions issued on or after the effective date of the final rule. Therefore, the old regulation's 10-day period (13 days if the appeal is mailed) for filing appeals and provisions for filing appeals with the Immigration Courts apply to Immigration Judge decisions issued before the effective date of this rule.

The rule outlines the required content of motions and notices of appeal, and requires parties to file or remit directly with the Board of Immigration Appeals (''Board''): (1) All motions to reopen and motions to reconsider decisions of the Board pertaining to proceedings before Immigration Judges; (2) all notices of appeals of decisions of Immigration Judges; and (3) all relevant fees or fee waiver requests. Furthermore, the rule addresses the definition of the term ''lawfully admitted for permanent residence,'' the procedure for certifying a case to the Board, and appeals of in absentia decisions. The Department notes that the field sites of the Executive Office for Immigration Review (''EOIR''), formerly referred to as the Offices of the Immigration Judges, are now called Immigration Courts.

The Department of Justice has published a number of proposed rules addressing both the motion practice and the appeals process before the Board. Most recently, the Department published a proposed rule regarding these procedures in May 1995 that incorporated and expanded proposed rules published in May and June 1994. 60 FR 24573 (May 9, 1995); 59 FR 29386 (June 7, 1994); 59 FR 24977 (May 13, 1994).

In response to the above rulemakings, the Department received 71 comments. The comments addressed a number of issues, including the definition of the term ''lawfully admitted for permanent residence,'' the time and number limitations on motions to reopen and reconsider, the availability of an appeal where an order has been entered in absentia (particularly in exclusion proceedings), the streamlined appeals procedure, and the construction of briefing schedules for both motions and appeals.

The Department has carefully considered and evaluated the issues raised by the commenters and has modified the rule considerably. The following sections summarize the comments, set forth the responses of the Department of Justice, and explain the final provisions adopted. We note that a number of technical corrections were made to the proposed rule. These corrections include the addition of 8 U.S.C. 1282, 31 U.S.C. 9701 and 8 CFR part 2 to the authority citation for Part 208 and the addition of 8 U.S.C. 1252a to the authority citation for Part 242.

(1) Definition of Lawful Permanent Resident—Section 1.1(p)

Comment: Some commenters objected that the definition of the term ''lawfully admitted for permanent residence'' in section 1.1(p) provides that lawful permanent resident status terminates upon the entry of a final administrative order of exclusion or deportation. They argued that lawful permanent resident status is not deemed to be terminated during the pendency of petitions for review, motions to reopen and/or reconsider, and habeas corpus proceedings, citing cases in the United States Courts of Appeal for the Ninth and Second Circuits. *Butros* v. *INS,* 990 F.2d 1142 (9th Cir. 1993); *Vargas* v. *INS,* 938 F.2d 358 (2d Cir. 1991). In those cases, the courts held that under the regulations regarding motions to reopen, lawful permanent resident status could not be terminated prior to the alien's actual physical departure from the United States.

Response and Disposition: After careful consideration, the Department has decided to retain the regulation as previously proposed. The finding that lawful permanent resident status terminates upon the entry of a final administrative order of exclusion or deportation was established by the Board in *Matter of Lok,* 18 I&N Dec. 101 (BIA 1981). The *Lok* rule has been upheld by courts of appeals in at least four circuits and provides finality in immigration proceedings. *See Jaramillo* v. *INS,* 1 F.3d 1149 (11th Cir. 1993); *Katsis* v. *INS,* 997 F.2d 1067 (3d Cir. 1993), *cert denied,* 114 S.Ct. 902 (1994); *Variamparambil* v. *INS,* 831 F.2d 1362 (7th Cir. 1987); *Rivera* v. *INS,* 810 F.2d 540 (5th Cir. 1987). In addition, the Ninth Circuit recently held that where deportability is not contested, lawful permanent resident status for purposes of an application for a waiver under section 212(c) of the Immigration and Nationality Act (''Act'') terminates upon the entry of an administratively final order of exclusion or deportation. *Foroughi* v. *INS,* 60 F.3d 510 (9th Cir. 1995).

The decisions in *Butros* and *Vargas* were tied closely to the former regulations regarding motions. In *Butros,* the court emphasized that the former section 3.2 was written very broadly and concluded that since the only expressed barrier to reopening or reconsideration contained in the regulation was actual departure from the United States, the Board could not by decision limit the right to reopening. However, the court specifically provided that the ''Board could, no doubt, alter this regulation'' to allow

further restrictions. 990 F.2d. at 1144. In *Vargas,* the Second Circuit also found that the former regulations preserved an alien's right to move for reopening until the occurrence of physical deportation. The court reasoned that, although the Board's decision in *Lok* prevented reopening by an alien who had not accrued the required seven years prior to a final administrative order of deportation, the Second Circuit would not allow the Board, through the denial of a motion, to extend the *Lok* rationale to terminate an alien's previously existing eligibility for section 212(c) relief. 938 F.2d at 361. This final rule addresses the ambiguity of the regulatory language noted in the Second and Ninth Circuit decisions by establishing clear limits on the ability to file a motion to reopen and the concomitant effect on the alien's status as a lawful permanent resident. The definition at section 1.1 will be applied nationwide, which will promote the goal of uniform application of the immigration laws.

Sections 3.2(c)(1) and 3.23(b)(4) are further amended to clarify that, notwithstanding the provisions of section 1.1(p) of this chapter, if an alien accrues the seven years of lawful unrelinquished domicile necessary for eligibility for a waiver under section 212(c) of the Act prior to the entry of an administratively final order of exclusion or deportation, he or she may file a motion to reopen for consideration or further consideration of such an application. An alien may not accrue time toward the seven years of lawful unrelinquished domicile required for section 212(c) purposes after the entry of a final administrative order of exclusion or deportation.

(2) Motions To Reopen—Sections 3.2 and 3.23

Comment: Commenters noted that motions to reopen can serve any of three fundamental purposes: (i) to provide an opportunity to bring new evidence to light; (ii) to allow parties to avail themselves of recent changes in the law; and (iii) to provide an opportunity for an applicant to seek additional relief that was not previously available. Given those purposes, commenters objected to the rule's time and number limitations on motions to reopen.

The May 1995 proposed rule expanded the filing period for motions to reopen from 20 days to 90 days. Commenters stated that this period was insufficient to fulfill the purposes of motions to reopen as set forth above. Commenters advocated either the elimination of any defined filing period for motions to reopen or further expansion of the filing period. In support of this position, they cited to a study conducted by the Attorney General in 1991 (''AG Study''), *see* summary at 68 INTERPRETER RELEASES No. 27 at 907 (July 22, 1991), which concluded that there was no abuse of the motions process. From this conclusion, commenters disputed the necessity for any reform of the motions process. A number of commenters alternatively requested that a ''good cause'' exception to the time and number limitations be added to the new provisions concerning motions to reopen.

Some commenters requested clearer language in section 3.2(c)(4) regarding the motions to reopen and motions to remand provision. Particularly, commenters were concerned that the rule required, rather than permitted, the Board to remand a motion to reopen to an Immigration Judge or a Service Officer when an appeal had already been filed. Commenters advocated a rule that would expressly state that the Board had discretion to render a decision on a motion to reopen without remanding the motion.

Response and Disposition: After careful consideration, the Department has decided to retain both the time and the number limitations applicable to motions to reopen. The provision instituting motions reform is statutorily required. The Immigration Act of 1990, Pub. L. No. 101–649, 104 stat. 4978 (1990), states that ''the Attorney General shall issue regulations with respect to * * * the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations shall include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.'' Immigration Act of 1990 at § 545(d), 104 stat. at 5066. The Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. (1990) (''Conference Report''), explained this provision as follows: ''Unless the Attorney General finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider.'' H.R. Conf. Rep. No. 955 at 133.

Some commenters argued that the Conference Report suggested that the Attorney General has discretion to not promulgate the regulations if she ''finds reasonable evidence to the contrary.'' However, the Department of Justice believes that the statutory directive to promulgate regulations limiting motions to reopen is mandatory. The Attorney General is only given discretion to determine the number of motions and the length of time to file such motions. It does not give the Attorney General discretion to determine whether to promulgate a rule putting limitations on motions.

Moreover, in a recent case, the Supreme Court noted that the Immigration Act of 1990, which amended the Act, demonstrated a congressional intent to ''expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions.'' *Stone* v. *INS*, 115 S.Ct. 1537, 1546 (1995). Justice Kennedy, writing for the majority, stated:

> Congress' intent in adopting and then amending the Act was to expedite both the initiation and the completion of the judicial review process. * * * [A] principal purpose of the 1990 amendments to the Act was to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions. In the Immigration Act of 1990, Congress * * * [f]irst * * * *directed* the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file. § 545(b). Second, it *instructed* the Attorney General to promulgate regulations specifying the maximum time period for the filing of those motions, hinting that a 20-day period would be appropriate.
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> *Stone* v. *INS*, 115 S.Ct. at 1546 (emphasis supplied).

Although the AG Study concluded that there was not significant abuse of the process, Congress has neither rescinded or amended its mandate to limit the number and time frames of motions. Therefore, the Attorney General's obligation to comply with Congress' statutory directive is unaffected by the conclusions of the AG Study.

Prior to the final rulemaking, provisions concerning a time limit for filing motions to reopen were published twice in proposed form. *See* 60 FR 24573 (May 9, 1995) and 59 FR 29386 (June 7, 1994). Consonant with the Conference Report, the first proposed rule provided for a 20-day time frame to file a motion. The Department received considerable comment regarding the 1994 proposed rule. In response to the arguments raised by the commenters, the May 1995 proposed rule provided for an expanded 90-day time frame to file motions to reopen. The Department received considerable comment in response to the May 1995 proposed rule, with many commenters arguing that even the 90-day time frame was

inadequate for the reasons previously stated.

After carefully weighing all of the comments, the Department has decided to retain the amount of time to file a motion to reopen at 90 days as provided in the May 1995 proposed rule. The 90-day time period represents a considerable extension beyond the 20 days suggested in the Conference Report. A time frame of 90 days for filing motions to reopen will provide parties an opportunity to avail themselves of changed law, facts, and circumstances. By setting a time limitation and retaining the one motion limitation, the rule is consistent with section 545 of the Immigration Act of 1990 and the directions of the Conference Report. The 90-day time period also conforms to the period provided in section 106(a) of the Act for filing a petition for review in federal court from a final order of deportation (except, of course, for aliens convicted of an aggravated felony who are limited to 30 days in which to file a petition for review). Therefore, the 90-day period is likely to promote consolidation of petitions for review of final orders of deportation and motions, thereby increasing judicial efficiency.

The Department does not agree with the commenters' suggestions that a ''good cause exception'' would be an appropriate procedural mechanism for addressing exceptional cases that fall beyond this rule's time and number limitations. Instead, section 3.2(a) of the rule provides a mechanism that allows the Board to reopen or reconsider *sua sponte* and provides a procedural vehicle for the consideration of cases with exceptional circumstances.

The final rule corrects a technical error found in the May 1995 proposed rule regarding stays of deportation. In that proposed rule, section 3.2(f) indicated that except where a motion is filed pursuant to the provisions of section 3.23(b)(5), the filing of a motion to reopen shall not stay the execution of any decision. This language is identical to that found in the prior June 1994 proposed rule. However, because of renumbering in the May 1995 proposed rule, section 3.2(f) should have referenced section 3.23(b)(6), not section 3.23(b)(5) to remain consistent. This oversight has been corrected although the section numbering has again changed. The correct cross reference in the final rule has become section 3.23(b)(4)(iii).

The Department has clarified the language of section 3.2(c)(4) by replacing the word ''shall'' in the May 1995 proposed regulation with the word ''may'' in the final rule. This language expressly recognizes the Board's discretion to decide whether to treat a motion to reopen as a motion to remand when it is filed at specified procedural junctures, i.e., at the time of the filing of an appeal or during the pendency of such an appeal but prior to a final Board decision. In such instances, motions to remand are not subject to the time and number limitations on motions to reopen and motions to reconsider as they occur before the entry of a final administrative decision. For that reason, the final rule drops the technically incorrect time and number limitation language that appeared in the proposed rule. However, this provision does not limit the Board's discretion to resolve a case without remanding it.

In order to provide more consistency and uniformity in appellate procedures, section 3.2(g)(3), regarding the motions briefing schedule, has been changed to provide the opposing party 13 days from the date of service of the motion to file a brief in opposition to a motion, regardless of whether the motion is before the Board or the Service.

(3) Motions To Reconsider—Sections 3.2 and 3.23

Comment: A number of commenters objected to section 3.2(b) of the May 1995 proposed rule, which allowed a petitioner to file only one motion to reconsider within 30 days of the final administrative decision, as unduly restrictive. The proposed 30-day filing period was increased from the 20-day filing period of the June 1994 proposed rule. However, commenters stated that even the 30-day time limit would work a hardship on litigants, particularly pro se litigants. Furthermore, they stated that the time limit might cut off meritorious claims. Some commenters found the 30-day time limit adequate.

Some commenters argued that the AG Study supported the contention that reform of the immigration motions process is unnecessary. They also disputed that motion reform was mandated by the Immigration Act of 1990.

Response and Disposition: The final rule retains the proposed rule's provisions regarding the time and number limitations on motions to reconsider. The Department believes that these provisions afford parties a sufficient opportunity to seek reexamination of certain issues and also respond to the mandates of the Immigration Act of 1990 to impose time and number limitations on motions.

The purpose of a motion to reconsider a decision is to provide an opportunity to reexamine the facts or to correct an error of law. The time limitation ensures that such reexamination occurs before the facts surrounding the decision become stale. The Department believes that the 30-day time frame is an appropriate time period to meet those goals. Furthermore, it provides parties a sufficient amount of time to draft and file the motion and is consistent with the 30-day time frame for filing a notice of appeal. To make it clearer and more accessible to the parties, section 3.23 has been reorganized.

(4) New Appeal Filing Procedures—Sections 3.3, 3.8, 3.38, 242.21 and 246.7

Comment: The vast majority of the commenters applauded the proposal to streamline and centralize the appeal process. They were particularly pleased that the notice of appeal and the fees/fee waiver requests would be filed directly with the Board. However, commenters were concerned that the requirement to provide a detailed statement of the reasons for appeal in the notice of appeal essentially required an appellant to argue his or her case prematurely. They suggested that this requirement would be particularly burdensome to pro se and non-English speaking appellants.

Commenters objected to the proposed time frames for filing notices of appeal. Specifically, they stated that a period of 15 calendar days from the issuance of an Immigration Judge's decision, where the decision is rendered orally, and 20 calendar days from the mailing of an Immigration Judge's decision, where a written decision is served by mail, was too little time, particularly in light of the notice of appeal's detailed statement requirement and delays in the mail service.

Commenters further argued that the appeals briefing schedule provision, which accords non-detained aliens 30 days to file a brief and detained aliens 14 days to file a brief, was inequitable and fundamentally unfair because it treated two classes of appellants differently. They also noted that the rule created a particular hardship for detained appellants who, because of the fact of their detention, have difficulty meeting filing deadlines. The commenters were further concerned that the rule could be understood to require parties to file briefs prior to receipt of the transcript.

Response and Disposition: The final rule retains the provisions that streamline and centralize the appeals process. As outlined in the proposed rule and republished in the final rule, the new appeals system requires parties to file all notices of appeal of decisions of Immigration Judges and all fee-related documents directly with the Board. The

final rule has been amended to provide that a notice of appeal must be filed within 30 calendar days after the mailing of an Immigration Judge's written decision or within 30 days of the stating of an Immigration Judge's oral decision. The time frame has been increased in order to address concerns raised both by the circuit courts of appeals and the commenters regarding the sufficiency of time to initiate the appellate process. In keeping with the Department's goal of streamlining the appeals process, the rule provides a uniform filing process, whether the Immigration Judge's decision was rendered orally or was written and served by mail.

The new process addresses concerns, identified by the Ninth Circuit, about both the prior 10-day filing time period for appeals and the requirement that parties remit the fee in one forum and file the notice of appeal in another. *See Gonzales-Julio* v. *INS,* 34 F. 3d 820 (9th Cir. 1994); *Vlaicu* v. *INS,* 998 F. 2d 758 (9th Cir. 1993). This final rule responds to those concerns by expanding the filing time for appeal to 30 days and by requiring that the notice of appeal and the fee be filed at the same place and time.

Additionally, the final rule makes uniform the briefing schedule for both detained and non-detained appellants. Although the proposed rule never anticipated requiring parties to submit a brief prior to transcript availability in those cases which are transcribed, the final rule contains clarifying language to that effect.

The Department has retained the requirement that parties specifically identify their reasons for appeal on the notice of appeal. The Board has repeatedly found this statement provides meaningful information that aids the Board's review of the cases. *Matter of Valencia,* 19 I&N Dec. 354 (BIA 1986); *Matter of Holguin,* 13 I&N Dec. 423 (BIA 1969). Furthermore, the statement requirement has been consistently upheld by the circuit courts. *Soriano* v. *INS,* 45 F.3d 287 (8th Cir. 1995); *Nazakat* v. *INS,* 981 F.2d 1146 (10th Cir. 1992); *Toquero* v. *INS,* 956 F.2d 193 (9th Cir. 1992); *Lozada* v. *INS,* 857 F.2d 10 (1st Cir. 1988); *Bonne-Annee* v. *INS,* 810 F.2d 1077 (11th Cir. 1987); *Townsend* v. *INS,* 799 F.2d 179 (5th Cir. 1986).

A new paragraph ''(e)'' has been added to section 3.38 to inform aliens that they are required to notify the Board within five working days of any changes of address or telephone number and to inform the aliens' representatives that changes in a representative's business mailing address or telephone number also should be submitted to the Board. The change of address and telephone number notification requirement mirrors the reporting requirements in section 3.15 relating to proceedings before Immigration Judges. Additionally, the Department will issue a new Appeal Fee Waiver Request Form (EOIR–26A) in conjunction with the enactment of this final rule. Parties unable to pay the fee fixed for an appeal will be required to file this form with their notice of appeal. The Department notes that this constitutes a change from the Board's past practice of accepting in pauperis affidavits and other informal requests to waive fees. The new Appeal Fee Waiver Request (Form EOIR–26A) will provide a uniform mechanism for requesting the Board to waive an appeal fee.

(5) In Absentia Hearings—Sections 3.1, 3.23 and 242.21

Comments: Commenters correctly asserted that section 242B(c) of the Act regarding in absentia hearings applies only to deportation proceedings. Therefore, they argued, a provision disallowing appeals from orders of exclusion entered in absentia lacks statutory authority. Commenters noted that the statute does not authorize in absentia exclusion hearings and advocated the withdrawal of the provision that provides for such hearings.

One commenter suggested that the in absentia hearing provisions in section 242B restrict only motions to reopen and judicial review and do not bar the timely filing of a notice of appeal on the merits of the case where a respondent receives notification of the in absentia order prior to expiration of the time to file an appeal. The commenter advocated allowing direct appeals under such circumstances.

Commenters also objected to section 3.23(b)(4)(iii), formerly section 3.23(b)(6), which specifies under what circumstances an order of deportation entered in absentia may be rescinded. They noted that the rule makes no provision for rescission of an order of exclusion entered in absentia.

Response and Disposition: With regard to in absentia hearings under section 242B(c) of the Act, the commenters are correct that the statute only applies to deportation hearings and does not apply to in absentia exclusion hearings and, further, that appeals from orders entered following such exclusion hearings should be allowed. Therefore, the provision in section 3.1(b)(1) of the proposed regulation that stated that ''no appeal shall lie from an order of exclusion entered in absentia'' has been removed. An appeal from an order of exclusion entered in absentia is permissible but must be filed within the time limit for appeals set by section 3.38(b).

Further, an alien may file a motion to reopen exclusion proceedings to rescind an order of exclusion entered in absentia. Such a motion must be supported by evidence that the alien had reasonable cause for his failure to appear at the exclusion hearing. This provision is consistent with the Board's decision in *Matter of Haim,* 19 I&N Dec. 641 (BIA 1988).

The rule retains the provision prohibiting an appeal to the Board from an Immigration Judge's order of deportation entered in absentia. Congress restricted review of deportation orders entered in absentia in section 242B of the Act by providing that such orders may only be rescinded by filing a motion to reopen with the Immigration Judge. *See* section 242B(c)(1) of the Act; *Matter of Gonzalez-Lopez,* Interim Decision #3198 (BIA 1993). Further, the Board has confirmed that sections 3.1(b) and 3.3 allow an alien to appeal to the Board from an Immigration Judge's denial of such a motion to reopen an in absentia decision. *Matter of Gonzales-Lopez* at 4.

In addition to restricting the manner in which an in absentia order of deportation may be rescinded, Congress delayed eligibility for most forms of relief from deportation for an alien against whom a final order of deportation is entered in absentia. *See* section 242B(e) of the Act. Specifically, where the alien fails to demonstrate improper notice or exceptional circumstances for failing to appear, the alien must wait until five years after the final order of deportation to apply for relief such as voluntary departure, suspension of deportation, or adjustment of status. Accordingly, the Department has determined that a bar against direct appeals from an in absentia deportation order of an Immigration Judge to the Board is consistent with the restrictive action Congress has taken towards such in absentia orders.

The Department considered the commenters' request for an appeal to the Board on the merits of a deportation case in which an in absentia order has been entered. However, we note that there exists the opportunity for review of such an order in the federal courts. Section 106 of the Act provides for judicial review of final orders of deportation including those entered in absentia. Specifically, section 242(B)(c)(4) allows for judicial review of an order entered in absentia under

section 242B, regarding the validity of the notice provided to the alien, the reasons for the alien's failure to appear, and the question of whether the Service demonstrated deportability by clear, convincing, and unequivocal evidence. Further, section 106(a)(5) of the Act allows for the direct de novo review of a final administrative order of deportation in federal district court, including one entered in absentia, where the alien makes a non-frivolous claim to be a national of the United States. In sum, given Congress' restrictive stance in section 242B of the Act regarding review of orders of deportation entered in absentia and in light of the fact that avenues still exist for review in federal court of such orders, the Department has retained the bar on direct appeals to the Board from an Immigration Judge's order of deportation entered in abstentia.

This regulation has been drafted and reviewed in accordance with Executive Order 12866, section 1(b). The Attorney General has determined that this rule is not a significant regulatory action under Executive Order 12866, section 3(f), and, accordingly, this rule has not been reviewed by the Office of Management and Budget.

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects

8 CFR Part 1

Administrative practice and procedure, Immigration.

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and record keeping requirements, Surety bonds.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and record keeping requirements.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and record keeping requirements.

8 CFR Part 242

Administrative practice and procedure, Aliens.

8 CFR Part 246

Administrative practice and procedure, Aliens, Immigration.

Accordingly, Chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 1—DEFINITIONS

1. The authority citation for part 1 continues to read as follows:

Authority: 66 Stat. 173; 8 U.S.C. 1101; 28 U.S.C. 509, 510; 5 U.S.C. 301.

2. Section 1.1 is amended by adding a new paragraph (p) to read as follows:

§ 1.1 Definitions.

* * * * *

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

3. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

4. Section 3.1 is amended by revising paragraphs (b)(1), (b)(2), and (c) to read as follows:

§ 3.1 General authorities.

* * * * *

(b) * * *

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter.

(2) Decisions of Immigration Judges in deportation cases, as provided in part 242 of this chapter, except that no appeal shall lie from an order of deportation entered in absentia. No appeal shall lie from an order of an Immigration Judge under § 244.1 of this chapter granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

* * * * *

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 3.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

* * * * *

5. Section 3.2 is revised to read as follows:

§ 3.2 Reopening or reconsideration.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

(b) *Motion to reconsider.* (1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, shall be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion, which shall be consolidated with and considered by the Board in connection with any appeal to the Board, is subject to the time and numerical limitations of paragraph (b)(2) of this section.

(2) A motion to reconsider a decision must be filed with the Board within 30

days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen proceedings (whether before the Board or the Immigration Judge) and that motion must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later.

(3) The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 3.23(b)(4)(iii);

(ii) To apply or reapply for asylum, or withholding of deportation, based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the former hearing; or

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) *Departure or deportation.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation of a person who is the subject of deportation or exclusion proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the deportation or exclusion order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which a deportation or exclusion order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under section 242(e) of the Act (8 U.S.C. 1252(e)), and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of § 3.23(b)(4)(iii), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) *Filing procedures.* (1) *English language, entry of appearance, and proof of service requirements.* A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27) must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments.

(2) *Distribution of motion papers.* (i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its

discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) *Oral argument.* A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

6. Section 3.3 is revised to read as follows:

§ 3.3 Notice of appeal.

(a) *Filing.* (1) *Appeal from decision of an Immigration Judge.* A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of an Immigration Judge shall be given notice of his or her right to appeal. An appeal from a decision of an Immigration Judge shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) directly with the Board, within the time specified in the governing sections of this chapter. The appealing parties are only those parties who are covered by the decision of an Immigration Judge and who are specifically named on the Notice of Appeal. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. If the respondent/applicant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27) must be filed with the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. The appeal and all attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A notice of appeal may not be filed by any party who has waived appeal pursuant to § 3.39.

(2) *Appeal from decision of a Service officer.* A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of a Service officer shall be given notice of his or her right to appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR–29) directly with the office of the Service having administrative control over the record of proceeding within the time specified in the governing sections of this chapter. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8 and, if the appellant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27). The appeal and all attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed until its receipt at the appropriate office of the Service, together with all required documents and fees, and the fee provisions of § 3.8 are satisfied.

(b) *Statement of the basis of appeal.* The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 3.1(d)(1–a)(i). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. The appellant must also indicate in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) whether he or she desires oral argument before the Board and whether he or she will be filing a separate written brief or statement in support of the appeal.

(c) *Briefs.* (1) *Appeal from decision of an Immigration Judge.* Briefs in support of or in opposition to an appeal from a decision of an Immigration Judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. An appellant shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a Service officer.* Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file in accordance with a briefing schedule set by that office. The alien shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the appeal is taken. The Service shall have the same period of time in which to file a reply brief that was initially granted to the alien to file his or her brief. The time to file a reply brief commences from the date upon which the alien's brief was due, as originally set or extended. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

(d) *Effect of certification.* The certification of a case, as provided in this part, shall not relieve the party affected from compliance with the provisions of this section in the event that he or she is entitled and desires to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal.

(e) *Effect of departure from the United States.* Departure from the United States of a person who is the subject of deportation proceedings, prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal.

7. Section 3.4 is revised to read as follows:

§ 3.4 Withdrawal of appeal.

In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the notice of appeal was filed. If the record in the case has not been forwarded to the Board on appeal in accordance with § 3.5, the decision made in the case shall be final to the same extent as if no appeal had been taken. If the record has been forwarded on appeal, the withdrawal of the appeal shall be forwarded to the Board and, if no decision in the case has been made on the appeal, the record shall be returned and the initial decision shall be final to the same extent as if no appeal had been taken. If a decision on the appeal has been made by the Board in the case, further action shall be taken in accordance therewith. Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

8. Section 3.5 is revised to read as follows:

§ 3.5 Forwarding of record on appeal.

(a) *Appeal from decision of an Immigration Judge.* If an appeal is taken from a decision of an Immigration Judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board.

(b) *Appeal from decision of a Service officer.* If an appeal is taken from a decision of a Service officer, the record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A Service officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the benefit that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be immediately forwarded to the Board.

9. Section 3.6 is revised to read as follows:

§ 3.6 Stay of execution of decision.

(a) Except as provided under § 242.2(d) of this chapter and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of an Immigration Judge under § 3.23 or § 242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except where such order expressly grants a stay or where the motion was filed pursuant to the provisions of § 3.23(b)(4)(ii). The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge or a Service officer.

10. Section 3.7 is revised to read as follows:

§ 3.7 Notice of Certification.

Whenever, in accordance with the provisions of § 3.1(c), a case is certified to the Board, the alien or other party affected shall be given notice of certification. An Immigration Judge or Service officer may certify a case only after an initial decision has been made and before an appeal has been taken. If it is known at the time the initial decision is rendered that the case will be certified, the notice of certification shall be included in such decision and no further notice of certification shall be required. If it is not known until after the initial decision is rendered that the case will be certified, the office of the Service or the Immigration Court having administrative control over the record of proceeding shall cause a Notice of Certification to be served upon the parties. In either case, the notice shall inform the parties that the case is required to be certified to the Board and that they have the right to make representations before the Board, including the making of a request for oral argument and the submission of a brief. If either party desires to submit a brief, it shall be submitted to the office of the Service or the Immigration Court having administrative control over the record of proceeding for transmittal to the Board within the time prescribed in § 3.3(c). The case shall be certified and forwarded to the Board by the office of the Service or Immigration Court having administrative jurisdiction over the case upon receipt of the brief, or upon the expiration of the time within which the brief may be submitted, or upon receipt of a written waiver of the right to submit a brief. The Board in its discretion may elect to accept for review or not accept for review any such certified case. If the Board declines to accept a certified case for review, the underlying decision shall become final on the date the Board declined to accept the case.

11. Section 3.8 is revised to read as follows:

§ 3.8 Fees.

(a) *Appeal from decision of an Immigration Judge or motion within the jurisdiction of the Board.* Except as provided in paragraph (c) of this section or when filed by an officer of the Service, a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) filed pursuant to § 3.3(a), or a motion related to Immigration Judge proceedings that is within the jurisdiction of the Board and is filed directly with the Board pursuant to § 3.2(g), shall be accompanied by the fee specified in applicable provisions of § 103.7(b)(1) of this chapter. Fees shall be paid by check or money order payable to the ''United States Department of Justice.'' Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. A remittance shall not satisfy the fee requirements of this section if the remittance is found uncollectible.

(b) *Appeal from decision of a Service officer or motion within the jurisdiction of the Board.* Except as provided in paragraph (c) of this section, a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR–29), or a motion related to such a case filed under this part by any person other than an officer of the Service, filed directly with the Service shall be accompanied by the appropriate fee specified, and remitted in accordance with the provisions of § 103.7 of this chapter.

(c) *Waiver of fees.* The Board may, in its discretion, authorize the prosecution of any appeal or any motion over which the Board has jurisdiction without payment of the required fee. In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or motion, he or she shall file with the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or motion, an Appeal Fee Waiver Request, (Form EOIR–26A). If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.

12. Section 3.23 is amended by revising paragraph (b) to read as follows:

§ 3.23 Motions.

* * * * *

(b) *Reopening/Reconsideration.* (1) The Immigration Judge may upon his or her own motion, or upon motion of the trial attorney or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction in the case is vested in the Board of Immigration Appeals under part 3 of this chapter. If the Immigration Judge is unavailable or unable to adjudicate the motion to reopen, the Chief Immigration Judge or his delegate shall reassign such motion to another Immigration Judge. Motions to reopen or reconsider a decision of the Immigration Judge must filed with the Immigration Court having administrative control over the record of proceeding. Such motions shall comply with applicable provisions of 8 CFR 208.4, 208.19, and 242.22. The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. A motion to reconsider shall state the reasons for the motion and shall be supported by pertinent authority. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.

(2) Upon request by an alien in conjunction with a motion to reopen or a motion to reconsider, the Immigration Judge may stay the execution of a final order of deportation or exclusion. The filing of a motion to reopen pursuant to the provisions of paragraph (b)(4)(iii) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(3) A motion to reconsider must be filed on or before July 31, 1996, on which the decision for which reconsideration is being sought was rendered, or whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.

(4) A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. A motion to reopen will not be granted for the purpose of providing the alien an opportunity to apply for any form of discretionary relief if the alien's rights to make such application were fully explained to him or her by the Immigration Judge and he or she was afforded an opportunity to apply at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in 1.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(i) Except as provided in paragraph (b)(4)(ii) of this section, a party may file only one motion to reopen proceedings (whether before the Board or the Immigration Judge) and that motion must be filed not later than 90 after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later.

(ii) The time and numerical limitations set forth in paragraph (b)(4)(i) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii) of this section, or to a motion to reopen proceedings to apply or reapply for asylum or for withholding of deportation based on changed circumstances, which arise subsequent to the conclusion of proceedings, in the country of nationality or in the country to which deportation has been ordered, or to a motion to reopen agreed upon by all parties and jointly filed.

(iii) A motion to reopen deportation proceedings to rescind an order of deportation entered in absentia must be filed:

(A) Within 180 days after the date of the order of deportation. The motion must demonstrate that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances); or

(B) At any time if the alien demonstrates that the alien did not receive notice in accordance with subsection 242B(a)(2) of the Act (8 U.S.C. 1252b(a)(2)) and notice was required pursuant to such subsection; or the alien demonstrates that the alien was in federal or state custody and did not appear through no fault of the alien.

(iv) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

13. Section 3.24 is revised to read as follows:

§ 3.24 Fees pertaining to matters within the jurisdiction of the Immigration Judge.

Unless waived by the Immigration Judge, any fee pertaining to a matter within the jurisdiction of the Immigration Judge shall be remitted in accordance with the provisions of § 103.7 of this chapter. Any such fee may be waived by the Immigration Judge upon a showing that the respondent/applicant is incapable of paying the fees because of indigency. A properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. 1746 by the respondent/applicant must accompany the request for waiver of fees and shall substantiate the indigency of the respondent/application.

14. Section 3.31 is amended by revising paragraph (b) to read as follows:

§ 3.31 Filing documents and applications.

* * * * *

(b) All documents or applications requiring the payment of a fee must be accompanied by a fee receipt from the Service or by an application for a waiver of fees pursuant to § 3.24. Except as provided in § 3.8(a)(c), any fee relating to Immigration Judge proceedings shall be paid to, and accepted by, any Service office authorized to accept fees for other purposes pursuant to § 103.7(a) of this chapter.

* * * * *

15. Section 3.38 is amended by revising paragraph (b); redesignating paragraphs (c) and (d) as paragraphs (f) and (g), respectively; and adding new paragraphs (c),(d) and (e) to read as follows:

§ 3.38 Appeals.

* * * * *

(b) The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day. A Notice of Appeal (Form EOIR–26) may not be filed by any party who has waived appeal.

(c) The date of filing of the Notice of Appeal (Form EOIR–26) shall be the date the Notice is received by the Board.

(d) A Notice of Appeal (Form EOIR–26) must be accompanied by the appropriate fee or by an Appeal Fee Waiver Request (Form EOIR–26A). If the fee is not paid or the Appeal Fee Waiver

Request (Form EOIR–26A) is not filed within the specified time period indicated in paragraph(b) of this section, the appeal will not be deemed properly filed and the decision of the Immigration Judge shall be final to the same extent as though no appeal had been taken.

(e) Within five working days of any change of address, an alien must provide written notice of the change of address on Form EOIR–33 to the Board. Where a party is represented, the representative should also provide to the Board written notice of any change in the representative's business mailing address.

* * * * *

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

16. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

§ 103.5 [Amended]

17. In § 103.5, paragraph (a)(1)(i) is amended by revising the phrase ''parts 210, 242, or 245a'' in the first sentence to read ''parts 3, 210, 242 and 245a,''.

18. In § 103.7, paragraph (a) is revised to read as follows:

§ 103.7 Fees.

(a) *Remittances.* Fees prescribed within the framework of 31 U.S.C. 483a shall be submitted with any formal application or petition prescribed in this chapter and shall be in the amount prescribed by law or regulation. Except for fees remitted directly to the Board pursuant to the provisions of § 3.8(a) of this chapter, any fee relating to any Executive Office for Immigration Review proceeding shall be paid to, and accepted by, any Service office authorized to accept fees. Payment of any fee under this section does not constitute filing of the document with the Board or with the Immigration Court. The Service shall return to the payer, at the time of payment, a receipt for any fee paid. The Service shall also return to the payer any documents, submitted with the fee, relating to any Immigration Judge proceeding. A charge of $5 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn. An issued receipt for any such remittance shall not be binding if the remittance is found uncollectible. Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. Fees in the form of postage stamps shall not be accepted. Remittances to the Service shall be made payable to the ''Immigration and Naturalization Service,'' except that in case of applicants residing in the Virgin Islands of the United States, the remittances shall be made payable to the ''Commissioner of Finance of the Virgin Islands'' and, in the case of applicants residing in Guam, the remittances shall be made payable to the ''Treasurer, Guam.'' If application to the Service is submitted from outside the United States, remittance may be made by bank international money order or foreign draft drawn on a financial institution in the United States and payable to the Immigration and Naturalization Service in United States currency. Remittances to the Board shall be made payable to the ''United States Department of Justice.''

* * * * *

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF DEPORTATION

19. The authority citation for part 208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1252 note, 1252b, 1253, 1282 and 1283; 31 U.S.C. 9701; and 8 CFR part 2.

20. In § 208.19, paragraph (a) is revised to read as follows:

§ 208.19 Motion to reopen or reconsider.

(a) A proceeding in which asylum or withholding of deportation was denied may be reopened or a decision from such a proceeding reconsidered for proper cause upon motion pursuant to the requirements of 8 CFR 3.2, 3.23, 103.5, and 242.22 where applicable.

* * * * *

PART 236—EXCLUSION OF ALIENS

21. The authority citation for part 236 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1362.

22. Section 236.7 is revised to read as follows:

§ 236.7 Appeals.

Except as limited by section 236 of the Act, an appeal from a decision of an Immigration Judge under this part may be taken by either party pursuant to § 3.38 of this chapter.

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

23. The authority citation for part 242 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1252 note, 1252a, 1252b, 1254, 1362; 8 CFR part 2.

§ 242.19 [Amended]

24. In § 242.19, the form number ''I–290A'' is removed each time it appears and, in its place, the form number ''EOIR–26'' is added in paragraphs (6) and (c).

25. In § 242.21, paragraph (a) is revised to read as follows:

§ 242.21 Appeals.

(a) Pursuant to part 3 of this chapter, an appeal shall lie from a decision of an Immigration Judge to the Board, except that no appeal shall lie from an order of deportation entered in absentia. The procedures regarding the filing of a Notice of Appeal (Form EOIR–26), fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal (Form EOIR–26) in accordance with the provisions of § 3.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 3.1(d)(1–a) of this chapter.

* * * * *

26. Section 242.22 is amended by revising the first sentence and by adding a sentence at the end of the section, to read as follows:

§ 242.22 Reopening or reconsideration.

Motions to reopen or reconsider are subject to the requirements and limitations set forth in § 3.23 of this chapter. * * * The filing of a motion to reopen pursuant to the provisions of § 3.23(b)(4)(ii) of this chapter shall stay the deportation of the alien pending the disposition of the motion and the adjudication of any properly filed administrative appeal.

PART 246—RESCISSION OF ADJUSTMENT OF STATUS

27. The authority citation for part 246 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1255, 1256, 1259.

28. Section 246.7 is revised to read as follows:

§ 246.7 Appeals.

Pursuant to part 3 of this chapter, an appeal shall lie from a decision of an Immigration Judge under this part to the Board of Immigration Appeals except that no appeal shall lie from an order of deportation entered in absentia. An appeal shall be taken within 30 days after the mailing of a written decision or the stating of an oral decision. The reasons for the appeal shall be specifically identified in the Notice of Appeal (Form EOIR 26); failure to do so may constitute a ground for dismissal of the appeal by the Board.

Dated: April 16, 1996.

Janet Reno,

Attorney General.

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