Proposed Rules

Federal Register
Vol. 76, No. 210
Monday, October 31, 2011

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

Executive Office for Immigration Review

8 CFR Parts 1208 and 1240

[EOIR Docket No. 173; AG Order No. 3307–2011]

RIN 1125–AA65

Forwarding of Asylum Applications to the Department of State

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

ACTION: Proposed rule.

SUMMARY: The Department of Justice is planning to amend its regulations to alter the process by which the Executive Office for Immigration Review (EOIR) forwards asylum applications for consideration by the Department of State (DOS). Currently, EOIR forwards to DOS all asylum applications that are submitted initially in removal proceedings before an immigration judge. The proposed rule would amend the regulations to provide for sending asylum applications to DOS on a discretionary basis. For example, EOIR could forward an application in order to ascertain whether DOS has information relevant to the applicant's eligibility for asylum. This change would increase the efficiency of DOS's review of asylum applications and is consistent with similar changes already made by U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

DATES: Written comments must be postmarked and electronic comments must be submitted on or before December 30, 2011. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 173, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Robin M. Stutman, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 173 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- Hand Delivery/Courier: Robin M. Stutman, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. Contact Telephone Number (703) 305–0470.

FOR FURTHER INFORMATION CONTACT: Robin M. Stutman, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to EOIR in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

All submissions received should include the agency name and EOIR Docket No. 173 for this rulemaking. Please note that all comments received are considered part of the public record and made available for public inspection at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency counsel's contact information.

II. Background

The EOIR regulations pertaining to asylum applications, at 8 CFR 1208.11(a), currently state: ''The Service shall forward to the Department of State a copy of each completed application it receives. At its option, the Department of State may provide detailed country conditions information relevant to eligibility for asylum or withholding of removal.'' The EOIR regulations for removal proceedings, at 8 CFR 1240.11(c)(2), currently state: ''Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy to the Department of State pursuant to § 1208.11 of this chapter.'' That statement is repeated in 8 CFR 1240.33(b) and 1240.49(c)(3) (providing the same procedure for exclusion and deportation proceedings, respectively, that were initiated before April 1, 1997). In addition, the regulations at 8 CFR 1208.11(c) provide that ''immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as they deem appropriate.''

EOIR receives and adjudicates asylum applications [1] where aliens in immigration proceedings submit the asylum application directly to the immigration judge (known as defensive asylum applications). EOIR also receives and adjudicates asylum applications that are referred for consideration in proceedings before an immigration judge after being initially adjudicated through DHS USCIS's affirmative asylum process (known as affirmative asylum applications).

Currently, the Immigration Court is required to send a copy of each defensively filed asylum application to DOS for review. In fiscal years 2008 (15,367), 2009 (14,509), and 2010 (14,210), EOIR received, on average 14,695 defensively filed asylum applications and forwarded a copy of each application to DOS.[2] Similarly, USCIS received 25,680 affirmative asylum applications in fiscal year 2007, 25,497 in fiscal year 2008, and 11,322 from October 1, 2008, until March 31, 2009. USCIS forwarded a copy of each of these affirmative applications to DOS.[3]

III. Reasons for Change

DOS has indicated that it does not have the resources to review many of the asylum applications forwarded to it. DOS has determined that the current process of forwarding every asylum application to DOS is not an efficient method because it does not provide a means for the agencies to identify particular cases for which DOS review might be expected to yield the most value.

To address this problem, DOS has requested EOIR to alter the process by which EOIR forwards asylum applications to DOS. This proposed rule would change the process to permit the immigration judge, in his or her discretion, to send asylum applications for consideration by DOS. For instance, an immigration judge could forward those applications where DOS could potentially have information relevant to the applicant's eligibility for asylum, withholding of removal under 241(b)(3) of the Immigration and Nationality Act (Act), or withholding of removal under the Convention Against Torture. DOS may have information helpful to the adjudication of the application, including information that confirms publicly available information or information that is not otherwise available.

EOIR notes that USCIS has already made similar changes to its corresponding regulations at 8 CFR 208.11, with respect to affirmative asylum applications filed with USCIS. *See* 74 FR 15367 (Apr. 6, 2009).

As noted earlier, the EOIR regulations at 8 CFR 1208.11(c) already provide that the immigration judges may forward to DOS for review and comment select applications as the judges deem appropriate. This process, which has been in place for years, has been a productive means by which immigration judges obtain country conditions information on specific cases. EOIR and DOS intend to maintain this process, as provided in the amended regulations at 8 CFR 1208.11(a).

DOS's Bureau of Democracy, Human Rights and Labor (DRL), the Bureau to which the asylum applications are forwarded, brings its country conditions expertise to asylum matters in a variety of ways, which as a whole are referred to as DRL's asylum function. Consistent with the regulations currently at 8 CFR 1208.11(c), and with USCIS's corresponding regulations at 8 CFR 208.11, DRL may, at its discretion, respond to requests for comments on cases specifically brought to its attention by EOIR immigration judges and USCIS's Asylum Division. Under the amended regulations at 8 CFR 1208.11(a), DRL will continue to fill this role with respect to requests from immigration judges.[4] DRL also produces updated issue papers or ''country profiles'' for use in asylum adjudications, and it responds to certain DHS Immigration and Customs Enforcement requests for document verification in asylum cases before EOIR. Additionally, DRL produces annual Country Reports on Human Rights Practices and annual International Religious Freedom Reports, which provide country conditions information useful to the adjudication of asylum applications. The amendments to the regulations being made in this proposed rule will not alter these functions.

IV. Description of the Proposed Rule

This proposed rule amends the regulations at 8 CFR 1208.11, 1240.11, 1240.33, and 1240.49 as follows. This rule revises the sentence in each of those sections requiring the Immigration Court to forward each asylum application to DOS. Under this proposed rule, the Immigration Court may forward asylum applications to DOS, but is not required to do so. This change will permit EOIR to exercise discretion to forward those applications. For instance, EOIR might wish to ascertain whether DOS has information relevant to the adjudication of a particular case or types of claims.

By consolidating certain paragraphs, the proposed rule also removes redundant references to the types of information that DOS may provide to EOIR.

This proposed change in the regulations will not require additional resources, either in the training or hiring of personnel at EOIR or DOS or in the expenditure of material or financial resources. In fact, altering the regulations will permit both EOIR and DOS to conserve resources. EOIR will no longer be required to expend resources on mailing to DOS every properly filed defensive asylum application it receives. Although EOIR will discontinue mailing to DOS every properly filed defensive asylum application EOIR receives, EOIR will maintain the practice of permitting an immigration judge to request, in his or her discretion, specific comments from DOS regarding individual cases or types of claims under consideration, or other such information as he or she deems appropriate. As noted earlier, this practice is currently provided by the regulations at 8 CFR 1208.11(c). It will be covered by the amended regulations at 8 CFR 1208.11(a). By focusing on

[1] We note that the regulations at 8 CFR 1208.1(a)(1) provide, in part, that subpart A of part 1208 ''shall apply to all applications for asylum under section 208 of the Immigration and Nationality Act (Act) or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, or under the Convention Against Torture.'' Thus, the terms ''asylum application'' or ''application for asylum,'' as used in the current regulations and in this proposed rule, refer to an application for: (1) Asylum under section 208 of the Act; (2) withholding of removal under section 241(b)(3) of the Act; (3) withholding or deferral of removal under the Convention Against Torture as provided in 8 CFR 1208.16 and 1208.17; and (4) withholding of deportation under former section 243(h) of the Act.

[2] These fiscal year receipt numbers for defensively filed asylum cases are based on the date that the Form I–589, Application for Asylum and for Withholding of Removal, is filed with the EOIR Immigration Courts. These numbers differ from the data contained in the Statistical Year Books prepared by EOIR, which is tied to the date the removal case was filed at EOIR.

[3] As noted later in this preamble, USCIS has already made similar changes to its corresponding regulations at 8 CFR 208.11. *See* 74 FR 15367 (Apr. 6, 2009). USCIS's revised regulations took effect on April 6, 2009. Since that date, USCIS has no longer been forwarding to DOS a copy of each affirmative asylum application it receives.

[4] DRL continues to fill this role with respect to requests from USCIS as well. As noted earlier in the preamble, USCIS has already made similar changes to its corresponding regulations at 8 CFR 208.11. *See* 74 FR 15367 (Apr. 6, 2009). Prior to these changes, USCIS requests for information on particular cases were authorized by 8 CFR 208.11(c). Currently, such requests are provided for in 8 CFR 208.11(a).

select cases forwarded by EOIR, DRL's officers will be able to best utilize their time and resources toward accomplishing their asylum responsibilities. A change in the regulations will also result in resource savings for asylum applicants, as applicants will no longer be required to make an extra copy of their application for EOIR to forward to DOS, as currently required by the instructions to the Form I–589 asylum application.

The types of comments that DOS may provide will not change. At its option, DOS may provide detailed country conditions information relevant to the applicant's eligibility for asylum and for withholding of removal. DOS may also provide an assessment of the accuracy of the applicant's assertions about conditions in the applicant's country of nationality or habitual residence and the applicant's particular situation, information about whether persons who are similarly situated to the applicant are persecuted or tortured in their respective country of nationality or habitual residence and the frequency of such persecution or torture, or such other information as DOS deems relevant.

Additionally, this proposed rule makes additional amendments in order to be consistent with changes that have occurred with the implementation of the Homeland Security Act of 2002. The Homeland Security Act authorized the creation of DHS and transferred the functions of the former Immigration and Naturalization Service (INS) to DHS, while retaining EOIR under the authority of the Attorney General. In order to accommodate these changes, title 8 of the Code of Federal Regulations was reorganized into separate chapters, chapter I for DHS and chapter V for the Department of Justice. *See* 68 FR 9824, 9834 (Feb. 28, 2003). The provisions of part 208, on procedures for asylum and withholding of removal, were duplicated into a new part 1208. As a result, part 208 governs asylum adjudications before DHS's USCIS and part 1208 governs asylum adjudications before EOIR. As this proposed rule only addresses submissions of asylum applications from EOIR to DOS, it is limited to amending 8 CFR 1208.11, 1240.11, 1240.33, and 1240.49. To be consistent with changes that have occurred with implementation of the Homeland Security Act, it removes references in EOIR's regulations to ''The Service'' and USCIS ''asylum officers'' forwarding asylum applications to DOS, as those matters are now governed by the DHS regulations at 8 CFR 208.11.

Finally, this proposed rule also amends part 1240 to cite to the correct regulatory provision regarding filing of an asylum application as provided in 8 CFR 1208.4(b). The regulations at 8 CFR 1240.11(c)(2) and 8 CFR 1240.33(b) currently cite incorrectly to 8 CFR 1208.4(c) and will be corrected to cite to 8 CFR 1208.4(b). This change is consistent with 8 CFR 1240.49(c)(3). These amendments are technical corrections and do not make any substantive changes to part 1240.

V. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities for the following reason: This rule affects only the process by which EOIR forwards and DOS receives asylum applications. The rule will not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

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

C. Small Business Regulatory Enforcement Fairness Act of 1996

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

D. Executive Order 12866

The Department has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has not been submitted to the Office of Management and Budget for review. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b).

The benefits of this proposed rule to the United States include a significant reduction of money spent (1) by EOIR to process and mail a copy of each asylum application to DOS, (2) by DOS to receive each asylum application, and (3) by asylum applicants to include an extra copy of their asylum application in their application packet. Currently, the total estimated cost to EOIR, DOS, and the public for this process of forwarding all defensive asylum applications is $246,014.00 (rounded to the nearest whole number) per year. This amount is based on the estimated cost to asylum applicants of $0.10 per photocopied page for an average of 14,695 defensive asylum applications filed in fiscal years 2008, 2009, and 2010, with an approximate 125 pages per asylum application (including supporting documentation), which comes to a total of $183,688.00 (rounded to the nearest whole number). Thus, altering the regulation will result in significant cost savings to the public by eliminating the cost to asylum applicants of submitting the third copy of the asylum application to EOIR.

Additionally, the cost of EOIR mailing each application to DOS is estimated at $2.54 per application. This figure is based on the cost per application of $1.00 for postage, $1.44 in employee costs, and $0.10 per envelope. EOIR's total annual cost of mailing asylum applications to DOS is $37,326.00 (rounded to the nearest whole number). The annual cost in human labor of DOS's receipt, storage, and disposition of files is estimated at $25,000. This figure includes $20,000 spent annually on GS–9, step 5 employees handling received asylum applications by unpacking, sorting, removing staples, and processing asylum applications for disposal for 3 hours per day, 52 days per year. It also includes $5,000 spent annually on the incineration of asylum applications, based on an estimate of personnel hours, materials, and transportation to the incinerators.

With the amendments made by this proposed rule, EOIR would discontinue forwarding every defensive asylum application to DOS. Instead, the Immigration Courts would continue to forward select individual applications where the immigration judges wish to ascertain whether DRL may have information relevant to the applicant or the applicant's situation. This process involves EOIR employees forwarding the asylum application and supplemental material to the appropriate person within DRL. DRL's

officers would review the file, conduct research, and have the option of responding, including with relevant country conditions information. The immigration judges would then take the relevant information into account in determining eligibility for asylum in individual cases. This commenting process already occurs and is already authorized in the regulations, so it is not included in the costs that an amended regulation would eliminate. Hence, altering the regulations will permit EOIR and DOS to save approximately $62,326.00 a year on the forwarding of all defensive asylum applications received by EOIR.

Once a final rule is issued, it is anticipated that EOIR and USCIS will work to modify the instructions to the Form I–589 asylum application to reflect the changes.

E. Executive Order 13132: Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Civil Justice Reform

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

G. Paperwork Reduction Act

The information collection requirement (Form I–589) contained in this rule has been previously approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. This rule does not contain a new or revised information collection.

List of Subjects

8 CFR Part 1208

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

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, part 1208 and part 1240 of chapter V of title 8 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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

Authority: 8 U.S.C. 1103, 1158, 1225, 1231, 1282.

2. Section 1208.11 is revised to read as follows:

§ 1208.11 Comments from the Department of State.

(a) The immigration judge may request, in his or her discretion, specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as an immigration judge deems appropriate.

(b) With respect to any asylum application, the Department of State may provide, at its discretion, to the Immigration Court:

(1) Detailed country conditions information relevant to eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, and withholding of removal under the Convention Against Torture;

(2) An assessment of the accuracy of the applicant's assertions about conditions in the applicant's country of nationality or habitual residence and the applicant's particular situation;

(3) Information about whether persons who are similarly situated to the applicant are persecuted or tortured in their respective country of nationality or habitual residence and the frequency of such persecution or torture; or

(4) Such other information as it deems relevant.

(c) Any comments received pursuant to paragraph (b) of this section shall be made part of the record. Unless the comments are classified under the applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.

* * * * *

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

3. The authority citation for part 1240 continues to read:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

4. Amend § 1240.11 by revising paragraph (c)(2) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(c) * * *

(2) An application for asylum or withholding of removal must be filed with the Immigration Court, pursuant to § 1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to § 1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under the applicable Executive Order, shall be given to both the alien and to DHS counsel and shall be included in the record.

* * * * *

5. Amend § 1240.33 by revising paragraph (b) to read as follows:

§ 1240.33 Applications for asylum or withholding of deportation.

* * * * *

(b) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to § 1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to § 1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under the applicable Executive Order, shall be given to both the applicant and to DHS counsel and shall be included in the record.

* * * * *

6. Amend § 1240.49 by revising paragraph (c)(3) to read as follows:

§ 1240.49 Ancillary matters, applications.

* * * * *

(c) * * *

(3) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to § 1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to § 1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, of the Department of State, unless classified under the applicable Executive Order, shall be given to both the applicant and to DHS counsel and shall be included in the record.

* * * * *

Dated: October 21, 2011.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2011–28117 Filed 10–28–11; 8:45 am]

BILLING CODE 4410–10–P