



November 27, 2012

Acting General Counsel, Jean King
Office of the General Counsel
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Submitted via www.regulations.gov

**Re: Retrospective Regulatory Review under Executive Order 13563
77 Fed. Reg. 59567 (Sept. 28, 2012), EOIR Docket No. 178**

Dear Acting General Counsel King:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) submit the following comments in response to the advance notice of proposed rulemaking published in the Federal Register on September 28, 2012, as part of the Department of Justice's (DOJ) "Retrospective Regulatory Review" under Executive Order 13563.

AIC is a 501(c)(3) tax-exempt, not-for-profit educational and charitable organization whose mission is to educate the American public about the contributions of immigrants to American society, to promote sensible and humane immigration policy, and to advocate for the just and equitable enforcement of immigration laws. Founded in 1987, the AIC carries out its mission through its four components: the Legal Action Center, the Immigration Policy Center, the International Exchange Center, and the Community Education Center.

Founded in 1946, AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

INTRODUCTION

With the publication of the September 28, 2012 notice, the Executive Office for Immigration Review (EOIR) provided the public with advance notice of future rulemaking and sought public input on potential amendments to select portions of its regulations. For this first two-year round of retrospective review, EOIR will review and consider amendments to 8 CFR Parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235. Part 1208 will be reviewed for substantive amendments in the future, but at this time will be

reviewed to standardize citations and terms, and update references. EOIR also stated that it will *not*, at this time, address the following issues that are currently under consideration through separate processes: the streamlining of BIA adjudications; ineffective assistance of counsel; the departure bar to motions to reopen; and mental competency issues.

8 CFR PART 1003

Motions to Reopen and Stays of Removal

Equitable Tolling: 8 CFR §§1003.2(b)(2), (c)(2) and §§1003.23(b)(1), (b)(4). We encourage EOIR to amend its regulations to make it clear that the time and numerical limitations on motions to reopen and reconsider set forth in 8 CFR §§1003.2(b)(2), (c)(2) and §§1003.23(b)(1), (b)(4) are subject to equitable tolling and waiver.¹ The majority of the courts of appeals have recognized that equitable tolling and/or waiver applies to the time and number limitations.² However, the First, Fourth, and Fifth Circuits have yet to issue precedential decisions on the issue, and the Eleventh Circuit has maintained that equitable tolling is barred.³ In order to ensure uniform application of the regulations throughout the country, EOIR should provide necessary clarifications.

Stays of Removal: 8 CFR §§1003.2(f) and 1003.23(b)(1)(v). Under current regulations, except in limited situations, the filing of a motion to reopen or reconsider does not stay removal. Instead, individuals must request, and the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA or Board) must grant, a stay of removal or the order may be executed while the motion is pending. We urge EOIR to amend the regulations to provide that the filing of a stay motion temporarily stays removal pending adjudication of the motion.⁴ Such a policy would protect individuals from the potentially serious harm suffered if removal is executed before the motion is adjudicated. Importantly, this policy also would promote the efficient use of judicial resources, as IJs and the BIA would no longer be disrupted by “emergency” motions to stay removal. Likewise, it would promote the efficient use of DHS resources, as individuals would not have to be returned to the United States if the motion is granted.

¹ The Supreme Court has differentiated between claim-processing rules like 8 CFR §§1003.2 and 1003.23 and jurisdictional rules, *see, e.g., Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011), and held that non-judicial deadlines are subject to a rebuttable presumption of equitable tolling. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010).

² *See, e.g., Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405, 409-410 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Hernandez-Moran v. Gonzalez*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001) (en banc); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).

³ *See, e.g., Abdi v. U.S. Att’y Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005); *but see Ruiz-Turcios v. U.S. Att’y Gen.*, No. 12-11503, ___ F.3d ___, 2012 U.S. App. LEXIS 23085, *4 n.1 (11th Cir. Nov. 8, 2012) (indicating that *Abdi* is incorrect).

⁴ In the Ninth Circuit, for example, the filing of a stay motion automatically confers a temporary stay by operation of law. *Deleon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); General Order 6.4(c)(1) (General Orders of the Ninth Circuit Court of Appeals).

Bond

Limited Appearances in Bond Proceedings: 8 CFR §1003.19. EOIR should revise 8 CFR §1003.19 to allow attorneys to enter separate appearances that are limited to custody and bond determinations. Rule 1.2(c) of the Model Rules of Professional Conduct, as reflected in state bar rules, states “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” This “unbundling” is beneficial to all legal consumers, and immigration courts should not continue to bind clients and lawyers in matters when they have agreed to limited representation.

Additionally, allowing limited appearances would increase pro bono representation of indigent respondents and would decrease the difficulties caused by transferring detainees through multiple jurisdictions. The regulation already makes it clear that custody and bond proceedings are separate and distinct from deportation or removal proceedings.⁵ We recommend that EOIR revise 8 CFR §1003.19 to specifically state that attorneys may enter an appearance that is limited solely to a respondent’s bond proceeding.

Jurisdiction over Bond Hearings: 8 CFR §1003.19(c). Section 1003.19(c) must be revised to clarify that an immigration court retains jurisdiction over a request for a bond redetermination hearing, even if the detainee is subsequently transferred out of the jurisdiction of the court. Currently, this regulation gives authority for bond redeterminations to one of the following offices, in designated order: 1) the immigration court having jurisdiction over the place of detention (if the respondent is detained); 2) the immigration court having administrative control over the case; or 3) the Office of the Chief Immigration Judge.

However, DHS regularly transfers detainees to different detention centers after they have filed a request for bond redetermination. Many attorneys report that immigration judges will not hold a bond redetermination hearing after a detainee is transferred out of the geographic jurisdiction of their court, citing 8 CFR §1003.19(c). This policy results in respondents facing significant delays in getting bond hearings.

As currently written, the regulation does not clearly explain that the immigration judge who originally had jurisdiction over a request for bond redetermination continues to have the authority to determine the bond of a respondent who is transferred to a different jurisdiction. Clarifying this regulation would increase access to counsel in bond redetermination hearings and decrease detention time.

Timing of Bond Hearing: 8 CFR §1003.19. EOIR should amend 8 CFR §1003.19 to specify that immigration judges must conduct bond hearings within 2 business days of the request. Attorneys report a wide range of time frames – from just a couple of days to several weeks and even longer. Given the liberty interests at stake, IJs must conduct timely hearings.

DHS’s Ability to Stay an Immigration Judge’s Order of Release: 8 CFR §1003.6, §1003.19(i)(2). Sections 1003.6 and 1003.19(i)(2) allow DHS to invoke an automatic stay of the order of an

⁵ See 8 CFR §1003.19(d).

immigration judge authorizing release, on bond or otherwise, in certain circumstances. Though 8 CFR §1003.6, implemented in 2006, purports to place some limitations on DHS's power, the automatic stay provision should be repealed in its entirety.

Jurisdiction and Venue

Telephonic and Video Hearings: 8 CFR §1003.25(c). AILA recommends that EOIR revise the regulations governing telephonic or video hearings to better ensure that the due process rights of the respondent, including access to counsel, are protected. Section 1003.25(c) should be reviewed and amended to restrict the circumstances in which a merits hearing may be held by video conference. Specifically, the regulation should provide that an evidentiary hearing on the merits may only be conducted through video conference with the consent of the respondent. Video hearings can impair the judge's ability to evaluate the respondent's demeanor and credibility, restrict the respondent's access to counsel due to physical separation between a lawyer and client, and lead to difficulties with translators who often appear by phone.

The regulation also should be amended to explicitly provide for telephonic hearings upon request of the respondent, absent extraordinary circumstances. Currently, a number of immigration judges and courts nationwide will not allow counsel for respondents to appear by telephone under any circumstances, even though the Immigration Court Practice Manual (ICPM) allows respondents to request telephonic master calendar hearings.⁶ Given that a significant number of noncitizens live in rural areas far from an immigration court, such local practices have the effect of limiting many respondents' access to counsel.

Filing and Service/Procedural Issues

As a preliminary matter, we understand that EOIR is planning to launch the initial stages of an electronic filing (e-filing) system within the next few months. We strongly support this effort and look forward to commenting on the proposed e-filing policies.

Service of Board Decisions: 8 CFR §1003.1(f). We recommend that this section be revised to clearly state that service on the DHS and upon the alien must occur by the same means. We also recommend that in cases where the alien is represented, the regulation provide for the transmission of the decision to the attorney of record through fax or e-mail, especially in situations where the alien is detained.

Mailbox Rule: 8 CFR §§1003.3(a)(1), 1003.38(c), 1240.15, 1240.53(a). The regulations currently state that the filing date for the notice of appeal and other filed documents is the date the document is *received* by EOIR. This rule leaves respondents and their counsel with very little effective control over timely filing. The attorney may mail or send via private delivery a notice of appeal that would be timely filed if delivered within a reasonable amount of time or even the "guaranteed" time, only to have the carrier or delivery service fail to deliver by the deadline. Not surprisingly, there has been considerable litigation regarding the timeliness of filings. Adopting the "mailbox rule" would give the respondent more control over meeting filing

⁶ See ICPM, Chapter 4.15(n).

deadlines by tying the deadline to the date of the actual mailing, rather than the delivery of the documents.

The U.S. Supreme Court applies the mailbox rule to all filings,⁷ and the Circuit Courts apply the mailbox rule to the filing of briefs.⁸ Significantly, both the Supreme Court and the other federal courts apply an even more flexible rule to filings by prisoners because prisoners' control over the fate of their documents ceases as soon as they hand them over to prison personnel.⁹

Both DHS and EOIR have rules governing the filing of asylum applications with DHS that incorporate the flexibility of the mailbox rule. Specifically, 8 CFR §§208.4(a)(2)(ii) and 1208.4(a)(2)(ii) say that an asylum application is considered to have been filed on the date it is received by DHS, except that:

In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date.

These rules should be extended to the filing of all types of documents with EOIR.

Lodging and Transfer Procedures: 8 CFR §1003.3(a)(1). EOIR should adopt rules similar to the practice in federal courts whereby documents are considered "lodged" when filed, even if they are deficient as to some requirement and/or filed in the wrong venue. For example, Supreme Court Rule 14.5 says:

If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter will be deemed timely.

⁷ Supreme Court Rule 29.2 says that "[a] document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days."

⁸ FRAP 25(a)(2)(B) says that a brief or appendix is timely filed if, on or before the last day for filing, it is mailed to the clerk by first class mail or other class of mail that is at least as expeditious, or "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days."

⁹ See Supreme Court Rule 29.2 (document "is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid"); FRAP 25(a)(2)(C) (document must be "deposited in the institution's internal mailing system on or before the last day for filing").

Similarly, the district courts and courts of appeals may transfer a case to a proper venue in the interest of justice.¹⁰

By contrast, 8 CFR §1003.3(a)(1) says that an appeal is not properly filed unless it is received by the Board within 30 days, with all required documents, fees or fee waiver requests, and proof of service. In addition, immigration courts and the BIA typically reject filings that are not submitted to the proper venue (i.e., filed at the BIA when they should have been filed at the immigration court). Given that the filing requirements and proper venue are not always easy to determine – particularly for unrepresented individuals – and because filing deadlines often are construed strictly, EOIR should amend its regulations to include a lodging rule and a provision directing transfer to the proper venue in the interest of justice.

Excusing Late Filed Appeals: 8 CFR §1003.38(b). Administrative appeals of IJ decisions must be filed within 30 days of the decision. In *Matter of Liadov*,¹¹ the Board found that it lacked the “authority” to extend the appeal filing deadline and refused to recognize any exceptions. Furthermore, in unpublished cases, the Board has expressly said that it lacks jurisdiction,¹² and several courts have rejected the Board’s suggestion that the administrative appeal deadline is jurisdictional.¹³ As a result, the Second, Sixth and Ninth Circuits require the Board to consider exceptions to the appeal deadline.¹⁴ Therefore, we urge EOIR to amend its regulations to state that the failure to meet the deadline may be excused where the party provides a reasonable explanation for failing to meet it.

Local Operating Procedures: 8 CFR §1003.40. Many practitioners report that the immigration courts they regularly practice before have local rules or requirements that go beyond the ICPM, yet very few of these local rules or requirements appear to be readily available to practitioners and the public. Section 1003.40 should require publication and notice of all local operating procedures. At a minimum, such procedures should be posted in the court, available on court websites, and obtainable from the court administrator by request.

Appeal from a Decision of a Service Officer: 8 CFR §§1003.3(a)(2), (c)(2) and §1003.5(b). As written, the regulations provide that an appeal of a decision of a Service officer is to be filed with the office having administrative control over the record of proceedings within 30 days of the service of the decision being appealed.¹⁵ The record of proceeding shall be forwarded to the Board “promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.”¹⁶ The regulation does not require DHS to forward the record of proceeding to the Board within a particular time frame, and practically speaking, it is

¹⁰ See 28 USC §1631; see also 28 USC §1404(a).

¹¹ 23 I&N Dec. 990 (BIA 2006).

¹² See *Irigoyen-Briones v. Holder*, 644 F.3d 943, 947 n.17 (9th Cir. 2011).

¹³ See *id.* at 949; *Liadov v. Mukasey*, 518 F.3d 1003, 1008 n.4 (8th Cir. 2008); *Khan v. United States DOJ*, 494 F.3d 255 (2d Cir. 2007); *Huerta v. Gonzales*, 443 F.3d 753, 756 (10th Cir. 2006).

¹⁴ See *Khan*, 494 F.3d at 259 (citing *Zhong Guang Sun v. U.S. Dep’t of Justice*, 421 F.3d 105, 111 (2d Cir. 2005)); *Vasquez Salazar v. Mukasey*, 514 F.3d 643 (6th Cir. 2008); *Irigoyen-Briones*, 644 F.3d at 951.

¹⁵ 8 CFR §1003.3(a)(2).

¹⁶ 8 CFR §1003.5(b) (emphasis added).

exceedingly common for DHS to delay forwarding the record for extended periods of time, often for one year or longer. At the same time, the alien is provided with a very limited time frame for filing an appeal brief—21 days.¹⁷ The regulation should be amended to require DHS to forward the file to the Board within a reasonable, but specific, period of time, such as 90 days.

Stipulated Removal Orders

Section 1003.25(b) authorizes the immigration judge to enter an order of removal that is stipulated by the parties. The regulation provides that if a respondent is unrepresented, the immigration judge must determine that his or her waiver is “voluntary, knowing, and intelligent.” In most, if not all, unrepresented cases, the immigration judge would not be able to make such an assessment absent an in-person hearing. Thus, the regulation should be amended to state that an immigration judge must conduct an in-person hearing to determine whether the stipulation is “voluntary, knowing, and intelligent.”

8 CFR PART 1216

Scope of Review: 8 CFR §1216.5(f). In discussing its review of Part 1216, EOIR cites to the recent BIA decision, *Matter of Herrera Del Orden*, 25 I&N Dec. 589 (BIA 2011), where the Board held that when an alien in removal proceedings seeks review of the denial of a waiver of the I-751 joint filing requirements under INA §216(c)(4), he or she may introduce, and the immigration judge should consider, any relevant evidence without regard to whether it was previously submitted or considered in proceedings before DHS. In so holding, the BIA noted that the immigration judge has broad authority under INA §240(b)(1) to conduct removal proceedings and receive evidence. We would support an amendment to 8 CFR §1216.5(f) to clarify that the immigration judge is not limited to a de novo review of the record as it existed in proceedings before DHS, consistent with the holding in *Herrera Del Orden*.

8 CFR PART 1235

Appeal of IJ Decision on Citizenship Claim: 8 CFR §1235.3(b)(5)(iv) (and 8 CFR §1003.1(b)). In response to previous comments, EOIR states that it is considering an amendment to Part 1235 to address review of an alien’s claim to U.S. citizenship status in expedited removal proceedings.¹⁸ In *Matter of Lujan-Quintana*, 25 I&N Dec. 53 (BIA 2009), the BIA dismissed DHS’s appeal of the immigration judge’s decision to vacate the expedited removal order based on the determination that the respondent was a U.S. citizen. The Board noted that no regulatory provision gives it jurisdiction to review an immigration judge’s decision to vacate an expedited removal order in a claimed status review proceeding. EOIR states that it is considering an amendment that would allow appeal under these circumstances to the BIA.¹⁹ We support this proposition, and ask that any amendment to the regulation clearly state that appeal of the decision of the immigration judge on a claim to U.S. citizenship status to the BIA is available to both the respondent (in the case of a denial) and DHS.

¹⁷ 8 CFR §1003.3(c)(2).

¹⁸ 77 Fed. Reg. at 59571.

¹⁹ *Id.*

CONCLUSION

We appreciate the opportunity to comment on this request for information and look forward to a continuing dialogue with the EOIR during the regulatory review process.

Sincerely,

THE AMERICAN IMMIGRATION COUNCIL
THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION