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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1240

[EOIR Docket No. 19-0010; A.G. Order No. 4843-2020]

RIN 1125-AA93

Procedures for Asylum and Withholding of Removal

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (“Department” or “DOJ”) proposes to amend the Executive Office for Immigration Review (“EOIR”) regulations governing asylum and withholding of removal, including changes to what must be included with an application for such relief for it to be considered complete and the consequences of filing an incomplete application, changes establishing a 15-day filing deadline for aliens applying for asylum in asylum-and-withholding-only proceedings, and changes related to the 180-day asylum adjudication clock.

DATES: Written or electronic comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight Eastern Time at the end of that day.

ADDRESSES: If you wish to provide comments regarding this rulemaking, you must submit comments, identified by the agency name and referencing RIN 1125-AA93 or EOIR Docket No. 19-0010, by one of the two methods below.

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- *Mail*: Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of an electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference the agency name and RIN 1125-AA93 or EOIR Docket No. 19-0010 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305-0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via one of the methods and by the deadline stated above. All comments must be submitted in English, or accompanied by an English translation. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the proposed rule; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection 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 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 prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

Personally identifiable information 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. The Department may withhold from public viewing information provided in comments 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>. To inspect the agency’s public docket file in person, you must make an appointment with the agency. Please see the “For Further Information Contact” paragraph above for agency contact information.

II. Discussion

In 1980, Congress enacted the Refugee Act of 1980, which, among other things, amended the Immigration and Nationality Act (“INA” or “Act”) to implement the obligations of the United States under the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”), by establishing a formal statutory procedure for granting asylum to certain refugees who are present in the United States, and by providing for a permanent procedure for the admission and resettlement of refugees. Pub. L. 96-212, 94 Stat. 102, 102. The term “refugee” is now generally defined as “any person who is outside of any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA 101(a)(42), 8 U.S.C. 1101(a)(42). Those five grounds, which mirror those set out in the 1951 Convention Relating to the Status of Refugees, as well as the 1967 Protocol, are the sole grounds for asylum in the United States today.

A. Form I-589 Filing Requirements

1. Filing Deadline for Asylum Applications in Asylum-and-Withholding-Only Proceedings

An applicant for relief or protection from removal, including asylum, must comply with applicable requirements to submit information or documentation in support of the application as provided by statute or regulation. INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B). With one exception for detained crewmembers of a vessel, *see* 8 CFR 1208.5(b)(1)(ii), the regulations currently do not prescribe a specific deadline for filing an application for asylum and

withholding of removal with EOIR.¹ Rather, in immigration proceedings, the immigration judge has the authority to set deadlines for the filing of applications and related documents. 8 CFR 1003.31(c). Where an immigration judge has set a deadline for filing an application for relief and that application is not filed within the time set by the court, the opportunity to file such an application shall be deemed waived. *Id.* The Board of Immigration Appeals has routinely held that applications for benefits are deemed abandoned when the alien fails to timely file them. *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992) (asylum application deemed abandoned after alien failed to file application by deadline set by the immigration judge); *Matter of Jean*, 17 I&N Dec. 100, 101-02 (BIA 1979) (asylum application deemed abandoned after alien failed to meet 20-day filing deadline set by immigration judge).

In this notice of proposed rulemaking (“proposed rule”), the Department proposes to revise 8 CFR 1208.4 to add a 15-day deadline from the date of the alien’s first hearing to file an application for asylum and withholding of removal for aliens in asylum-and-withholding-only proceedings.² Aliens in such proceedings are generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers, and are often also detained. 8 CFR 1208.2(c).³ Moreover, their only avenues for

¹ There is a statutory one-year deadline for filing asylum applications, which allows for limited exceptions and exclusions. INA 208(a)(2)(B), (D), (E), 8 U.S.C. 1158(a)(2)(B), (D), (E).

² For many years, these proceedings have been referred to as “asylum-only” proceedings. *See, e.g., Matter of D-M-C-P-*, 26 I&N Dec. 644, 645 (BIA 2015) (“The applicant expressed a fear of returning to Argentina, and on June 23, 2011, his case was referred to the Immigration Court for asylum-only proceedings . . .”). EOIR now uses the term “asylum-and-withholding-only proceedings.” *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Interview*, 85 FR 36264, 36265 n.2 (June 15, 2020).

³ Most aliens who are applicants for admission are subject to detention during the inspection process and any subsequent expedited removal proceedings. 8 CFR 235.3. Aliens who are ordered removed after entering the United States are subject to detention by the Department of Homeland Security (“DHS”). INA 241(a)(2), 8 U.S.C. 1231(a)(2). The categories of aliens described in 8 CFR 1208.2(c) encompass both categories—i.e., those denied admission to the United States and those who have entered the United States and subsequently become subject to

relief or protection are applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT regulations”), and they would not be in asylum-and-withholding-only proceedings if they had not already claimed a fear of persecution or torture upon being returned to their home countries. 8 CFR 1208.2(c)(3)(i). Claims for asylum and withholding of removal (both statutory, INA 241(b)(3), 8 U.S.C. 1231(b)(3), and under the CAT regulations) are the sole issues to be resolved in the proceeding and are squarely presented at the outset of the proceeding; thus, there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible. Moreover, delaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time. Further, without such a deadline for the asylum application, there is a risk that applicants may simply delay proceedings, resulting in inefficiency in what should otherwise be a streamlined proceeding. Finally, such a deadline is consistent with

removal through a removal order issued by DHS outside of immigration proceedings conducted by the Department. For aliens in the former category, their asylum claims typically are presented at the time admission is denied. For aliens in the latter category, their asylum claims typically arise after DHS has detained them and begun the process of effectuating their removal. More specifically, alien crewmembers who are subject to denial of permission to land or removal pursuant to INA 252, 8 U.S.C. 1282, are also subject to detention. INA 252(b), 8 U.S.C. 1282(b); 8 CFR 252.1(a). Alien stowaways are subject to removal pursuant to INA 235(a)(2), 8 U.S.C. 1225(a)(2). Alien stowaways who go through the credible fear screening process are detained. INA 235(b)(1)(B)(iii)(IV), 8 U.S.C. 1225(b)(1)(B)(iii)(IV). An applicant for admission under the Visa Waiver Program (“VWP”) who is refused admission may be removed, though such removal does not constitute a removal under the Act. 8 CFR 217.4(a)(1), (3). An alien admitted under the VWP who is found to be deportable is ordered removed. 8 CFR 217.4(b). Aliens who have received S nonimmigrant status under INA 101(a)(15)(S), 8 U.S.C. 1101(a)(15)(S), may be subject to removal. 8 CFR 236.4. Aliens subject to the Guam-Commonwealth of the Northern Mariana Islands VWP are subject to similar procedures regarding refusal of admission and removal as aliens subject to the regular VWP. 8 CFR 212.1(q)(8).

existing regulations that specify a 10-day deadline for detained crewmembers to file an asylum application, 8 CFR 1208.5(b)(1)(ii), and with the regulatory directive in 8 CFR 1208.5(a) that asylum applications filed by detained aliens are to be given expedited consideration.⁴

To allow for unusual situations in which an alien may need additional time to file the application, notwithstanding the alien's recent assertion of a fear of persecution, the Department also proposes to amend 8 CFR 1208.4 to allow for the extension of the deadline for good cause similar to the extension to the 10-day deadline allowable for alien crewmembers to file an asylum application. *See* 8 CFR 1208.5(b)(1)(ii).

Finally, the regulatory deadline would not preclude an alien from amending or supplementing the application later in the course of proceedings, subject to an immigration judge's discretion consistent with 8 CFR 1208.4(c); rather, the deadline would ensure only that the application is filed in a timely manner consistent with the streamlined and focused nature of asylum-and-withholding-only proceedings.

2. Re-filing an Incomplete Application with EOIR

A Form I-589, Application for Asylum and for Withholding of Removal, is incomplete if it does not include a response to each question, is unsigned, or lacks required supporting evidence described on the form and form instructions. 8 CFR 1208.3(c)(3). An incomplete application does not start the accrual of time for an asylum applicant to file for employment authorization. *Id.* As currently drafted, however, the regulations provide that if the immigration

⁴ To ensure this deadline is met, the proposed rule also extends the requirements of 8 CFR 1240.11(c)(1)(i) through (iii), regarding advisals given by an immigration judge and the provision of an asylum application to aliens in certain circumstances in removal proceedings, to aliens in proceedings under 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(iii).

court⁵ fails to return an I-589 application submitted by mail within 30 days, the application will be deemed complete. *Id.* The regulations do not provide a time frame in which an alien must re-file the application if the alien wishes it to be considered. *Id.* Upon an alien's request and as a matter of discretion, an immigration judge may allow an alien to amend or supplement the alien's application after it is filed. 8 CFR 1208.4(c).

The proposed rule would revise 8 CFR 1208.3(c)(3) to ensure that cases of individuals seeking asylum are processed efficiently by minimizing any delay between the return of an incomplete asylum application and the re-filing of a complete one. First, the proposed rule would remove the current provision that an alien's incomplete asylum application submitted by mail will be deemed complete if the immigration court fails to return the application within 30 days of receipt. Instead, the proposed rule would provide that immigration courts will reject all incomplete applications and return them to the applicant in a timely fashion to the address of record for the alien or any representative of record.⁶ Further, the proposed rule would add a maximum of 30 days for the alien to correct any deficiencies in his or her application; the regulations do not currently have any time requirement for the alien to correct an incomplete application. If the alien fails to file a complete application within the required time period,

⁵ As currently written, 8 CFR 1208.3(c)(3) uses the term "Service" instead of "immigration court." Use of the term "Service" reflects that the Department did not update certain terms and positions when EOIR's regulations were copied from chapter I to new chapter V of title 8 of the Code of Federal Regulations following the creation of DHS in 2003. Other references in chapter V to the Immigration and Naturalization Service or DHS offices apply equally to immigration judges or EOIR.

⁶ Aliens are required to maintain an updated address with the immigration court. Form EOIR-33 must be filed with the immigration court within five days of a change in address. 8 CFR 1003.15(d)(2).

absent exceptional circumstances, the application would be deemed abandoned and would be denied.

Thirty days is a reasonable period in which to remedy application defects, and the Department expects that applicants would have an incentive to re-file the application as soon as possible in order to trigger the possibility of obtaining employment authorization. It is well established that immigration judges have the authority to set filing deadlines and manage their dockets consistent with applicable law, and this requirement is fully consistent with that authority. *See* 8 CFR 1003.10(b), 1003.14(b), 1003.18, 1003.31(c). Further, if an application is not filed within the time set by an immigration judge, the opportunity to file that application shall be deemed waived. 8 CFR 1003.31(c). Additionally, reasonable filing deadlines do not violate the immigration laws or any international treaty obligations. *See, e.g., Hui Zheng v. Holder*, 562 F.3d 647, 655-56 (4th Cir. 2009); *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008); *Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001).

Without such a deadline, there is a risk that applicants will delay proceedings based on an assertion that a corrected application will be forthcoming, resulting in wasted immigration judge time and increasing the likelihood that, due to the ongoing addition of cases to the docket, the eventual application may not be adjudicated within 180 days as contemplated by the Act. INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). These changes will enhance efficiencies for the immigration courts by ensuring that cases proceed in a timely and predictable manner rather than allowing deficiencies in applications to be corrected at any point, and are fully consistent with the Attorney General's authority to set conditions or limitations on the consideration of asylum applications. INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Moreover, administrative agencies have the prerogative to determine proper rules of procedure that best allow them to carry out

their missions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978).

3. Submission of Any Applicable Asylum Fee

The Department also proposes to amend 8 CFR 1208.3(c)(3) to specify that any required filing fee must be submitted in connection with the asylum application at the time of filing. *See* 8 CFR 1003.24, 1003.31(b), 1103.7(a)(3) (describing process for payment of fees relating to EOIR proceedings). A Department regulation, 8 CFR 1103.7(b)(4)(ii), provides that when EOIR uses a Department of Homeland Security (“DHS”) form in immigration proceedings, the applicable fee is the one provided under DHS regulations at 8 CFR 103.7.⁷ EOIR uses the U.S. Citizenship and Immigration Services (“USCIS”) Form I-589, Application for Asylum and for Withholding of Removal, for which DHS sets the application fee. Under the Department’s regulation, the DHS fee would also apply to any filing of USCIS Form I-589 in EOIR proceedings. *See* 8 CFR 1103.7(b)(4)(ii); *see also* 8 CFR 103.7. Thus, the proposed rule would provide that a fee must be submitted if DHS requires one.⁸

⁷ On November 14, 2019, DHS proposed to adjust its fee schedule for certain applications it adjudicates, including applications also adjudicated by EOIR—e.g., Forms I-191, I-485, I-601, I-589, and I-881. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280, 62326-27 (Nov. 14, 2019). As part of that proposed rulemaking, DHS proposed to move its fee schedule from 8 CFR 103.7 to 8 CFR 106.2. *See* 84 FR at 62359-63. On August 3, 2020, DHS published the final rule regarding its new fee schedule to be effective October 2, 2020. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788 (Aug. 3, 2020). The Department will conform its reference in 8 CFR 1103.7(b)(4)(ii) to DHS’s new fee regulation in a separate rulemaking.

⁸ DHS’s recent final rule will require a fee of \$50 for Form I-589 in most circumstances. 85 FR at 46791. All fees for DHS applications adjudicated by the Department are payable to DHS, and DHS deposits the funds in the Immigration Examinations Fee Account. *See* INA 286, 8 U.S.C. 1356.

B. Form I-589 Procedural Requirements

1. Supplementing the Record

Under 8 CFR 1208.12, an immigration judge⁹ may rely on material provided by certain entities when deciding an asylum application, or deciding whether an alien has a credible fear of persecution or torture pursuant to 8 CFR 1208.30 or a reasonable fear of persecution or torture pursuant to 8 CFR 1208.31. Currently, those entities are the Department of State, the DOJ Office of International Affairs, DHS, and other credible sources, which, under the regulation, may include international organizations, private voluntary agencies, news organizations, or academic institutions.

The Department proposes to clarify the external materials upon which an immigration judge may rely, including by broadening the scope of Department components and other government agencies that may possess relevant information for an immigration judge in adjudicating a claim. The Department also proposes to revise the standard for an immigration judge's consideration of information from non-governmental sources to ensure that only probative and credible evidence is considered. Although materials provided by non-governmental organizations are sometimes helpful, the current regulatory text could be read to imply that they always are, which is not necessarily the case. *See, e.g., M.A. v. U.S. INS*, 899 F.2d 304, 313 (4th Cir. 1990) (en banc) ("A standard of asylum eligibility based solely on pronouncements of private organizations or the news media is problematic almost to the point of

⁹ The current text of 8 CFR 1208.12 refers to an asylum officer instead of an immigration judge. This reflects that the Department did not update certain terms and positions when EOIR's regulations were copied from chapter I to new chapter V of title 8 of the Code of Federal Regulations following the creation of DHS in 2003. The proposed regulation corrects that oversight and replaces "asylum officer" with "immigration judge" in 8 CFR 1208.12.

being non-justiciable.”). The proposed revision provides appropriate guidance regarding the use of such materials to ensure that only credible and probative materials are considered.

The Department also proposes to expand 8 CFR 1208.12 to allow an immigration judge to submit evidence into the record and consider that evidence, so long as the judge has provided a copy to both parties, which will give the parties an opportunity to respond to or address the information appropriately. This proposal is consistent with the immigration judge’s powers and duties under 8 CFR 1003.10(b) to manage immigration court hearings: “In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.” *See also* 8 CFR 1003.36 (“The Immigration Court shall create and control the Record of Proceeding.”). It is also consistent with an immigration judge’s duty to develop the record. *See, e.g., Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) (“[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.”); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102-03 (8th Cir. 2014) (concluding that the immigration judge’s introduction of documents into the record did not deprive the respondent of due process because “IJs maintain an affirmative duty to develop the record”); *see also Richardson v. Perales*, 402 U.S. 389, 410 (1971) (finding that an administrative law judge “acts as an examiner charged with developing the facts”); Charles H. Koch, Jr., *Administrative Law and Practice* § 5.25 (2d ed. 1997) (noting that “[t]he presiding official is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike the trial judge, an administrative judge has a well-established affirmative duty to develop the record”). Further, this change will better enable immigration judges to ensure full consideration of all

relevant evidence and full development of the record for cases involving a pro se respondent. *See Matter of S-M-J*, 21 I&N Dec. 722, 729 (BIA 1997) (en banc) (noting that “various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator”).

2. The Asylum Adjudication Clock

The proposed rule would remove and reserve 8 CFR 1208.7 as EOIR does not adjudicate applications for employment authorization.¹⁰ Further, there is confusing language in 8 CFR 1208.7 regarding the relationship between the time period for applications for employment authorization, which EOIR does not adjudicate, and the time period for adjudicating actual asylum applications, which are relevant for EOIR’s purposes.

The INA contains two separate provisions relating to a 180-day time frame in the context of an asylum application. The first, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), directs the Attorney General to set procedures for processing asylum applications providing that, in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed. Implementing regulations clarify that the “time period[] within which . . . the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the

¹⁰ On June 22, 2020, DHS issued a final rule, effective August 21, 2020, in which it removed from its regulations in part 208 of title 8 (1) the 30-day processing provision for initial employment authorization applications for those with pending asylum applications, and (2) the 90-day time frame for receipt of an application to renew employment authorization. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 FR 37502, 37503. The rule also indicated that DOJ may issue conforming changes to 8 CFR 1208.7 at a later date. *Id.* at 37510. By removing 8 CFR 1208.7, which mirrors 8 CFR 208.7, the proposed rule would avoid any potential conflict with DHS regulatory provisions. On June 26, 2020, DHS published a final rule, effective August 25, 2020, making changes to 8 CFR 208.7. *See Asylum Application, Interview, and Employment Authorization for Applicants*, 85 FR 38532. The removal of 8 CFR 1208.7 avoids any potential conflict with changes to 8 CFR 208.7.

Act shall begin when the alien has filed a complete asylum application in accordance with” applicable procedures. 8 CFR 1208.7(a)(2).

The second, INA 208(d)(2), 8 U.S.C. 1158(d)(2), addresses when an asylum applicant may be granted employment authorization based on an asylum application, providing that an applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

EOIR’s current regulations provide that (1) an alien cannot apply for employment authorization until at least 150 days after filing an application for asylum, and (2) “no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application.” 8 CFR 1208.7(a)(1).

Furthermore, the time periods within which the alien may not apply for employment authorization “shall begin when the alien has filed a complete asylum application in accordance with” applicable regulations. 8 CFR 1208.7(a)(2).¹¹

Although neither provision is privately enforceable, INA 208(d)(7), 8 U.S.C. 1158(d)(7), both statutory provisions express Congress’s strong expectation that asylum applications would be adjudicated within 180 days of the date of filing. Section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), does so expressly, by indicating that asylum applications should be adjudicated within 180 days absent “exceptional circumstances.” And INA 208(d)(2), 8 U.S.C. 1158(d)(2), does so implicitly, by providing that employment authorization shall not be granted

¹¹ DHS regulations with similar provisions have been amended, *see* note 10, *supra*, and this proposed rule would eliminate these provisions altogether from EOIR’s regulations as discussed below.

prior to 180 days after an alien files an asylum application, i.e., after the claim is supposed to have been adjudicated.

Although both of these provisions reflect an expectation that asylum applications should be adjudicated within 180 days of filing, the provisions themselves are not identical. For example, the adjudication deadline for the asylum application itself is subject to tolling for “exceptional circumstances.” INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). In contrast, the period during which an alien is barred from filing an application for employment authorization based on an asylum application may be tolled solely for an alien-caused continuance, 8 CFR 1208.7(a)(1), and continuances are subject to a “good cause” standard, *see* 8 CFR 1003.29 and 1240.6.¹²

Aliens in removal proceedings sometimes request continuances pursuant to 8 CFR 1003.29 that, if granted, would delay adjudication of their asylum applications past the 180-day deadline. Section 1003.29 imposes a “good cause” standard for granting continuances. But if granting a continuance would result in missing the 180-day deadline, the immigration judge may only grant the continuance if the respondent satisfies both the “good cause” standard of 8 CFR 1003.29 and also shows the “exceptional circumstances” required by INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). Under 8 CFR 1208.7(a)(2), “[a]ny delay requested or caused by the applicant shall not be counted as part of” the 180-day adjudication deadline described in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). This means that an alien who causes delays in the adjudication process is not entitled to such a prompt adjudication

¹² The “good cause” standard governs continuances under 8 CFR 1003.29 and adjournments under 8 CFR 1240.6, and both provisions were derived from former 8 CFR 242.13 (1958). *Matter of L-A-B-R-*, 27 I&N Dec. 405, 407 n.1 (A.G. 2018). For simplicity, the proposed rule generally refers only to 8 CFR 1003.29.

of his asylum claim. But, absent delays that qualify as exceptional circumstances, 8 CFR 1208.7(a)(2) does not relieve immigration judges of their obligation to adjudicate asylum claims within 180 days.

Neither existing regulations nor EOIR's operational guidance, however, has always clearly and carefully distinguished between INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and INA 208(d)(2), 8 U.S.C. 1158(d)(2). *See* Policy Memorandum 19-05, Guidance Regarding the Adjudication of Asylum Applications Consistent with INA section 208(d)(5)(A)(iii) (Nov. 19, 2018). Consequently, the proposed rule remedies that confusion by removing regulatory language related to the employment authorization process that EOIR does not administer and by amending part 1003 of EOIR's regulations to implement INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and to direct immigration judges to adjudicate asylum applications within 180 days of filing absent exceptional circumstances.

Although the term "exceptional circumstances" is not defined for purposes of INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii),¹³ there is no indication that Congress intended for that standard to be satisfied by any request for delay by the applicant or to be linked to the employment authorization process. To the contrary, EOIR's adjudication of asylum applications is a wholly separate process from DHS's adjudication of employment authorization applications. Indeed, there is no apparent basis to include the reference to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), in 8 CFR 1208.7 because that regulation otherwise addresses employment authorization, which is unrelated to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii).¹⁴

¹³ The term "exceptional circumstances" is defined in INA 240(e)(1), 8 U.S.C. 1229a(e)(1), but only for purposes of INA 240 and 240A, 8 U.S.C. 1229a and 1229b.

¹⁴ The reference to INA 208(d)(5)(A)(iii) was inserted into 8 CFR 208.7 (which was later copied in 8 CFR 1208.7) without explanation. *See* 62 FR 444, 464 (Jan. 3, 1997).

To better effectuate the “exceptional circumstances” exception to the 180-day deadline in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), the Department proposes to add a definition of exceptional circumstances in the context of asylum adjudications that is similar to the one currently in INA 240(e)(1), 8 U.S.C. 1229a(e)(1). The statutory definition in INA 240(e)(1), 8 U.S.C. 1229a(e)(1), characterizes circumstances in which an order of removal issued in absentia may be rescinded for an alien who had notice of the hearing at which the alien failed to appear, provided the alien filed a motion to reopen and rescind the order within 180 days. INA 240(b)(5)(C)(i), 8 U.S.C. 1229a(b)(5)(C)(i). As a definition of circumstances in which an adjudication should have been delayed, it also represents a helpful explanation of the exceptional nature of circumstances that would warrant an exception to the 180-day deadline.

As of August 14, 2020, EOIR has over 560,000 applications for asylum and withholding of removal pending, and its ability to ensure they are adjudicated consistent with the statutory requirements of INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), may be undermined by the current text of 8 CFR 1208.7(a)(2), which could be interpreted to allow either party to unilaterally delay the adjudication of an asylum application without necessarily showing exceptional circumstances, in contravention of the statute. Nothing in the text of INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), which is directed toward adjudicators rather than applicants, indicates that an asylum applicant may unilaterally prompt an extension of the adjudication deadline in the absence of exceptional circumstances.

An applicant may have his or her removal proceeding continued upon a showing of good cause. 8 CFR 1003.29, 1240.6; *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). Although neither “good cause” nor “exceptional circumstances” is defined by statute or regulation in this context, there is no indication that the two terms were intended to mean the same thing. To the

contrary, plain meaning would dictate that the two terms reflect different standards. Indeed, in other contexts, “good cause” is generally treated as a lower standard than “exceptional circumstances.” *Compare United States v. Lea*, 360 F.3d 401, 403 (2d Cir. 2004) (“Exceptional circumstances [under a criminal detention statute] exist where there is a unique combination of circumstances giving rise to situations that are out of the ordinary.” (internal quotation marks omitted)), with *Hall v. Sec’y of Health, Educ. & Welfare*, 602 F.2d 1372, 1377 (9th Cir. 1979) (“Good cause is . . . not a difficult standard to meet.”).

In short, “exceptional circumstances” are circumstances that are “clearly out of the ordinary, uncommon, or rare.” *United States v. Larue*, 478 F.3d 924, 926 (8th Cir. 2007) (per curiam) (applying “exceptional reasons” standard); *see also* INA 240(e)(1), 8 U.S.C. 1229a(e)(1) (exceptional circumstances include “battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances”). The term “good cause” has no settled meaning and generally requires a balancing of relevant factors to determine whether it exists. *Matter of L-A-B-R-*, 27 I&N Dec. at 412-13. Thus, although an exceptional circumstance will support a finding of good cause, good cause itself is not necessarily an exceptional circumstance that would warrant an exception to the statutory 180-day adjudication deadline for an asylum application. The inclusion of the reference to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), in 8 CFR 1208.7, which could be understood to effectively allow an alien or DHS to delay the adjudication deadline pursuant only to the “good cause” standard in 8 CFR 1003.29 and 1240.6, is in tension with the statute. Thus, not only does 8 CFR 1208.7 warrant deletion, but modifications to 8 CFR 1003.29 and 1240.6 are also necessary. Moreover, removing the reference to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), as part of the

removal of all of 1208.7 will allow EOIR to ensure that the statutory mandate regarding adjudicating asylum applications within 180 days is fulfilled absent exceptional circumstances.

In order to further ensure that asylum adjudications are completed within the 180-day period prescribed by INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), the proposed rule would directly promulgate a clear regulation implementing INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), in 8 CFR 1003.10(b) as part of the listing of immigration judge powers and duties. It would also amend 8 CFR 1003.31(c), which outlines the immigration judge's authority to set and extend time limits for filings of applications and related documents, to ensure that the setting of deadlines for filing supporting documents does not inadvertently extend the 180-day deadline absent exceptional circumstances. In short, the changes would incorporate the 180-day timeline by limiting an immigration judge's ability to set filing deadlines that would cause the adjudication of an asylum application to exceed 180 days absent a showing of exceptional circumstances.

Finally, the proposed rule would also remove and reserve § 1208.9 because that provision refers to operations performed by asylum officers in DHS, not immigration judges in EOIR. That provision was duplicated from § 208.9 as part of the reorganization of title 8 following the transfer of functions from the former Immigration and Naturalization Service to DHS due to the Homeland Security Act of 2002, Pub. L. 107-296. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9834 (Feb. 28, 2003).

III. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this proposed regulation in accordance with the Regulatory Flexibility Act and has determined that it will not have a significant economic impact on a

substantial number of small entities. 5 U.S.C. 605(b). The proposed rule would not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are placed in immigration proceedings.

B. Unfunded Mandates Reform Act of 1995

This proposed 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. Congressional Review Act

This proposed rule would not be a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). 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 enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563

The Office of Information and Regulatory Affairs of the Office of Management and Budget (“OMB”) has determined that this proposed rule is a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the regulation has been submitted to OMB for review. 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 potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Department believes that this proposed rule would effectuate congressional intent to resolve cases in an expeditious manner and would provide significant net benefits relating to EOIR proceedings by allowing the agency to resolve cases more quickly. *See* Executive Order 12866, sec. (1)(b)(6) (stating that “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs”). As of August 14, 2020, EOIR has over 560,000 pending cases with an application for asylum and withholding of removal, and the median processing time for a non-detained case with an asylum application is 807 days. This proposed rule would assist EOIR in adjudicating new asylum cases more efficiently in order to ensure that this volume does not increase to an insurmountable degree. No costs to the Department or to respondents are expected. Respondents are already required to submit complete asylum applications in order to have them adjudicated, and immigration judges already have authority to set deadlines.

The Department notes that this proposed rule would not impose any new fees. Consistent with the treatment of other applications referred by USCIS that are renewed in immigration proceedings, an alien filing a USCIS Form I-589 with USCIS who is then referred to DOJ for immigration proceedings would pay the application fee only once. The Department’s fees for applications published by DHS are established in accordance with 8 CFR 1103.7(b)(4)(ii),

which, in turn, cross-references the DHS fee schedule. Given the inextricable nature of the two agencies' asylum processes and the benefit of not treating applicants for substantially similar benefits differently if they file with DOJ or with DHS, the Department's regulations have contained this cross-reference for several years, and this proposed rule would not alter it. The Department is also not authorized, per regulation, to waive the application fee for an application published by DHS if DHS identifies that fee as non-waivable. 8 CFR 1103.7(c). The proposed rule would also not alter that regulatory structure.

The Department believes that this proposed rule would impose only minimal direct costs on the public, to include the costs associated with attorneys and regulated entities familiarizing themselves with this rule. An immigration judge's ability to set filing deadlines is already established by regulation, and filing deadlines for both applications and supporting documents are already a well-established aspect of immigration court proceedings guided by regulations and the Immigration Court Practice Manual. The proposed rule also does not require an immigration judge to schedule a merits hearing at any particular time after the application is filed, as long as the application is adjudicated within 180 days absent exceptional circumstances, which is an existing and longstanding statutory requirement. Moreover, this rule does not require that an alien wait until the immigration judge sets a filing deadline before filing an application, and an alien remains free to file his or her asylum application with the immigration court before the first hearing. Asylum applications are frequently filed prior to or at an initial immigration court hearing already, and existing regulations allow for supplementing an initial application as appropriate, subject to an immigration judge's discretion. Most aliens filing asylum applications

in pending immigration proceedings—87 percent—have representation,¹⁵ and the proposed rule would not be expected to increase any burdens on practitioners, who are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and who are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by an immigration judge. The Department acknowledges that establishing a fixed deadline to file an asylum application in some types of immigration proceedings may alter the manner in which attorneys organize their caseloads, though it also recognizes that attorneys have been aware of the 180-day adjudication deadline for asylum applications for over two decades and may be familiar with the similar existing deadline for alien crewmember asylum applications in 8 CFR 1208.5(b)(1)(ii). The Department seeks comment on the proposed rule’s potential indirect costs and benefits to practitioners, if any, beyond those already inherent in immigration proceedings and existing law.

No costs to the Department are associated with the proposed regulatory changes. The changes do not create an incentive that would cause DHS to file more cases and, thus, are not expected to result in an increase in the number of cases to be adjudicated by EOIR. Further, the changes provide guidance for administrative decision-making but do not require immigration judges to make more decisions or to prolong immigration proceedings.

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

¹⁵ EOIR, Current Representation Rates, available at <https://www.justice.gov/eoir/page/file/1062991/download>.

among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This proposed rule may require edits to the USCIS Form I-589, Application for Asylum and for Withholding of Removal, because the filing of an asylum application may now require submission of a fee receipt. If necessary, a separate notice will be published in the *Federal Register* requesting comments on the information collection impacts of this rule and the revised USCIS Form I-589.

List of Subjects

8 CFR Part 1003

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

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1003, 1208, and 1240 are proposed to be amended 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. In § 1003.10, amend paragraph (b) by adding three sentences at the end of paragraph to read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * In the absence of exceptional circumstances, an immigration judge shall complete administrative adjudication of an asylum application within 180 days after the date an application is filed. For purposes of this paragraph (b) and of §§ 1003.29 and 1240.6 of this chapter, the term *exceptional circumstances* refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the parties or the immigration court. A finding of good cause does not necessarily mean that an exceptional circumstance has also been established.

* * * * *

3. Revise § 1003.29 to read as follows:

§ 1003.29 Continuances.

The immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b).

4. In § 1003.31, revise paragraph (c) to read as follows:

§ 1003.31 Filing documents and applications.

* * * * *

(c) Subject to § 1208.4(d) of this chapter, the immigration judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any, provided that nothing in this section shall authorize setting or extending time limits for the filing of documents after an asylum application has been filed that would cause the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b). If an application or document is not filed within the time set by the immigration judge, the opportunity to file that application or document shall be deemed waived.

* * * * *

PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

5. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229; Pub. L. 115-218.

6. In § 1208.3, revise paragraph (c)(3) to read as follows:

§ 1208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application must be properly filed in accordance with the form instructions and with §§ 1003.24, 1003.31(b), and 1103.7(a)(3) of this chapter, including payment of a fee, if any, as explained in the instructions to the application. For purposes of filing with an immigration court, an asylum application is incomplete if it does not include a response to each of the required questions contained in the form, is unsigned, is unaccompanied by the required materials specified in paragraph (a) of this section, is not completed and submitted in accordance with the form instructions, or is unaccompanied by any required fee receipt. The filing of an incomplete application shall not commence the period after which the applicant may file an application for employment authorization. An application that is incomplete shall be rejected by the immigration court. If an applicant wishes to have his or her application for asylum considered, he or she shall correct the deficiencies in the incomplete application and re-file it within 30 days of rejection. Failure to correct the deficiencies in an incomplete application or failure to timely re-file the application with the deficiencies corrected, absent exceptional circumstances as defined in § 1003.10(b), shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application.

* * * * *

7. In § 1208.4, add paragraph (d) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(d) *Filing deadline.* For any alien in asylum proceedings pursuant to § 1208.2(c)(1) and paragraph (b)(3)(iii) of this section, the immigration judge shall comply with the requirements of § 1240.11(c)(1)(i) through (iii) and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application,

which includes an application for withholding of removal and protection under the Convention Against Torture. The immigration judge may extend the deadline for good cause. If the alien does not file an asylum application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security for execution of an order of removal.

§ 1208.7 [Removed and Reserved]

8. Remove and reserve § 1208.7.

§ 1208.9 [Removed and Reserved]

9. Remove and reserve § 1208.9.

10. In § 1208.12, revise paragraph (a) to read as follows:

§ 1208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, which includes an application for withholding of removal and protection under the Convention Against Torture, or in deciding whether the alien has a credible fear of persecution or torture pursuant to § 1208.30, or a reasonable fear of persecution or torture pursuant to § 1208.31, an immigration judge may rely on material provided by the Department of State, other Department of Justice offices, the Department of Homeland Security, or other U.S. government agencies, and may rely on foreign government and non-governmental sources if those sources are determined by the judge to be credible and probative. On his or her own authority, an immigration judge may submit relevant evidence into the record, if it is credible and probative, and may consider it in deciding an asylum application, which includes an application for withholding of removal and protection under the Convention Against Torture, provided that a copy of the evidence has been provided to both parties and both

parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.

* * * * *

**PART 1240 – PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN
THE UNITED STATES**

11. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681).

12. Revise § 1240.6 to read as follows:

§ 1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Department of Homeland Security, provided that nothing in this section shall authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b) of this chapter.

Dated: September 16, 2020.

William P. Barr,
Attorney General.