Proposed Rules

Federal Register
Vol. 60, No. 89
Tuesday, May 9, 1995

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

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

[EOIR No. 102P; AG Order No. 1965–95]

RIN 1125–AA01

Motions and Appeals in Immigration Proceedings

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: Proposed regulations were published in the **Federal Register** on June 7, 1994 concerning motions and appeals in immigration proceedings and on May 13, 1994 concerning fees. The June proposed rulemaking was promulgated to implement section 545 of the Immigration Act of 1990, Public Law 101–649, which requires both time and number limitations on motions to reopen and reconsider and changes in the substantive and procedural aspects of motion and appeal practice. The May proposed rulemaking was promulgated to establish an alternative procedure for filing proof of fee payments with the Board of Immigration Appeals (the ''Board'').

Since the publication of these two proposed rules, the agency has further examined its current appeal procedures and has decided to establish a uniform central system for filing and tracking appeals before the Board. Under the proposed procedure, parties would file a notice of appeal from a decision of an Immigration Judge and remit the appeal fee or fee waiver petition with the notice of appeal directly to the Board. The rule also would require that motions to reopen and motions to reconsider decisions of the Board be filed directly with the Board accompanied by the appropriate fee or fee waiver petition. This rule would supersede the May and June proposed rulemakings.

This proposed centralization of the appeals procedure is fundamentally interrelated to the proposed changes of both the June and the May proposed rulemakings. Therefore, the agency has determined to merge these substantive and procedural proposals into one rule and to provide an opportunity for public comment on this merged rule. The June proposed rule has been changed to clarify certain provisions and to reflect many of the commenters' concerns. The single unified proposed rule is published herein and addresses both the language of section 545(d) of the Immigration Act of 1990 and new procedural changes to the filing of appeals, motions, and their concomitant fees with the Board.

DATES: Written comments must be received on or before June 8, 1995.

ADDRESSES: Please submit written comments to Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION: The agency recently published two proposed rules concerning motions to reopen, motions to reconsider, notices of appeal, and filing fees. 59 FR 29386 (published June 7, 1994) (the ''June proposed rulemaking''); 59 FR 24977 (1994) (published May 13, 1994) (the ''May proposed rulemaking''). The June proposed rulemaking established both time and number limitations on motions to reopen proceedings and on motions to reconsider decisions as well as certain changes to appellate procedures to reflect the statutory directives in section 545 of the Immigration Act of 1990. The May proposed rule amended the requirement that the parties, after remitting all fee payments to the Immigration and Naturalization Service (the ''Service''), file the proof of payment with the Office of the Immigration Judge within 10 calendar days of the issuance of an oral decision or within 13 days of the mailing of a written decision. The May proposed rulemaking retained the filing of proof of fee payment procedure but expanded the time frame for filing to 30 days.

Since the publication of these proposed rules, the agency has decided that additional changes should be made in its current procedures for filing appeals and other filings with the Board. These changes are interrelated to the regulatory changes proposed in both May and June 1994 concerning substantive and procedural changes in motion and appeal practice. Therefore, the rule concerning motions and appeals has been modified to reflect the new appeal procedures and to clarify or supersede certain provisions within the original proposed rules. In addition, several changes have been made in response to the comments received concerning the proposed rules. However, the agency is continuing to consider and evaluate each of the issues raised in the comments to the original proposed rules. Comments which were submitted in response to the first publication will continue to be considered, and it will not be necessary to resubmit comments concerning those provisions which are repeated herein. However, the public is encouraged to comment on those areas in which the proposed rule has been amended.

An outline of the changes to the original motion and appeals rule, as well as an explanation of the new appeal filing procedures follows.

(1) *Motions to reconsider.* The time frame for filing a motion to reconsider a decision with the Board has been expanded from 20 to 30 days after the mailing of the Board's decision, or within 30 days of the effective date of the final rule, whichever is later. No additional time is added for mailing of the decision. Language has been added to the rule to state that a motion to reconsider shall specify the errors of fact or law in the prior Board order. This language clarifies that a motion to reconsider a decision is a request to reexamine the prior Board decision. It is not to be confused with a motion to reopen, which addresses the decision in light of the existence of new law or fact or changed circumstances. Many of the comments objected to the 20-day limit for motions to reconsider on the basis that this time frame did not allow sufficient time for the development of new evidence. As stated above, this argument is not applicable for motions to reconsider. Motions to reconsider should be brought to the attention of the adjudicator in a prompt manner, while the circumstances surrounding the decision are easier to reexamine. Nonetheless, the agency has proposed expanding the time to file a motion to reconsider by an additional 10 days for

a total of 30 days subsequent to the decision. As the time frame was expanded by 10 additional days, the 3-day extension for mailing has been removed.

(2) *Motions to reopen.*

a. *Numerical limit.* Language has been added to clarify that a party many file only one motion to reopen proceedings, whether before the Board or the Immigration Judge. This provision makes clear that a motion to reopen shall be limited to one during the entire course of proceedings. This language reflects the direction in the Joint Explanatory Statement of the Committee of Conference (p. 133), of the Immigration Act of 1990, that only one motion to reopen and one motion to reconsider a decision be permitted in immigration proceedings.

b. *Time limit.* The proposed rule had provided a 20-day time frame for filing a motion to reopen. Many commenters argued that the purpose of the motion to reopen was to provide an opportunity to bring new evidence to light, to acknowledge recent changes in the law, or to provide an opportunity for the applicant to seek additional relief that was not available in the first instance. The commenters further urged that unrepresented aliens and, in particular, detained aliens would not have access to counsel in time to develop a meaningful motion to reopen within the 20-day period, regardless of the merits of their position.

The agency has carefully weighted these comments and agrees that a greater time period should be provided for motions to reopen to allow for those situations described above. The agency has determined that such motions must be filed within 90 days of the final decision of the adjudicator. At present, the regulations provide for unlimited motions to reopen without any time limit for filing. The proposed rule will dramatically limit this form of relief to one opportunity, and such opportunity for reopening will be limited to a 90-day time period. These limitations reflect the congressional intent to streamline the deportation process, while providing a reasonable opportunity for meritorious cases to be heard.

c. *Exceptions.* The time and numerical limitations set forth in the body of the rule do not apply in certain circumstances. In the case of an applicant seeking to apply or reapply for asylum or withholding of deportation, the language has been modified to provide for a motion to reopen based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the former hearing. This language mirrors the language in section 3.2(c)(1) and will reflect more accurately the standard for reopening that is currently in practice.

d. *Judicial proceedings.* The rule clarifies that motions to reopen or reconsider shall indicate whether the validity of both deportation or exclusion orders have been or are the subject of any judicial proceedings. This change amends the rule to include reference to exclusion as well as deportation orders, and its reference was inadvertently omitted from the original proposed rule.

(3) *New appeal filing procedures.* The rule proposes to amend the filing procedures with the Board to require parties to file all notices of appeal of decisions of immigration judges, as well as motions to reopen and motions to reconsider decisions of the Board directly with the Board. The proposed rule will also abolish the current system of remitting the fees in these cases to the Service. Instead, the proposed rule provides that the required fee or fee waiver petition must accompany the notice of appeal or motion and be filed directly with the Board. Notices of appeal from Service officer decisions and appropriate fees or fee waiver petitions shall continue to be filed directly with the office of the Service having administrative control over the record of proceedings.

In order to allow sufficient time for filing an appeal directly with the Board, this rule expands the time frame in which to file an appeal. Where the Immigration Judge decision is rendered orally, the rule will require that a party file a notice of appeal within 15 calendar days of the Immigration Judge's decision. Where a written decision is served by mail, the rule will require that a party file a notice of appeal within 20 calendar days after the decision was mailed. Briefs in support of or in opposition to an appeal from a decision of an Immigration Judge shall be filed directly with the Board also.

The rule restates that certification of a case does not relieve a party from compliance with the appeals provisions. Further, departure from the Untied States by an individual in deportation proceedings constitutes a waiver of his or her right to appeal.

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

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

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

List of Subjects

8 CFR Part 1

Administrative practice and procedure, Aliens.

8 CFR Part 3

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

8 CFR Part 103

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

8 CFR Part 208

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

8 CFR Part 242

Administrative practice and procedure, Aliens.

Accordingly, title 8, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—DEFINITIONS

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

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

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

§ 1.1 Definitions.

* * * * *

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such

status terminates upon entry of a final administrative order of exclusion or deportation.

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

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

§ 3.1 General authorities.

* * * * *

(b) * * *

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter, except that no appeal shall lie from an order of exclusion entered in absentia.

(2) Decisions of Immigration Judges in deportation cases, as provided in part 242 of this chapter, except that no appeal shall lie from an order of deportation entered in absentia, nor shall an appeal lie from an order of an Immigration Judge under § 244.1 of this chapter granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

* * * * *

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

* * * * *

5. Section 3.2 is revised to read as follows:

§ 3.2 Reopening or reconsideration

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

(b) *Motion to reconsider.* A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision, or within 30 days of effective date of the final rule, whichever is later, A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision render by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, shall be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion, which shall be consolidated with and considered by the Board in connection with any appeal to the Board, is subject to the time and numerical limitations of this paragraph.

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

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

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

(i) Filed pursuant to the provisions of § 3.23(b)(5);

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

(iii) Agreed upon by all parties and jointly filed.

(4) A motion to reopen a decision rendered by an Immigration Judge, or Service officer that is pending when an appeal is filed, or that is filed subsequent to the filing of an appeal to the Board from the proceedings sought to be reopened, shall be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion, which shall be consolidated with, and considered by the Board in connection with, the appeal to the Board, is subject to the requirements set forth in paragraph (c)(1) of this section and the time and numerical limitations set forth in paragraph (c)(2) of this section.

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

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

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of § 3.23(b)(5), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) *Filing procedures.* (1) *Distribution of motion papers.* A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board and must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board. A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding; provided, however that when a motion to reopen or a motion to reconsider is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27) must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments.

(2) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(1) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(1) of this section, the opposing party shall have 10 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

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

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

6. Section 3.3 is revised to read as follows:

§ 3.3 Notice of appeal.

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

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

(b) *Statement of the basis of appeal.* The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or

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

(c) *Briefs.* (1) *Appeal from decision of an Immigration Judge.* Briefs in support of or in opposition to an appeal from a decision of an Immigration Judge shall be filed directly with the Board in accordance with a written briefing schedule set by the Board. An appellant who is not detained shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Board. A detained appellant shall be provided 14 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a Service officer.* Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file in accordance with a briefing schedule set by that office. If the alien concerned is not detained, the appellant shall be provided 30 days in which to file a brief. If the alien concerned is detained, the appellant shall be provided 14 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the appeal is taken. The Service shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the alien's brief was due, as originally set or extended. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief or a reply brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

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

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

7. Section 3.4 is revised to read as follows:

§ 3.4 Withdrawal of appeal.

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

8. Section 3.5 is revised to read as follows:

§ 3.5 Forwarding of record on appeal.

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

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

9. Section 3.6 is revised to read as follows:

§ 3.6 Stay of execution of decision.

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

(b) The provisions of paragraph (a) of this section shall not apply to an order of an Immigration Judge under § 3.23 or § 242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except where such order expressly grants a stay or where the motion was filed pursuant to the provisions of § 3.23(b)(5). The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge or a Service officer.

10. Section 3.7 is revised to read as follows:

§ 3.7 Notice of Certification.

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

11. Section 3.8 is revised to read as follows:

§ 3.8 Fees.

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

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

(c) *Waiver of fees.* The Board may, in its discretion, authorize the prosecution of any appeal or any motion over which the Board has jurisdiction without payment of the required fee. In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or motion, he or she shall file with the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or motion, his or her affidavit or unsworn declarations made pursuant to 28 U.S.C. 1746, stating the nature of the proceeding and his or her belief that he or she is entitled to redress. Such document shall also establish his or her inability to pay the required fee and shall request permission to prosecute the appeal or motion without payment of such fee. If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.

12. In § 3.23, paragraph (b) is revised to read as follows:

§ 3.23 Motions.

* * * * *

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

(2) A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief be granted if the alien's rights to make such application were fully explained to him or her by the Immigration Judge and he or she was afforded an opportunity to do so at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(3) A motion to reconsider must be filed within 30 days after the date on which the decision for which reconsideration is being sought was rendered, or within 30 days of the effective date of the final rule, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.

(4) Except as provided in paragraph (b)(5) of this section, a party may file only one motion to reopen proceedings (whether before the Board or the Immigration Judge) and that motion must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or within 90 days of the effective date of the final rule, whichever is later.

(5) The time and numerical limitations set forth in paragraph (b)(4) of this section shall not apply to a motion to reopen filed pursuant to the

provisions of paragraph (b)(6) of this section, or to a motion to reopen proceedings to apply or reapply for asylum or for withholding of deportation based on changed circumstances, which arise subsequent to the commencement of proceedings, in the country of nationality or in the country to which deportation has been ordered, or to a motion to reopen agreed upon by all parties and jointly filed.

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

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

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

(7) Upon request by an alien in conjunction with a motion to reopen or a motion to reconsider, the Immigration Judge may stay the execution of a final order of deportation or exclusion. The filing of a motion to reopen pursuant to the provisions of paragraph (b)(5) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

13. Section 3.24 is revised to read as follows:

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

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

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

§ 3.31 Filing documents and applications.

* * * * *

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

* * * * *

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

§ 3.38 Appeals.

* * * * *

(b) The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed directly with the Board of Immigration Appeals within 15 calendar days after the Immigration Judge has rendered an oral decision on the record in the presence of the respondent/applicant or his or her attorney. Where the decision of the Immigration Judge is served by mail, the Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed with the Board within 20 calendar days after the date the decision is mailed. If the final date for filing falls on a Saturday, Sunday or legal holiday, this appeal time shall be extended to the next business day. A Notice of Appeal (Form EOIR–26) may not be filed by any party who has waived appeal.

(c) A Notice of Appeal must be accompanied by the appropriate fee or by an application for a waiver of fees. If the fee is not paid or the application for a waiver of fees is not filed within the specified time period, as indicated in paragraph (b) of this section, the appeal will not be deemed properly filed and the decision of the Immigration Judge shall be final to the same extent as though no appeal had been taken.

* * * * *

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

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

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

§ 103.5 [Amended]

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

18. Section 103.7 is revised to read as follows:

§ 103.7 Fees.

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

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF DEPORTATION

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

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1252 note, 1252B, 1253, and 1283.

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

§ 208.19 Motion to reopen or reconsider.

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

* * * * *

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

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

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

22. In § 242.21, paragraph (a) is revised to read as follows;

§ 242.21 Appeals.

(a) Pursuant to part 3 of this chapter, and appeal shall lie from a decision of an Immigration Judge to the Board, except that no appeal shall lie for an order of deportation or exclusion entered in absentia. The procedures regarding the filing of a Notice of Appeal (Form EORI—26), fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal shall be taken within 20 calendar days after the mailing of a written decision, or 15 calendar days after the mailing of a written decision, or 15 calendar days after the stating of an oral decision, or the service of a summary decision on Form I–38 or Form I–39. The reasons for the appeal shall be stated in the Notice of Appeal, Form EOIR–26, in accordance with the provisions of § 3.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 3.1(d)(1–a) of this chapter.

* * * * *

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

§ 242.22 Reopening or reconsideration.

Motions to reopen or reconsider are subject to the requirements and limitations set forth in § 3.23 of this chapter. * * * The filing of a motion to reopen pursuant to the provisions of § 3.23(b)(5) of this chapter shall stay the deportation of the alien pending the disposition of the motion and the adjudication of any properly filed administrative appeal.

Dated: April 25, 1995.

Janet Reno,

Attorney General.

[FR Doc. 95–11002 Filed 5–8–95; 8:45 am]

BILLING CODE 153–126–GF–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 92

[Docket No. 91–071–1]

Importation of Hedgehogs and Tenrecs

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the animal importation regulations to prohibit the importation of hedgehogs or tenrecs into the United States from countries affected by foot-and-mouth disease. Additionally, we are proposing to impose certain restrictions on the importation of hedgehogs or tenrecs into the United States from countries declared free of foot-and-mouth disease. We believe these actions are necessary to prevent the introduction of foot-and-mouth disease and other communicable animal diseases into the United States.

DATES: Consideration will be given only to comments received on or before July 10, 1995.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 91–071–1, Animal and Plant Health Inspection Service, Policy and Program Development, Regulatory Analysis and Development, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 91–071–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Keith Hand, Senior Staff Veterinarian, Animal and Plant Health Inspection Service, Veterinary Services, Import-Export Animals Staff, 4700 River Road Unit 39, Riverdale, MD 20737–1231, (301) 734–5097.

SUPPLEMENTARY INFORMATION:

Background

The animal importation regulations (contained in 9 CFR part 92 and referred to below as the regulations) prohibit or restrict the importation of certain animals and birds into the United States to prevent the introduction of communicable diseases of livestock and poultry. Subpart G of part 92 prohibits the importation of brushtail possums and hedgehogs from New Zealand.

Foot-and-mouth disease (FMD) is an acute, highly contagious viral disease of cloven-footed animals, causing fever and blisters in the mouth and around the hoofs. These blisters result in loss of weight, due to the animal's inability to eat; the blisters may permanently deform the animal's feet. The high morbidity rate of cattle affected with FMD results in severe production losses, highlighting the economic importance of this disease. Estimates indicate that an outbreak of FMD in the United States could cost in excess of $1 billion.

Published research obtained by the Animal and Plant Health Inspection Service (APHIS) indicates that certain animals of the order Insectivora, including the family Erinaceidae (hedgehogs), may harbor the FMD virus. Animals of the family Tenrecidae (tenrecs) are often referred to as the Madagascar hedgehog, and are similar to hedgehogs in appearance and behavior. Given these similarities, we believe tenrecs may also be capable of harboring this virus and transmitting it to other animals. Currently, there are no tests or treatments for FMD in hedgehogs or tenrecs. Therefore, we are proposing to amend part 92 to prohibit the importation of hedgehogs and tenrecs into the United States from countries where FMD exists to prevent the introduction of FMD into the United States.

Further, research and APHIS' experience with hedgehogs and tenrecs indicates that these animals present a significant risk of carrying ectoparasites (for example, ticks, mites, and lice). Certain ticks spread East coast fever, heartwater, African swine fever, and other exotic diseases of livestock. Both hedgehogs and tenrecs are hosts to the type of ticks that carry these diseases, which do not exist in the United States. Therefore, we also propose to amend part 92 to impose certain restrictions on the importation of hedgehogs or tenrecs from countries declared free of FMD, including requirements for inspection and treatment for ectoparasites.