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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

EOIR Docket No. 181; AG Order No. 3450-2014

RIN 1125-AA78

Separate Representation for Custody and Bond Proceedings

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Executive Office for Immigration Review (EOIR) regulations relating to the representation of aliens in custody and bond proceedings. Specifically, this rulemaking proposes to allow a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the alien's proceedings before the Immigration Court.

DATES: Written comments must be submitted on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

ADDRESSES: Please submit written comments to Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530. To ensure proper handling, please reference RIN No. 1125-AA78 or

EOIR docket No. 181 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530; telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personally identifiable information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifiable information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFIABLE INFORMATION” in the first paragraph of your comment. You must also locate all the personally identifiable information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot

effectively be redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personally identifiable information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

II. Background

The Immigration and Nationality Act (INA) provides that aliens appearing before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." INA sec. 240(b)(4) (8 U.S.C. 1229a(b)(4)); *see also* INA sec. 292 (8 U.S.C. 1362). In order to represent an alien before EOIR, a representative must file a Notice of Entry of Appearance with the Immigration Court or the Board of Immigration Appeals (Board). *See* 8 CFR 1003.17, 1003.3(a)(3). A representative who enters his or her appearance before the Immigration Court is the representative of record for the alien in all of the alien's proceedings, including removal or deportation proceedings and, if the alien is detained, custody and bond proceedings. To the extent a representative wishes to represent an alien solely in custody and bond proceedings, and not in any other proceedings before the Immigration Court, he or she must file a motion to withdraw representation after the alien's custody and bond proceedings conclude. *Cf. Matter of N-K- & V-S-*, 21 I&N Dec. 879, 880, 881 n.2 (BIA 1997). Whether to grant or deny that

motion is within the sole discretion of the immigration judge presiding over the particular case. *See* 8 CFR 1003.17(b).

Over the past several years, EOIR has seen a substantial increase in the number of aliens appearing before its Immigration Courts. At the end of fiscal year (FY) 2013, there were 350,330 cases pending at the Immigration Courts, marking an increase of 22,901 cases pending above those at the end of FY 2012. *See* 2013 EOIR STAT. Y.B. W1, *available at* <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.¹

Moreover, a significant number of aliens appeared before EOIR without representation. Forty-one percent of the aliens whose immigration proceedings were completed in FY 2013, or 71,653 aliens, were unrepresented. *See* 2013 EOIR STAT. Y.B. F1. Non-detained aliens are much more likely to be represented before the Immigration Courts, as are aliens who have been released from detention. Of the 265,708 initial case completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented. By contrast, of the 214,506 initial case completions during the same timeframe for aliens who were never detained, only 50,075 aliens, or 23 percent, were unrepresented. Similarly, of the 90,316 initial case completions during the same timeframe for detained aliens who were released, only 25,426 aliens, or 28 percent, were unrepresented.

Immigration proceedings involving unrepresented aliens often require more time than those involving represented aliens. For instance, immigration judges may need to spend additional time to ensure that unrepresented aliens understand the nature and

¹ *See also Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2 (May 18, 2011) (statement of Juan P. Osuna, Director, EOIR) (“Director’s Testimony”) (discussing the increase in the number of matters received by the Immigration Court), *available at* <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf>.

purpose of the removal process, as well as their rights and responsibilities. An unrepresented alien may also ask for a continuance (or continuances) of his or her proceedings to obtain counsel. By contrast, aliens who are represented are likely to have discussed their proceedings, including their rights and responsibilities, with their counsel in advance of a hearing, and thereby avoid additional delays of the kind that may occur with respect to aliens who lack representation.

III. Proposed Amendment to Permit Separate Appearances

In order for a representative to enter an appearance solely for custody and bond proceedings before the Immigration Courts, EOIR is proposing to amend its regulations to specifically allow separate appearances in such proceedings. Permitting such separate appearances is expected to encourage more attorneys and accredited representatives to agree to represent aliens who would otherwise appear pro se at their custody and bond proceedings, which, in turn, will benefit the public by increasing the efficiency of the Immigration Courts.

Providing for separate appearances in custody and bond proceedings has been of significant and longstanding interest to public stakeholders. On September 28, 2012, EOIR published an advance notice of proposed rulemaking (ANPRM), which requested the public's input on potential amendments to the EOIR regulations pursuant to the Department of Justice's Plan for Retrospective Analysis of Existing Rules (Plan).² *See* Retrospective Regulatory Review Under E.O. 13563, 77 Fed. Reg. 59567 (Sept. 28, 2012). The ANPRM included notification that EOIR planned to evaluate whether to

² Following the issuance of Executive Order 13563, the Department issued the Plan on August 22, 2011, identifying several regulations that it planned to review during the next two years. Pursuant to the Plan, the Department is conducting a retrospective review of portions of the EOIR regulations, including part 1003 of chapter V of title 8 of the Code of Federal Regulations.

propose a rule providing for separate appearances in bond proceedings. *See* 77 Fed. Reg. 59569.³ In response to the ANPRM, EOIR received comments from the public in support of permitting such appearances. Specifically, commenters noted that permitting separate appearances would increase the level of representation of aliens in custody and bond proceedings and improve the efficiency of those proceedings.

These comments echoed statements made previously by public interest groups that have indicated that more attorneys would be willing to represent detained aliens, including as pro bono counsel, if they were able to enter an appearance exclusively for custody and bond proceedings. For example, since 2007, the American Immigration Lawyers Association (AILA), in public meetings with EOIR, has continuously appealed to EOIR to amend its rules to allow representatives to enter a separate appearance on behalf of an alien for custody and bond proceedings, without such appearance also constituting an appearance for removal and deportation proceedings. Specifically, AILA has stated that separate appearances “encourage pro bono representation and provide greater flexibility for attorneys and clients to agree on the scope of representation based on the client’s needs and resources.” EOIR/AILA Liaison Meeting Agenda Questions and Answers, March 29, 2012, at 10.⁴

In light of the anticipated benefits and public support detailed above, EOIR has decided to promulgate this separate rulemaking proposing to amend its regulations at 8 CFR 1003.17 to explicitly allow for separate appearances in custody and bond

³ The ANPRM also provides notice that the Department intends to standardize citations and terms to ensure consistency within the EOIR regulations and with respect to the DHS regulations. As indicated in the Plan and discussed in the ANPRM, the revisions to this rule include updated references to DHS, by changing the term “the Service” to “DHS.”

⁴ EOIR/AILA Liaison Meeting Questions and Answers are available at <http://www.justice.gov/eoir/ailaarchive.htm>. AILA also raised the issue of separate appearances at several other EOIR/AILA Liaison meetings, including those held on October 10, 2007; October 21, 2008; and April 6, 2011.

proceedings. Under EOIR's regulations, such proceedings are separate and apart from removal and deportation proceedings. *See* 8 CFR 1003.19(d); *Matter of Guerra*, 24 I&N Dec 37, 40 n.2 (BIA 2006); *Matter of R-S-H-*, 23 I&N Dec 629, 630 n.7 (BIA 2003). This proposed rule effectuates that separation by requiring Notices of Entry of Appearance to be filed separately for different types of proceedings. Specifically, an attorney or representative who appears on behalf of an alien in his or her custody and bond proceedings will not be held responsible for appearing, filing documents, receiving notices, or any of the other duties enumerated in 8 CFR 1292.5(a) in the alien's other proceedings, unless and until the attorney or representative files a Notice of Entry of Appearance in such proceedings.

The Board has held in a precedential decision that a representative of record cannot enter a "limited" appearance in immigration proceedings. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). In *Matter of Velasquez*, the Board cited to the regulations in effect at the time, 8 CFR 292.1, 292.4 and 292.5(a) (1986)⁵, which identified who was eligible to appear as a representative, the form a representative needed to file to enter an appearance, and the notice requirements. Those regulations did not include a provision for limited or separate appearances. This proposed rule leaves intact the holding in *Matter of Velasquez*, as a separate appearance in custody and bond proceedings would not be considered a "limited" appearance, which is generally

⁵ These regulations remain substantially unchanged, except that former sections 292.1, 292.4 and 292.5(a) of the regulations were redesignated as sections 1292.1, 1292.4, and 1292.5(a) in 2003 in response to the Homeland Security Act of 2002, which transferred the responsibilities of the former Immigration and Naturalization Service to the newly created Department of Homeland Security. *See* 68 Fed. Reg. 10350 (Mar. 5, 2003).

understood to refer to a limit in the scope of representation required by a representative.⁶ By contrast, this proposed rule would require a representative of record to represent an alien in all aspects of each separate type of proceeding, unless the Immigration Court grants a motion to withdraw or substitute counsel.

Under the current regulations, representatives are already required to file a Notice of Entry of Appearance on Form EOIR-28 in any proceedings before an immigration judge. *See* 8 CFR 1003.17. Under this proposed amendment to EOIR’s regulations, representatives will continue to be required to file a Form EOIR-28 in custody and bond proceedings as required by 8 CFR 1003.17. However, the Form EOIR-28 will be amended to require a representative to indicate if he or she is entering an appearance for custody and bond proceedings only, any other proceedings only, or for all proceedings.

The Department welcomes public comment on the proposed amendments to EOIR’s regulations providing for separate appearances before the Immigration Court for custody and bond proceedings.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate “small entities,” as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

⁶ All fifty states and the District of Columbia have rules governing limited appearances, many of which permit an attorney to limit the scope of representation in a particular matter to, for example, the preparation of court submissions without requiring the attorney to appear as counsel of record. *See* http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/limited_appearances.html.

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity.

The benefits of this proposed rule include increased representation of detained aliens by permitting a representative to enter an appearance before the Immigration Court for the discrete task of securing a bond or release from detention, without requiring the representative also to represent the alien in all of the alien's immigration proceedings. The public will benefit from this amendment to the regulations, because the amendment will make it easier for aliens who may not be able to afford to hire an attorney for all of their proceedings before the Immigration Court to at least be able to be represented during their custody and bond proceedings. The Department anticipates that this rule will also have a positive economic impact on the Department, because increasing the number of aliens who are represented in their custody and bond proceedings will enable immigration judges to adjudicate proceedings in a more effective and timely manner, adding to the overall efficiency of immigration proceedings. The Department does not foresee any burdens to the public or the Department.

E. Executive Order 13132 (Federalism)

This 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 13132, the Department has determined that this rule does not have sufficient federalism implications to warrant preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule has been prepared in accordance with the standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The information collection requirement (Form EOIR-28) contained in this rule has been previously approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. This proposed rule contains revised recordkeeping and reporting requirements. Specifically, EOIR will collect additional information on the Notice of Entry of Appearance form indicating the type of proceeding(s) for which an attorney or representative is entering his or her appearance. Accordingly, the Department submitted a copy of this rule to the Office of Management and Budget.

List of Subjects

8 CFR Part 1003

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

Accordingly, for the reasons stated in the preamble, the Attorney General is proposing to amend part 1003 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of

Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Amend § 1003.17 by revising paragraph (a), to read as follows:

§ 1003.17 Appearances

(a) In any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Entry of Appearance on Form EOIR-28 with the Immigration Court, and shall serve a copy of the Notice of Entry of Appearance on the DHS as required by §1003.32(a). The entry of appearance of an attorney or representative in a custody or bond proceeding shall be separate and apart from an entry of appearance in any other proceeding before the Immigration Court. An attorney or representative may file an EOIR-28 indicating whether the entry of appearance is for custody or bond proceedings only, any other proceedings only, or for all proceedings. Such Notice of Entry of Appearance must be filed and served even if a separate Notice of Entry of Appearance(s) has previously been filed with the DHS for appearance(s) before the DHS.

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July 29, 2014
Date

Eric H. Holder, Jr.
Attorney General

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