

**Authority:** 7 U.S.C. 450, 7711–7714, 7751, 7754, 8303, 8306, 8308, 8310, 8311, and 8315; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331 and 4332; 7 CFR 2.22, 2.80, and 371.4.

#### § 94.1 [Amended]

2. In § 94.1, paragraph (a)(2) is amended by removing the words “Northern Ireland,”, by removing the word “and” immediately before the word “Trust”, and by adding the words “, and the United Kingdom” immediately after the words “Pacific Islands”.

#### § 94.11 [Amended]

3. In § 94.11, paragraph (a), the first sentence is amended by removing the words “Northern Ireland,” and by removing the words “and Switzerland”, and adding the words “Switzerland, and the United Kingdom” in their place.

Done in Washington, DC, this 12th day of December 2002.

**Peter Fernandez,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 02–31659 Filed 12–16–02; 8:45 am]

**BILLING CODE 3410–34–P**

## RAILROAD RETIREMENT BOARD

### 20 CFR Parts 260 and 320

RIN 3220–AB03

#### Requests for Reconsideration and Appeals Within the Board

**AGENCY:** Railroad Retirement Board.

**ACTION:** Final rule.

**SUMMARY:** The Railroad Retirement Board (Board) amends its regulations to simplify the procedures with respect to requests for reconsideration and appeals within the Board. These amendments clarify the appeals procedures and make the regulations more readable and understandable to the public.

**DATES:** This rule is effective December 17, 2002.

**FOR FURTHER INFORMATION CONTACT:**

Marguerite P. Dadabo, Assistant General Counsel, Railroad Retirement Board, (312) 751–4945, TDD (312) 751–4701.

**SUPPLEMENTARY INFORMATION:** Part 260 of the Board’s regulations deals generally with administrative review of denials of claims or requests for waiver of recovery of overpayments under the Railroad Retirement Act (RRA). Part 320 deals with the same matters under the Railroad Unemployment Insurance Act (RUIA). The Board believes this regulation streamlines the process without diminishing the rights of

claimants in the administrative review process. In addition, the Board believes that part 260 has been made more readable and thus more understandable to the public.

Specifically, the Board amends § 260.2 to clarify that the procedure applicable to the appeal of a decision denying the crediting of compensation also applies to the crediting of service months under the RRA. Sections 260.3(d) and 320.10(e) are amended to add as possible good cause for failure to file a timely reconsideration request or appeal within the agency that the claimant believed his or her representative had filed such a request or appeal. In order to protect an appellant where he or she may have a problem obtaining appeal forms, §§ 260.5(b), 260.9(b), 320.12, and 320.39 are amended to provide that the right to appeal is protected by the submission of a written request received within the appeal period stating an intent to appeal, if the claimant files the appeal form within the 30-day period following the date of the letter sending the form to the claimant.

As proposed, section 260.5(l) provides that a hearing may be conducted by telephone conference at the discretion of the hearings officer. We have also amended section 320.25(d) to conform it to proposed section 260.5(l), which is being adopted without change.

A request for waiver of recovery of an overpayment must be filed within 60 days of the notice of overpayment. Sections 260.4(c) and 320.11(f) provide that the Board will still consider a request for waiver filed after the 60-day time period, but may proceed to collect the overpayment and that any amounts collected prior to the request for waiver will not be waived.

The regulation amends both parts 260 and 320 to delay recovery of an erroneous payment when a timely appeal is filed with the Bureau of Hearings and Appeals (new paragraphs 260.5(d) and 320.12(c)) and also when a timely appeal is filed with the three-member Board (new paragraphs 260.9(d) and 320.39(b)).

Sections 260.9(d) and (e) clarify that new evidence will ordinarily not be accepted on appeal to the three-member Board from a decision of a hearings officer, but that argument will be accepted. A new § 320.40(d) parallels § 260.9(e). Sections 260.10 and 320.49 provide that the date of postmark will be considered the date of filing a document with the Board. Finally, a number of nomenclature changes are made to reflect a recent reorganization.

Sections 260.10 and 320.49 are revised to state that as a general rule a

document is filed on the day it is received by the Board but that the date of a postmark or other evidence of the date of mailing will be used to establish a filing date. The current § 320.49 contains a provision that allows the Board and a base-year employer to agree to transmit documents and notices by electronic mail. That sentence was inadvertently omitted from the proposed rule, and has been restored in the final rule as paragraph 320.49(c).

The Board published the proposed rule on March 29, 2002 (67 FR 15127), and invited comments by May 28, 2002. No comments were received. With the exceptions for §§ 320.25(d) and 320.49 noted above, the proposed rule has been redrafted as a final rule without change.

#### Collection of Information Requirements

Pursuant to the Paperwork Reduction Act of 1995, the information collection associated with this rule, the Form HA–1, used to file appeals to the Bureau of Hearings and Appeals and to the three-member Board, has been approved by the Office of Management and Budget under control number 3220–0007. This collection has been cleared for use through August 31, 2004 by the Office of Management and Budget.

#### Regulatory Impact Statement

Prior to publication of this final rule, the Board submitted this rule to the Office of Management and Budget for review pursuant to Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for rules that constitute significant regulatory action, including rules that have an economic effect of \$100 million or more annually. This final rule is not a major rule in terms of the aggregate costs involved. Specifically, we have determined that this final rule is not a major rule with economically significant effects because it would not result in increases in total expenditures of \$100 million or more per year.

The revisions made by this final rule are significant. Parts 260 and 320 explain the procedures for seeking review of and appealing a decision through several levels within the Railroad Retirement Board. The revisions should result in modest savings in administrative costs due to the streamlining of procedures. However, the revisions will benefit the

agency's constituents as a result of the overall additional protections provided.

Both the Regulatory Flexibility Act and the Unfunded Mandates Act of 1995 define "agency" by referencing the definition of "agency" contained in 5 U.S.C. 551(1). Section 551(1)(E) excludes from the term "agency" an agency that is composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them. The Railroad Retirement Board falls within this exclusion (45 U.S.C. 231f(a)) and is therefore exempt from the Regulatory Flexibility Act and the Unfunded Mandates Act.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive Order 13132 and have determined that it would not have a substantial direct effect on the rights, roles, and responsibilities of States or local governments.

In accordance with the provisions of Executive Order 12866, this regulation has been reviewed by the Office of Management and Budget.

#### List of Subjects

##### 20 CFR Part 260

Administrative practice and procedure, Railroad retirement, Reporting and recordkeeping requirements.

##### 20 CFR Part 320

Administrative practice and procedure, Claims, Railroad unemployment insurance, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Railroad Retirement Board amends title 20, chapter II, parts 260 and 320 of the Code of Federal Regulations as follows:

#### **PART 260—REQUESTS FOR RECONSIDERATION AND APPEALS WITHIN THE BOARD FROM DECISIONS ISSUED BY THE BUREAU OF DISABILITY AND MEDICARE OPERATIONS, BUREAU OF RETIREMENT BENEFITS, BUREAU OF SURVIVOR BENEFITS, OFFICE OF RETIREMENT AND SURVIVOR PROGRAMS, AND THE BUREAU OF RESEARCH AND EMPLOYMENT ACCOUNTS**

1. The authority citation for part 260 continues to read as follows:

**Authority:** 45 U.S.C. 231f; 45 U.S.C. 231g; 45 U.S.C. 355.

2. The heading of part 260 is revised to read as follows:

#### **PART 260—REQUESTS FOR RECONSIDERATION AND APPEALS WITHIN THE BOARD**

3. The heading of § 260.1, and introductory paragraph (a) are revised to read as follows:

##### **§ 260.1 Initial decisions.**

(a) *General.* Claims for benefits shall be adjudicated and initial decisions made by the Board concerning:

\* \* \* \* \*

4. In §§ 260.1(b), 260.1(d)(1), and (d)(2), remove the words "Director of the appropriate bureau or office" and "appropriate bureau or office" wherever they appear, and add in their place the word "Board".

5. The heading and § 260.2 are revised to read as follows:

##### **§ 260.2 Initial decisions on the amount of service and compensation credited to an employee.**

Within 30 days after receipt of a timely request by an employee for amendment with respect to the number of service months and amount of compensation credited to the employee by the Board under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, the Board shall appoint a qualified employee to make a determination with respect to such matter. The employee appointed by the Board shall promptly render a decision. Written notice of such decision shall be communicated to the employee within 30 days after such decision is made. Such decision shall include notification of the employee's right to reconsideration of the initial decision as provided in § 260.3. For purposes of this section, a timely request to amend an employee's record of service months and compensation maintained under the Railroad Retirement Act shall be filed within four years after the date on which the report of service months and compensation was required to be made to the Board by the employee's employer. See § 211.16 of this chapter.

6. In § 260.3 the heading, paragraph (a) introductory text, paragraphs (b) through (d), and paragraph (f) are revised to read as follows:

##### **§ 260.3 Request for reconsideration of initial decision.**

(a) *Right to file request for reconsideration.* Every claimant shall have the right to file a request for

reconsideration of an initial decision described in § 260.1(a) or in § 260.2.

*Provided, however, That:*

\* \* \* \* \*

(b) *Written request for reconsideration.* A written request for reconsideration may be filed with any office of the Board within 60 days from the date on which notice of the initial decision is mailed to the claimant. The claimant shall state the basis for the reconsideration request and provide any additional evidence which is available. No hearing will be provided.

(c) *Right to further review of initial decision.* The right to further review of an initial decision shall be forfeited unless a written request for reconsideration is filed within the time period prescribed in this section or good cause is shown by the claimant for failing to file a timely request for reconsideration.

(d) *Timely request for reconsideration.* In determining whether the claimant has good cause for failure to file a timely request for reconsideration the bureau director shall consider the circumstances which kept the claimant from filing the request on time and if any action by the Board misled the claimant. Examples of circumstances where good cause may exist include, but are not limited to:

(1) A serious illness which prevented the claimant from contacting the Board in person, in writing, or through a friend, relative or other person;

(2) A death or serious illness in the claimant's immediate family which prevented him or her from filing;

(3) The destruction of important and relevant records;

(4) A failure to be notified of a decision;

(5) An unusual or unavoidable circumstance existed which demonstrates that the claimant would not have known of the need to file timely or which prevented the claimant from filing in a timely manner; or

(6) The claimant thought that his or her representative had requested reconsideration.

(e) \* \* \*

(f) *Timely review.* The Board shall make every effort to issue a decision upon reconsideration and send a copy of the decision to the claimant within 60 days of the date that the decision for reconsideration is filed.

(g) \* \* \*

7. In § 260.4 the heading is revised, and paragraphs (b) through (i) are revised to read as follows:

**§ 260.4 Request for waiver of recovery of an overpayment and/or for reconsideration of an initial erroneous payment decision.**

\* \* \* \* \*

(b) *Request for waiver of recovery and/or reconsideration of an erroneous payment decision and for a personal conference.* A request for reconsideration of an erroneous payment decision must be filed in accordance with § 260.3(b) of this part. A request for waiver of recovery of an overpayment decision and for a personal conference under this section shall be in writing and addressed to the field office of the Board set forth in the initial decision letter or to the Debt Recovery Manager and shall be filed within 60 calendar days from the date on which notice of the overpayment decision was sent to the beneficiary. The beneficiary shall state in the request whether he or she elects to have a personal conference. If the beneficiary does not elect to have a personal conference with respect to his or her request for waiver of recovery or for reconsideration of the overpayment decision, he or she may, along with the request, submit any evidence and argument which he or she would like to present in support of his or her case.

(c) *Right to further review of an initial overpayment decision.* The right to further review of an initial overpayment decision shall be forfeited unless a written request for reconsideration is filed within the time period prescribed in § 260.3(b) of this part (60 days) or good cause, as defined in section 260.3(d) of this part, is shown by the beneficiary for failing to file a timely request for reconsideration. Nothing in this section shall be taken to mean that waiver of recovery will not be considered in these cases where the request for waiver is not filed within 60 days, but action to recover the erroneous payment will not be deferred if such a request is not filed within 60 days. Any amounts recovered prior to the date on which the request for waiver as permitted under the preceding sentence is filed shall not be waived under part 255 of this chapter.

(d) *Delay in commencement of recovery of erroneous payment.* Where a timely request for waiver or reconsideration is filed as provided in this section, the Board shall not commence recovery of the erroneous payment by suspension or reduction of a monthly benefit payable by the Board until a decision with respect to such request for waiver or reconsideration has been made and notice thereof mailed to the claimant.

(e) *Impartial review.* Upon receipt of a timely request for personal conference

under this section, the Board shall promptly arrange for the selection of a Board employee to conduct a personal conference in the case. The employee designated to conduct the personal conference under this section shall not have had any prior involvement with the initial erroneous payment decision and shall conduct the personal conference in a fair and impartial manner. The employee designated to conduct the personal conference under this section shall promptly schedule a time and place for the personal conference and promptly notify the beneficiary of such. If the beneficiary agrees, the personal conference may be conducted by telephone.

(f) *Personal conference.* The beneficiary shall upon request have the opportunity to review, prior to the personal conference, his or her claim folder and all documents pertinent to the issues raised. A personal conference conducted under this section shall be informal. At the personal conference the beneficiary shall be afforded the following rights:

(1) To present his or her case orally and to submit evidence, whether through witnesses or documents;

(2) To cross-examine adverse witnesses who appear at the personal conference; and

(3) To be represented by counsel or other person.

(g) *Preparation of recommended decision.* Upon completion of the personal conference the employee who conducts the personal conference shall prepare a summary of the case including a statement of the facts, the employee's findings of fact and law, and a recommended decision.

(h) *Timely review.* The Board shall make every effort to render a decision with respect to the beneficiary's request for reconsideration of the initial erroneous payment determination and/or waiver of recovery and notify the beneficiary of that decision within 60 days of the date that the request for reconsideration and/or waiver is filed or the date that the summary of the case is received from the employee who conducts the personal conference, whichever is later.

(i) *Right to appeal adverse decision.* If the Board renders a decision adverse to the beneficiary, he or she may appeal the decision to the Bureau of Hearings and Appeals, as provided in § 260.5 of this part.

(j) \* \* \*

8. The heading and § 260.5 are revised to read as follows:

**§ 260.5 Appeal from a reconsideration decision.**

(a) *General.* Every claimant shall have a right to appeal to the Bureau of Hearings and Appeals from any reconsideration decision with which he or she disagrees.

(b) *Appeal from a reconsideration decision.* Appeal from a reconsideration decision shall be made by filing the form prescribed by the Board for such purpose. Such appeal must be filed with the Bureau of Hearings and Appeals within 60 days from the date upon which notice of the reconsideration decision is mailed to the claimant. Any written request stating an intent to appeal which is received within the 60-day period will protect the claimant's right to appeal, provided that the claimant files the appeal form within the later of the 60-day period following the date of the reconsideration decision, or the 30-day period following the date of the letter sending the form to the claimant.

(c) *Right to review of a reconsideration decision.* The right to review of a reconsideration decision shall be forfeited unless an appeal is filed in the manner and within the time prescribed in this section.

However, when a claimant fails to file an appeal with the Bureau of Hearings and Appeals within the time prescribed in this section, the hearings officer may waive this requirement of timeliness. Such waiver shall only occur in cases where the claimant has made a showing of good cause for failure to file a timely appeal. Good cause for failure to file a timely appeal will be determined by a hearings officer in the manner prescribed in § 260.3(d) of this part.

(d) *Delay in the commencement of recovery of erroneous payment.* Where a timely appeal seeking waiver of recovery of an erroneous payment has been filed with the Bureau of Hearings and Appeals, the Board shall not commence recovery of the erroneous payment by suspension or reduction of a monthly benefit payable by the Board until a decision with respect to such appeal seeking waiver has been made and notice thereof has been mailed to the claimant.

(e) *Impartial review.* Within 30 days after the claimant has filed a proper appeal, the Director of Hearings and Appeals shall appoint a hearings officer to act on the appeal. The Director of Hearings and Appeals may, if the Bureau of Hearings and Appeals' caseload dictates, appoint a qualified Board employee, other than a hearings officer assigned to the Bureau of Hearings and Appeals, to act as a hearings officer with respect to a case. Such hearings officer

shall not have any interest in the parties or in the outcome of the proceedings, shall not have directly participated in the initial decision or the reconsideration decision from which the appeal is made, and shall not have any other interest in the matter which might prevent a fair and impartial decision.

(f) *Power of hearings officer to conduct hearings.* In the development of appeals, the hearings officer shall have the power to hold hearings, require and compel the attendance of witnesses by subpoena or otherwise in accordance with the procedures set forth in part 258 of this chapter, administer oaths, rule on motions, take testimony, and make all necessary investigations.

(g) *Evidence presented in support of appeal.* (1) The appellant, or his or her representative, shall be afforded full opportunity to present testimony, or written evidence or exhibits upon any controversial question of fact; to examine and cross-examine witnesses; and to present argument in support of the appeal.

(2) The formal rules of evidence shall not apply; however, the hearings officer may exclude evidence which he or she finds is irrelevant or repetitious. Any evidence excluded by the hearings officer shall be described and that description made part of the record.

(3) If, in the judgment of the hearings officer, evidence not offered by the appellant is available and is relevant and material to the merits of the claim, the hearings officer may obtain such evidence upon his or her own initiative. If new evidence is obtained after an oral hearing, other than evidence submitted by the appellant or his or her representative, the hearings officer shall provide the appellant or his or her representative with a copy of such evidence. In such event, the appellant shall have 30 days to submit rebuttal evidence or argument or to request a supplemental hearing to confront and challenge such new evidence. The appellant may move for an extension of time to submit rebuttal evidence or argument and the hearings officer may grant the motion upon a showing of good cause.

(h) *Submission of written argument in lieu of oral hearings.* Where the hearings officer finds that no factual issues are presented by an appeal, and the only issues raised by the appellant are issues concerning the application or interpretation of law, the appellant or his or her representative shall be afforded full opportunity to submit written argument in support of the claim but no oral hearing shall be held.

(i) *Conduct of oral hearing.* (1) In any case in which an oral hearing is to be

held, the hearings officer shall schedule a time and place for the conduct of the hearing. The hearing shall not be open to the public. The hearings officer shall promptly notify by mail the party or parties to the proceeding as to the time and place for the hearing. The notice shall include a statement of the specific issues involved in the case. The hearings officer shall make every effort to hold the hearing within 150 days after the date the appeal is filed.

(2) If the appellant objects to the time or place of the hearing, he or she must notify the hearings officer no later than 5 calendar days before the time set for the hearing. The appellant must state the reason for his or her objection. If at all possible, the request should be in writing. The hearings officer will change the time or place of the hearing if he or she finds there is good cause to do so.

(3) The hearings officer shall rule on any objection timely filed by a party under paragraph (i) of this section and shall notify the party of his or her ruling thereon. The hearings officer may for good cause shown, or upon his or her own motion, reschedule the time and/or place of the hearing. The hearings officer also may limit or expand the issues to be resolved at the hearing.

(4) If neither a party nor his or her representative appears at the time and place scheduled for the hearing, that party shall be deemed to have waived his or her right to an oral hearing unless said party either filed with the hearings officer a notice of objection showing good cause why the hearing should have been rescheduled, which notice was timely filed but not ruled upon, or, within 10 days following the date on which the hearing was scheduled, said party files with the hearings officer a motion to reschedule the hearing showing good cause why neither the party nor his or her representative appeared at the hearing and further showing good cause as to why said party failed to file at the prescribed time any notice of objection to the time and place of the hearing.

(5) If the hearings officer finds either that a notice of objection was timely filed showing good cause to reschedule the hearing, or that the party has within 10 days following the date of the hearing filed a motion showing good cause for failure to appear and to file a notice of objection, the hearings officer shall reschedule the hearing. If the hearings officer finds that the hearing shall not be rescheduled, he or she shall so notify the party in writing.

(j) *Record of evidence considered.* The hearings officer will make a record of the material evidence. The record will include the applications, written

statements, reports, and other documents that were used in making the determination under review and any other additional evidence the appellant or any other party to the hearing presents in writing. If a hearing was held in the appeal, the tape recording of the hearing will be part of the record while the appeal is pending. The hearings officer's decision will be based on the record. The entire record at any time during the pendency of the appeal shall be available for examination by the appellant or by his or her duly authorized representative.

(k) *Extension of time to submit evidence.* Except where the hearings officer has determined that additional evidence not offered by the appellant at or prior to the hearing is available, the record shall be closed as of the conclusion of the hearing. The appellant may request an extension of time to submit evidence and the hearings officer will grant the request upon a showing of good cause for failure to have submitted the evidence earlier. The extension shall be for a period not exceeding 30 days.

(l) *Hearing by telephone.* At the discretion of the hearings officer, any hearing required under this part may be conducted by telephone conference. (The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 3220-0007)

#### § 260.8 [Amended]

9. In § 260.8, remove the word "bureau" wherever it appears and add in its place the word "office".

10. Section 260.9 is amended by redesignating paragraphs (d) through (g) as paragraphs (e) through (h), by revising paragraph (b), adding a new paragraph (d), and by revising redesignated paragraph (e) and redesignated paragraph (f) to read as follows:

#### § 260.9 Final appeal from a decision of the hearings officer.

\* \* \* \* \*

(b) *Appeal from decision of hearings officer.* Final appeal from a decision of a hearings officer shall be made by the execution and filing of the final appeal form prescribed by the Board. Such appeal must be filed with the Board within 60 days from the date upon which notice of the decision of the hearings officer is mailed to the appellant at the last address furnished by him or her. Any written request stating an intent to appeal which is received within the 60-day period will protect the claimant's right to appeal,

Provided that the claimant files the appeal form within the later of the 60-day period following the date of the reconsideration decision, or the 30-day period following the date of the letter sending the form to the claimant.

(c) \* \* \*

(d) *Delay in the commencement of recovery of erroneous payment.* Where a timely appeal seeking waiver of recovery of an erroneous payment has been filed with the three-member Board, the Board shall not commence recovery of the erroneous payment by suspension or reduction of a monthly benefit payable by the Board until a decision with respect to such appeal seeking waiver has been made and notice thereof has been mailed to the claimant.

(e) *Submission of additional evidence.* Upon final appeal to the Board, the appellant shall not have the right to submit additional evidence. However, the Board may grant a request to submit new evidence where new and material evidence is available that, despite due diligence, was not available before the decision of the hearings officer was issued.

The Board may also obtain new evidence on its own motion. Upon admission of new evidence, the Board, at its discretion, may:

(1) Vacate the decision of the hearings officer and remand the case to the Bureau of Hearings and Appeals for issuance of a new decision. The decision of the hearings officer on remand may be appealed to the Board in the manner described in paragraph (b) of this section; or

(2) Return the case to the hearings officer for further consideration with direction to submit a recommended decision to the Board.

(f) *Decision of the Board.* The decision of the Board shall be made upon the record of evidence developed by the hearings officer and any additional evidence admitted pursuant to paragraph (e) of this section. The appellant may submit additional argument in writing with the appeal to the Board. The appellant shall have no right to an oral presentation before the Board except where the Board so permits. Such presentation shall be limited in form, subject matter, length, and time as the Board may indicate to the appellant.

\* \* \* \* \*

11. The heading, and § 260.10 are revised to read as follows:

**§ 260.10 Determination of date of filing.**

(a) *General rule.* Except as otherwise provided in paragraph (b) of this section, for purposes of this part, a

document or form is filed on the day it is received by an office of the Board or by an employee of the Board who is authorized to receive it at a place other than one of the Board's offices.

(b) *Other dates of filing.* The Board will also accept as the date of filing the date a document or form is mailed to the Board by the United States mail, if using the date the Board receives it would result in the loss or lessening of rights. The date shown by a U.S. postmark will be used as the date of mailing. If the postmark is unreadable, or there is no postmark, the Board will consider other evidence of when the document or form was mailed to the Board.

**PART 320—INITIAL DETERMINATIONS UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT AND REVIEWS OF AND APPEALS FROM SUCH DETERMINATIONS**

12. The authority citation for part 320 continues to read as follows:

**Authority:** 45 U.S.C. 355 and 362(1).

**§ 320.5 Initial determinations.**

13. In § 320.5, following the words "Director of", remove the words "Unemployment and Sickness Insurance" and add in their place the words "Policy and Systems".

14. In § 320.6, the introductory paragraph of § 320.6(b) is revised, a new paragraph (b)(8) is added, paragraphs (d) and (e) are revised, and a new paragraph (f) is added to read as follows:

**§ 320.6 Adjudicating office.**

\* \* \* \* \*

(b) *Field offices.* Field offices are authorized to make initial determinations on the following issues relating to eligibility for unemployment or sickness benefits, as the case may be:

\* \* \* \* \*

(8) Whether a claimant's earnings attributable to days in a period for which he or she has registered for unemployment benefits exceed the amount of the applicable monthly compensation base.

\* \* \* \* \*

(d) *Director of Operations.* The Director of Operations is authorized to make determinations on all issues of eligibility for unemployment and sickness benefits as set forth in paragraphs (b) and (c) of this section, and on any other issue not reserved to the Director of Policy and Systems by paragraph (e) of this section.

(e) *Director of Policy and Systems.* The Director of Policy and Systems shall adjudicate:

(1) The applicability of the disqualification in section 4(a-2)(iii) of

the Railroad Unemployment Insurance Act if the claimant's unemployment results from a strike against a railroad employer by which he or she is employed; and

(2) Whether a plan submitted by an employer or other person or company qualifies as a nongovernmental plan for unemployment or sickness insurance, within the meaning of part 323 of this chapter.

(f) *Debt Recovery Manager.* The Debt Recovery Manager shall adjudicate:

(1) All requests for waiver of recovery of an erroneous payment made under the Railroad Unemployment Insurance Act; and

(2) Offers of compromise of debts arising out of the benefit provisions of the Railroad Unemployment Insurance Act.

15. In § 320.10, paragraph (e) is revised to read as follows:

**§ 320.10 Reconsideration of initial determination.**

\* \* \* \* \*

(e) *Timely request for reconsideration.* In determining whether either the claimant or the base-year employer(s) has good cause for failure to file a timely request for reconsideration, the adjudicating office shall consider the circumstances which kept either the claimant or the base-year employer(s) from filing the request on time and whether any action by the Board misled either of them. Examples of circumstances where good cause may exist include, but are not limited to:

(1) A serious illness which prevented the claimant from contacting the Board in person, in writing, or through a friend, relative or other person;

(2) A death or serious illness in the claimant's immediate family which prevented him or her from filing.

(3) The destruction of important and relevant records;

(4) A failure to be notified of a decision;

(5) The existence of an unusual or unavoidable circumstance which demonstrates that either the claimant or the base-year employer(s) would not have known of the need to file timely or which prevented either of them from filing in a timely manner; or

(6) The claimant thought that his or her representative had requested reconsideration.

16. In § 320.11, paragraphs (a) and (f) are revised to read as follows, and in paragraphs (d), (e), and (g), remove the words "Director of Unemployment and Sickness Insurance", and add in their place the words "Debt Recovery Manager"; also, in paragraphs (d) and (g), remove the word "Director" and add

in its place the word "Manager" wherever it appears.

**§ 320.11 Request for waiver of recovery.**

(a) *Time limitation.* The claimant shall have 60 days from the date of the notification of the erroneous payment determination in which to file a request for waiver, except that where an erroneous payment is not subject to waiver in accordance with § 340.10(e) of this chapter, waiver may not be requested and recovery will not be stayed. Such requests shall be made in writing and be filed by mail or in person at any Board office. The claimant shall, along with the request, submit any evidence and argument which he or she would like to present in support of his or her case. A request solely for reconsideration of an overpayment shall not be considered a request for waiver under this section but shall be treated as a request for reconsideration under § 320.10 of this part.

\* \* \* \* \*

(f) *Requests made after 60 days.* Nothing in this section shall be taken to mean that waiver of recovery will not be considered in those cases where the request for waiver is not filed within 60 days, but action to recover the erroneous payment will not be deferred if such request is not filed within 60 days, and any amount of the erroneous payment recovered prior to the date on which the request is filed shall not be subject to waiver under part 340 of this chapter. Further, it shall not be considered that a claimant prejudices his or her request for waiver by tendering all or a portion of an erroneous payment or by selecting a particular method of repaying the debt. However, no waiver consideration shall be given to a debt which is settled by compromise.

\* \* \* \* \*

17. Section 320.12 is revised to read as follows:

**§ 320.12 Appeal to the Bureau of Hearings and Appeals.**

(a) Any party aggrieved by a decision under § 320.10 of this part or a claimant aggrieved by a decision under § 320.11 of this part may appeal such decision to the Bureau of Hearings and Appeals. Such an appeal shall be made by filing the form prescribed by the Board for such purpose. The appeal must be filed with the Bureau of Hearings and Appeals within 60 days from the date upon which notice of the decision on reconsideration or waiver of recovery was mailed to either a claimant or the base year employer(s). Any written request stating an intent to appeal which is received within the 60-day period will protect the claimant's or

base-year employer's right to appeal, *Provided that* the claimant or base-year employer files the appeal form within the later of the 60-day period from the date of the reconsideration decision, or the 30-day period following the date of the Board's letter sending the appeal form to the claimant or base-year employer.

(b) If no appeal is filed within the time limits specified in paragraph (a) of this section, the decision of the adjudicating office under §§ 320.10 or 320.11 of this part shall be considered final and no further review of such decision shall be available unless the hearings officer finds that there was good cause for the failure to file a timely appeal as described in § 320.10 of this part.

(c) Where a timely appeal seeking waiver of recovery of an erroneous payment has been filed with the Bureau of Hearings and Appeals, the Board shall not commence recovery of the erroneous payment by suspension or reduction of a monthly benefit payable by the Board until a decision with respect to such appeal seeking waiver has been made and notice thereof has been mailed to the claimant.

18. In § 320.25, paragraphs (a), (b), and (d) are revised to read as follows:

**§ 320.25 Hearing of appeal.**

(a) *Manner of conducting hearing.* The hearing shall be informal, fair, and impartial, and shall be conducted in such manner as to ascertain the substantial rights of the parties. The hearing shall not be open to the public.

(b) *Evidence presented in support of appeal.* (1) Any party, or his or her representative, shall be afforded full opportunity to present evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses; and to present argument in support of the appeal.

(2) The formal rules of evidence shall not apply; however, the hearings officer may exclude evidence which he or she finds is irrelevant or repetitious. Any evidence excluded by the hearings officer shall be described and that description made part of the record.

(3) If, in the judgment of the hearings officer, evidence not offered is available and is relevant and material to the merits of the claim, the hearings officer may obtain such evidence upon his or her own initiative. If new evidence is obtained after an oral hearing, other than evidence submitted by a party or his representative, the hearings officer shall provide the parties or their representatives with a copy of such evidence. In such event, any party shall

have 30 days to submit rebuttal evidence or argument or to request a supplemental hearing to confront and challenge such new evidence. Any party may move for an extension of time to submit rebuttal evidence or argument and the hearings officer may grant the motion upon a showing of good cause.

(c) \* \* \*

(d) *Hearing by telephone.* At the discretion of the hearings officer, any hearing required under this part may be conducted by telephone conference.

19. Section 320.28 is revised to read as follows:

**§ 320.28 Record of evidence considered.**

The hearings officer will make a record of the material evidence. The record will include the applications, written statements, reports, and other documents that were used in making the determination under review and any other additional evidence the appellant or any other party to the hearing presents in writing. If a hearing was held in the appeal, the tape recording of the hearing will be part of the record while the appeal is pending. The hearings officer's decision will be based on the record. The entire record at any time during the pendency of the appeal shall be available for examination by any party or by his or her duly authorized representative.

20. Section 320.39 is revised to read as follows:

**§ 320.39 Execution and filing of appeal to Board from decision of hearings officer.**

(a) An appeal to the Board from the decision of a hearings officer shall be filed on the form provided by the Board and shall be executed in accordance with the instructions on the form. Such appeal shall be filed within 60 days from the date upon which notice of the decision of the hearings officer was mailed to the parties. The right to further review of a decision of a hearings officer shall be forfeited unless formal final appeal is filed in the manner and within the time prescribed in this section. Any written request stating an intent to appeal which is received within the 60-day period will protect the claimant's right to appeal, *Provided that* the claimant files the appeal form within the later of the 60-day period following the date of the reconsideration decision, or the 30-day period following the date of the letter sending the appeal form to the claimant. However, when a party fails to file an appeal before the Board within the time prescribed in this section, the Board may waive this requirement if along with the final appeal, the party in writing requests an extension of time.

The request for an extension of time must give the reasons why the final appeal form was not filed within the time limit prescribed in this section. If in the judgment of the Board the reasons given establish that the party has good cause for not filing the final appeal form within the time limit prescribed, the Board will consider the appeal to have been filed in a timely manner. The Board will use the standards found in § 320.10(e) of this part in determining if good cause exists.

(b) Where a timely appeal seeking waiver of recovery of an erroneous payment has been filed with the three-member Board, the Board shall not commence recovery of the erroneous payment by suspension or reduction of a monthly benefit payable by the Board until a decision with respect to such appeal seeking waiver has been made and notice thereof has been mailed to the claimant.

21. The heading of § 320.40 is revised, and a new paragraph(d) is added to read as follows:

**§ 320.40 Procedure before the Board on appeal from a decision of a hearings officer.**

\* \* \* \* \*

(d) Any party may submit additional argument in writing with the appeal to the Board. No party shall have the right to an oral presentation before the Board except where the Board so permits. Such presentation may be limited in form, subject matter, length, and time as the Board may indicate to the parties.

22. Section 320.49 is revised to read as follows:

**§ 320.49 Determination of date of filing.**

(a) *General rule.* Except as otherwise provided in paragraph (b) of this section, for purposes of this part, a document or form is filed on the day it is received by an office of the Board or by an employee of the Board who is authorized to receive it at a place other than one of the Board's offices.

(b) *Other dates of filing.* The Board will also accept as the date of filing the date a document or form is mailed to the Board by the United States mail, if using the date the Board receives it would result in the loss or lessening of rights. The date shown by a U.S. postmark will be used as the date of mailing. If the postmark is unreadable, or there is no postmark, the Board will consider other evidence of when the document or form was mailed to the Board.

(c) *Use of electronic mail.* By agreement between a base-year employer and the Board, any document required to be filed with the Board or any notice required to be sent to the

employer may be transmitted by electronic mail.

Dated: December 11, 2002.

By Authority of the Board,

**Beatrice Ezerski,**

*Secretary to the Board.*

[FR Doc. 02-31640 Filed 12-16-02; 8:45 am]

**BILLING CODE 7905-01-P**

**DEPARTMENT OF STATE**

**22 CFR Part 40**

**[Public Notice 4218]**

**Visas: Uncertified Foreign Health-Care Workers**

**AGENCY:** Department of State.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule changes the requirements pertaining to the issuance of visas to certain foreign health care workers. It provides that an alien who seek to enter the United States to perform health-care services (other than a physician) is excludable unless the alien presents a certificate establishing the alien's competency in a specific health care field issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or another credentialing organization approved by the Attorney General through the Immigration and Naturalization Service (INS). The promulgation of this rule is necessary in order to comply with U.S. laws regarding the inadmissibility of aliens into the United States. The rule will result in the imposition of a requirement for certain visa applicants seeking to enter the United States as health care workers to obtain documentation of their professional credentials and qualifications from approved private credentialing agencies and provide that documentation to a consular officer in order to qualify for visa issuance.

**DATES:** Effective date: This interim rule is effective on December 17, 2002.

*Comment date:* The Department will consider comments submitted on or before February 18, 2003.

**ADDRESSES:** Please submit comments in duplicate to Chief, Legislation and Regulations Division, Visa Services, Department of State, 20520-0106, by e-mail to [VisaRegs@state.gov](mailto:VisaRegs@state.gov), or by fax at 202-663-3898.

**FOR FURTHER INFORMATION CONTACT:** Penafrañcia D. Salas, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520-0106, 202-663-2878.

**SUPPLEMENTARY INFORMATION:**

**What Is the Authority for This Rule?**

Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009, 636-37 (1996), created a new ground of inadmissibility and visa ineligibility now codified as section 212(a)(5)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(5)(C). It provides that, subject to section 212(r) of the INA, an alien who seeks to enter the United States for the purpose of performing labor as a health care worker, other than as a physician, is excludable (inadmissible) unless the alien presents to the consular officer a certificate from the CGFNS or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services (HHS) verifying that:

(a) The alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission to the United States under the classification specified in the application; are comparable with that required for an American health care worker of the same type; are authentic; and, in the case of a license, unencumbered; and

(b) The alien has the level of competence in oral and written English considered by the Secretary of HHS in consultation with the Secretary of Education, to be appropriate for the health care work of the kind in which the alien will be engaged; as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(c) If a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, that the alien has passed such an examination.

INA section 212(r) mandates separate certification procedures for certain aliens seeking to enter the United States to perform nursing services. In general, such procedures apply to those aliens who already possess a valid State license and who received their nursing training in a country where the quality of education and the English proficiency of nursing graduates have been recognized by the CGFNS as meeting its standards.