Billing Code 9111-97

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615-0095]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information or new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the Federal Register to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: All submissions received must include the OMB Control Number 1615-0095 in the body of the letter, the agency name and Docket ID USCIS-2008-0027. To avoid duplicate submissions, please use only **one** of the following methods to submit comments:

(1) Online. Submit comments via the Federal eRulemaking Portal Web site at

http://www.regulations.gov under e-Docket ID number USCIS-2008-0027;

(2) Mail. Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue, NW, Washington, DC 20529-2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue, NW, Washington, DC 20529-2140, telephone number 202-272-8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at http://www.uscis.gov, or call the USCIS Contact Center at 800-375-5283 (TTY 800-767-1833).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act:

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS is required to provide 60-day notice in the Federal Register to solicit comments from the public on proposed collections of information. USCIS published this Notice at 84 FR 39359 on August 9, 2019. USCIS received comments and in reviewing has made a determination that additional edits to the collection of information are necessary. Due to the nature of the changes, USCIS is publishing a second 60-day notice in the Federal Register to present these changes and to obtain public comment.

II. Proposed Changes to the Form Instructions for Form I-290B:

USCIS is proposing several changes to the Form I-290B Instructions. USCIS proposes to clarify the AAO's procedures pertaining to the consideration of evidence submitted for the first time on appeal and the requirement that affected parties address each ground of ineligibility raised in the unfavorable decision. USCIS proposes to permit affected parties to waive the "initial field review" of their appeal for faster processing. USCIS proposes to explain its standard of review for appeals of discretionary decisions. USCIS also proposes to clarify that it does not have appellate jurisdiction over Adam Walsh Act "no-risk" determinations. USCIS is proposing these changes to better inform affected parties of administrative appellate procedures and facilitate the AAO's review of the substantive merits of appeals. The specific changes proposed are discussed as follows:

(1) Appeals Must Address All Grounds of Ineligibility Identified in the Unfavorable Decision.

The proposed Form I-290B and instructions state that appeals must address each ground of ineligibility identified in the unfavorable decision. If an affected party does not address one or more ground(s) of ineligibility in the unfavorable decision, the issue(s) may be deemed waived for the appeal. Further, the proposed form and instructions explain that a waived ground of ineligibility may form the sole basis for a dismissed appeal. *See, e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). This proposed language underscores to affected parties the importance of addressing each stated ground of the unfavorable decision on appeal. USCIS believes that this clarification of current practice will improve the quality of appeals and facilitate the AAO's review of the substantive merits of appeals.

(2) Affected Parties May Waive the "Initial Field Review" Process.

The proposed Form I-290B and instructions permit affected parties to waive the "initial field review" (IFR) process. The regulations at 8 CFR 103.3(a)(2)(ii)-(v) provide that an appeal to the AAO be reviewed by the officer that made the unfavorable decision (or by the officer with jurisdiction over the matter in cases where the affected party has moved) before the appeal is sent to the AAO. The officer reviews the appeal to determine whether to take favorable action (e.g., by granting a motion to reopen or a motion to reconsider and approving the benefit request). If the officer decides not to take favorable action, the appeal is then forwarded to the AAO for appellate review.

Unless favorable action is taken, the IFR process delays the adjudication of appeals, because of the additional step prior to AAO review. Many stakeholders are not aware of the IFR process, and they contact the AAO for case status inquiries when the AAO has yet to receive the appeal. This delay often causes frustration. Further, affected parties sometimes send supplemental materials to the AAO when the appeal itself is at a USCIS service center or field office pending IFR. Other times, affected parties incorrectly send materials to a service center or field office when the appeal has already been transferred to the AAO.

USCIS proposes to provide affected parties with the option to waive the IFR process in order to have their case reviewed sooner by the AAO. However, USCIS acknowledges that taking advantage of this option means that the affected party will give up the opportunity to have favorable action taken more quickly on their case during IFR. In addition, by waiving IFR and having the appeal sent directly to the AAO, the affected party waives review by the officer who

made the unfavorable decision of whether an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider under 8 CFR 103.3(a)(2)(v)(B)(*2*).

(3) Clarification of the "Initial Field Review" Process When Evidence is Not Submitted Concurrently With the Appeal; and Treatment of Newly Submitted Evidence on Appeal.

DHS regulations do not provide for the submission of evidence in support of a standard appeal. The regulations allow for the submission of a brief only. *See* 8 CFR 103.3(a)(2)(vi) ("The affected party may submit a brief with Form I-290B."); *see also* 8 CFR 103.3 (1958), 7.11 (1952). Only the Special Agricultural Worker and Legalization regulations specifically allow for the submission of new evidence on appeal, since these applicants may not file a motion to reopen or reconsider. 8 CFR 103.3(a)(3)(i) (noting that the Form I-694 appeal may be "accompanied by any additional new evidence").

In 1991, the Immigration and Naturalization Service amended the instructions to Form I-290B to include the option of submitting new evidence with the appeal brief. The reason for this change was the implementation of the IFR process. The submission of evidence on appeal permitted the immigration officer who issued the unfavorable decision to decide during IFR whether to treat the appeal as a motion to reopen or forward the appeal to the AAO for review. 54 FR 29344 (Proposed Rule); 55 FR 20767-01 (Final Rule).

In *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), the Board of Immigration Appeals (BIA) determined that where a petitioner fails to timely and substantively respond to a Notice of Intent to Deny (NOID) or make a reasonable request for an extension, the BIA will not consider any evidence first offered on appeal as its review is limited to the record of proceeding before the district director. In *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), the BIA held

that if a petitioner was put on notice of an evidentiary requirement (by statute, regulation, form instructions, request for evidence (RFE), NOID, etc.) and was given a reasonable opportunity to provide the evidence, then any new evidence submitted on appeal pertaining to that requirement would not be considered, and the appeal would be adjudicated based on the evidentiary record before the director. Conversely, if the petitioner had not been put on notice of the deficiency or given a reasonable opportunity to address it before the denial, and on appeal the petitioner submits additional evidence addressing the deficiency, the record would generally be remanded to allow the director to initially consider and address the newly submitted evidence.

For these reasons, except in exigent circumstances and at USCIS discretion, the AAO will not consider evidence submitted for the first time on appeal if:

- The affected party was put on notice of an evidentiary requirement (by statute, regulation, form instructions, RFE, NOID, notice of intent to revoke, etc.);
- The affected party was given a reasonable opportunity to provide the evidence; and
- The evidence was reasonably available to the affected party at the time it was supposed to have been submitted.

USCIS also proposes to clarify on Form I-290B that if the affected party elects to submit evidence on appeal, the evidence must be submitted concurrently with the appeal in order for the officer who issued the unfavorable decision (or the officer with jurisdiction over the matter in cases where the affected party has moved) to review the new evidence for favorable action as a motion to reopen. If the affected party elects to submit a brief or evidence after the filing of the appeal, the affected party must submit it directly to the AAO. *See* 8 CFR 103.3 (a)(2)(viii);

Instructions for Notice of Appeal or Motion at https://www.uscis.gov/i-290b. This means that the officer conducting IFR will not have an opportunity to review the new evidence and therefore cannot treat the appeal as a motion to reopen prior to forwarding the appeal to the AAO. This clarification in the form and instructions is meant to make it absolutely clear to filers what happens if the evidence is not concurrently submitted with the Form I-290B but is instead submitted later with the brief to the AAO. Further, as the appellate process was not meant to provide for the submission of evidence in support of an appeal, this clarification also elucidates that, except in exigent circumstances, the submission of evidence directly to the AAO may only result at most in a remand, provided the evidence is material and does not fall into one of the three categories described above.

(4) Abuse of Discretion Standard of Review for Discretionary Decisions.

For USCIS discretionary decisions, the officer generally identifies and weighs the applicable positive and negative factors, which may include the alien's conduct, character, relationships, ties to the United States, medical condition, and other humanitarian factors. *See, e.g., USCIS Policy Manual*, Vol. 7, Ch. 10, "Legal Analysis and Use of Discretion" (2019). To determine whether a denial is based on discretion, the AAO reviews the written decision for an analysis that weighs both positive and adverse factors, followed by unambiguous language to indicate that the matter is denied "as a matter of discretion," and a specific citation to a statute that confers discretionary authority.

A majority of discretionary immigration benefits are not subject to review on appeal. *See, e.g.*, 8 CFR 207.3 (refugee waivers), 209.2(f) (application for adjustment of status of alien granted asylum), 212.3(c) (application for advance permission to return to an unrelinquished

domicile under section 212(c) of the Act), 214.1(c)(5) (applications for extension of nonimmigrant stay), 216.5(f) (hardship waiver for joint petition to remove conditions for alien spouse), 240.25(e) (application for voluntary departure), 245.2(a)(5)(ii) (adjustment of status under section 245(a) of the Act), 245.2(a)(5)(iii) (adjustment of status under the Act of 1966), 245.2(c) (adjustment of status under section 214(d) of the Act), 249.2(b) (record of admission under section 249 of the Act), and 274a.13(c) (applications for employment authorization). A smaller number of discretionary case types fall under the appellate jurisdiction of the AAO. *See* 8 CFR 212.2(h) (requests for consent to reapply for admission), 212.7(a)(3) (applications for waiver of certain grounds of inadmissibility), 223.2(g) (applications for reentry permits and refugee travel documents), 244.10(d) (application for Temporary Protected Status), 245.23(i) (applications for T adjustment of status), and 245.24(f)(2) (applications for U adjustment of status).

The AAO may review questions of law, policy, fact, and discretion *de novo*. *See* section 557(b) of the Administrative Procedure Act (APA); *Powers and Duties of Service Officers*, 49 Fed. Reg. 7355 (Feb. 29, 1984). *See also Soltane v. USDOJ*, 381 F.3d 143, 145-46 (3rd Cir. 2004); *Sadeghzadeh v. USCIS*, 322 F.Supp.3d 12, 19 (DDC 2018). The AAO's *de novo* review authority is also acknowledged in its precedent decisions. *See, e.g., Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 542 n.1 (AAO 2015).

While *de novo* review may be suitable for questions of law and fact, DHS has questioned whether this *de novo* review approach is appropriate for discretionary decisions given the initial adjudicator's role in developing the record, identifying the discretionary factors, and ultimately weighing the alien's conduct, character, relationships, and other humanitarian factors.

Appellate bodies traditionally use three different standards of review (*de novo*, clear error, and abuse of discretion) depending on whether the issue being reviewed is a question of law, fact, or discretion, respectively. *De novo* review is the lowest or least deferential standard of review. With *de novo* review, the appellate adjudicator does not give any deference to the decision below. It considers the issue anew, as if no decision had been previously rendered. *De novo* review traditionally applies to questions of law, such as statutory and regulatory interpretation. Conversely, "abuse of discretion" is the highest or most deferential standard of review. Abuse of discretion requires a firm conviction that a discretionary decision is grossly unsound, unreasonable, contrary to law, or unsupported by the evidence. *See* Black's Law Dictionary (11th ed. 2019). This level of deference is traditionally given to an exercise of discretionary authority.

To that end, DHS proposes to revise the instructions for Form I-290B to inform affected parties that the AAO will review discretionary USCIS decisions using the abuse of discretion standard of review. This means that the AAO will not overrule the an exercise of discretion unless there is a firm conviction the decision is grossly unsound, unreasonable, contrary to law, or unsupported by the evidence. This level of review is appropriate because the AAO should not overturn a reasonable exercise of discretion simply because the appeals officer in his or her discretion would have reached a different result.

(5) AAO does not have appellate jurisdiction over "no risk" determinations under the Adam Walsh Act.

The proposed Form I-290B Instructions clarify that the AAO does not have jurisdiction over appeals of "no risk" determinations under the Adam Walsh Child Protection and Safety Act

of 2006, Pub. L. No. 109-248, 120 Stat. 587 (AWA). Section 402(a)(2) of the AWA bars approval of family-based visa petitions filed by U.S. citizens who have been convicted of a "specified offense against a minor" unless the DHS Secretary, in his or her "sole and unreviewable discretion," determines that the U.S. citizen poses "no risk" to the beneficiary of the petition.

The AAO's appellate jurisdiction is based on a delegation of authority from the Secretary of Homeland Security. *See* Delegation Number 0150.1(U) (effective March 1, 2003). The Secretary may delegate any authority or function to administer and enforce the immigration laws to any official, officer, or DHS employee. 6 U.S.C. 112(b)(1) (2012); 8 U.S.C. 1103(a)(4); 8 CFR 2.1.

Regarding AWA "no risk" determinations, in *Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014), the BIA held that Congress entrusted AWA "no risk" determinations to DHS, not the BIA. USCIS subsequently issued a policy memorandum agreeing that DHS maintains sole jurisdiction over AWA "no risk" determinations. *See* PM-602-0124, *Initial Field Review of Appeals to the Administrative Appeals Office* (Nov. 4, 2015). However, the Secretary has not delegated appellate authority to the AAO by revising Delegation 0150.1(U) or through other means provided by 8 C.F.R. § 2.1. Although USCIS officers may certify cases involving AWA "no risk" determinations to the AAO, the Secretary has not yet delegated *appellate* authority over AWA "no risk" determinations to the AAO. Accordingly, in order for USCIS to review an adverse AWA "no risk" determination decision, the correct course of action is to file a motion to reopen or reconsider on Form I-290B.

This clarification has been added to the Form I-290B Instructions because in the past, the

AAO is aware that it incorrectly reviewed at least one appeal of an AWA "no risk" determination, in addition to multiple cases that were properly certified for review. Additionally, the AAO had posted inconsistent information on the USCIS web site regarding AWA jurisdiction. Consequently, to reduce stakeholder confusion regarding this issue, this proposed language has been included in the update to the Form I-290B Instructions.

III. Administrative Procedure Act (APA)

This proposed Form revision is a procedural rule and as a rule "of agency organization, procedure, or practice," is exempt from the APA and USCIS is not required to provide notice and an opportunity to comment prior to its issuance. *See* 5 U.S.C. § 553(b)(3)(A). The proposed revisions to the form and instructions clearly outline the requirements and documentation necessary to support a request for an appeal or motion. The revised Form I-290B simply effectuates technical changes to appeals and motions squarely within the definition of a procedural rule. The substantive standards for appeals and motions remain unchanged and a revision that changes evidence or filing requirements but does not "change the substantive standards by which [USCIS] evaluates [appeals] . . . fall[s] comfortably within the realm of the 'procedural.'" *JEM Broad. Co.*, 22 F.3d at 327; *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1055 (D.C. Cir. 1987) (concluding that "the focus and timing of review are matters for agency discretion, falling well within § 553's procedural exemption" provided substantive standards remain unchanged).

To the extent the proposed revisions are not procedural, they are still exempt from notice-and-comment rulemaking because they are, at most, "interpretive." Interpretive rules, which "merely explain, but do not add to, the substantive law that already exists in the form of a

statute or legislative rule." *Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010) ("[A]gencies issue interpretive rules to clarify or explain existing law or regulations so as to advise the public of the agency's construction of the rules it administers." Here, 8 CFR 103.3 and 103.5 set forth the requirements for appeals including the evidence to support the reasons the USCIS decision is incorrect. The five changes outlined above simply clarify regulatory requirements and do not change substantive standards for appeals and motions, just the procedural steps and evidence for filing.

Comments:

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: http://www.regulations.gov and enter USCIS-2008-0027 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at http://www.regulations.gov, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of http://www.regulations.gov.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper

performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Notice of Appeal or Motion.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-290B; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. Form I-290B standardizes requests for appeals and motions and ensures that the basic information required to adjudicate appeals and motions is provided by applicants and petitioners, or their attorneys or representatives. USCIS uses the data collected on Form I-290B to determine whether an applicant or petitioner is eligible to file an appeal or motion, whether the requirements of an appeal or motion have been met, and whether the applicant or petitioner is eligible for the requested immigration benefit. Form I-290B can also be filed with ICE by schools appealing decisions on Form I-17 filings for certification to ICE's

Student and Exchange Visitor Program (SEVP).

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-290B is 28,000 and the estimated hour burden per response is 1.5 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 42,000 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $8,652,000.

Dated: November 29, 2019.

Kathy Nuebel Kovarik,

Acting Deputy Director,

U.S. Citizenship and Immigration Services,

Department of Homeland Security.

BILLING CODE 9111-97

[FR Doc. 2019-26331 Filed: 12/5/2019 8:45 am; Publication Date: 12/6/2019]