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SUBCHAPTER A—GENERAL PROVISIONS

PART 1—DEFINITIONS

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

§ 1.1 Definitions.

As used in this chapter:

(a) The terms defined in section 101 of the Immigration and Nationality Act (66 Stat. 163) shall have the meanings ascribed to them in that section and as supplemented, explained, and further defined in this chapter.

(b) The term *Act* means the Immigration and Nationality Act, as amended.

(c) The term *Service* means the Immigration and Naturalization Service.

(d) The term *Commissioner* means the Commissioner of Immigration and Naturalization.

(e) The term *Board* means the Board of Immigration Appeals.

(f) The term *attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

(g) Unless the context otherwise requires, the term *case* means any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceeding, including preliminary steps by any private person or corporation preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service or the Board is initiated.

(h) The term *day* when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

(i) The term *practice* means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board.

(j) The term *representative* refers to a person who is entitled to represent others as provided in §§ 292.1(a) (2), (3), (4), (5), (6), and 292.1(b) of this chapter.

(k) The term *preparation*, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.

(l) The term *immigration judge* means special inquiry officer and may be used interchangeably with the term special inquiry officer wherever it appears in this chapter.

(m) The term *representation* before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section.

(n) The term *Executive Office* means Executive Office for Immigration Review.

(o) The term *director* means either district director or regional service center director, unless otherwise specified.

(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.

[23 FR 9115, Nov. 26, 1958, as amended at 30 FR 14772, Nov. 30, 1965; 34 FR 12213, July 24, 1969; 38 FR 8590, Apr. 4, 1973; 40 FR 23271, May 29, 1975; 48 FR 8039, Feb. 25, 1983, 52 FR 2936, Jan. 29, 1987; 53 FR 30016, Aug. 10, 1988; 61 FR 18904, Apr. 29, 1996]

PART 2—AUTHORITY OF THE COMMISSIONER

AUTHORITY: 28 U.S.C. 509, 510; 5 U.S.C. 301; 8 U.S.C. 1103.

§ 2.1 Authority of the Commissioner.

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Executive Office, the Board, the Office of the Chief Special Inquiry Officer, and Special Inquiry Officers, there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.

[48 FR 8039, Feb. 25, 1983]

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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.

EDITORIAL NOTE: Nomenclature changes to part 3 appear at 52 FR 2941, Jan. 29, 1987.

§ 3.0 Executive Office for Immigration Review.

(a) *Organization.* The Executive Office for Immigration Review shall be headed by a Director, who shall be responsible for the general supervision of the Board of Immigration Appeals and the Office of the Chief Immigration Judge in the execution of their duties in accordance with 8 CFR part 3. The Director may redelegate the authority delegated to him by the Attorney General to the Chairman of the Board of Immigration Appeals or the Chief Immigration Judge. The Director shall be assisted in the performance of his duties by an Executive Assistant.

(b) *Citizenship Requirement for Employment.* (1) An application to work at the Executive Office for Immigration Review (EOIR or Agency), either as an employee or as a volunteer, must include a signed affirmation from the applicant that he or she is a citizen of the United States of America. Upon the Agency's request, the applicant must document United States citizenship.

(2) The Director of EOIR may, by explicit written determination and to the extent permitted by law, authorize the appointment of an alien to an Agency position when necessary to accomplish the work of EOIR.

[48 FR 8039, Feb. 25, 1983, as amended at 60 FR 29468, June 5, 1995]

Subpart A—Board of Immigration Appeals

§3.1 General authorities.

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall consist of a Chairman and fourteen other members. The Board Members shall exercise their independent judgment and discretion in the cases coming before the Board. A majority of the permanent Board Members shall constitute a quorum of the Board sitting en banc. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Director may in his discretion designate Immigration Judges to act as temporary, additional Board Members for whatever time the Director deems necessary. The Chairman may divide the Board into three-member panels and designate a presiding member of each panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each panel shall be empowered to review cases by majority vote. A majority of the number of Board Members authorized to constitute a panel shall constitute a quorum for such panel. Each panel may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of cases before it. In the case of an unopposed motion or a motion to withdraw an appeal pending before the Board, a single Board Member or the Chief Attorney Examiner may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of such motions before it. The permanent Board may, by majority vote on its own motion or by direction of the Chairman, consider any case en banc or reconsider en banc any case decided by a panel. By majority vote of the permanent Board, decisions of the Board shall be designated to serve as precedents pursuant to paragraph (g) of this section. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(2) *Chairman.* The Chairman shall direct, supervise, and establish internal operating procedures and policies of the Board. He shall designate a member of the Board to act as Chairman in his absence or unavailability. The Chairman shall be assisted in the performance of his duties by a Chief Attorney Examiner, who shall be directly responsible to the Chairman. The Chief Attorney Examiner shall serve as an Alternate Board Member when, in the absence or unavailability of a Board Member or Members or for other good cause, his participation is deemed necessary by the Chairman. Once designated, his participation in a case shall continue to its normal conclusion.

(3) *Board Members.* Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board.

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter.

(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. No appeal shall 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.

(3) Decisions of immigration judges on applications for the exercise of the discretionary authority contained in section 212(c) of the Act as provided in part 212 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in part 242 of this chapter.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.

(9) Decisions of Asylum Officers of the Service on applications for asylum or withholding of deportation filed by alien crewman or stowaways, as provided in § 253.1(f)(4) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in part 240 of this chapter.

(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 certify 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 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 request oral argument and to submit a brief.

(d) *Powers of the Board*—(1) *Generally.* Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.

(1–a) *Summary dismissal of appeals.* (i) *Standards.* The Board may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR–26 or Form EOIR–29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in law or fact unless the Board determines that it is supported by a good faith argument for extension, modification or reversal of existing law.

(E) The party concerned indicates on Form EOIR–26 or Form EOIR–29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing; or

(F) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 292.2(d) of this chapter of an appeal which is summarily dismissed under paragraph (d)(1–a)(i) of this section may constitute frivolous behavior under § 292.3(a)(15) of this chapter. Summary dismissal of an appeal under paragraph (d)(1–a)(i) of this section does not limit the other

grounds and procedures for disciplinary action against attorneys or representatives.

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(3) *Rules of practices: Discipline of attorneys and representatives.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization desiring representation is of a kind described in §1.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any special Inquiry Officer.

(e) *Oral argument.* When an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. Oral argument shall be heard at the discretion of the Board at such date and time as the Board shall fix. The Service may be represented before the Board by an officer of the Service designated by the Service.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions of the Board as precedents.* Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or Immigration Judges in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.

[23 FR 9117, Nov. 26, 1958, as amended at 27 FR 96, Jan. 5, 1962; 27 FR 10789, Nov. 6, 1962; 30 FR 14772, Nov. 30, 1965; 36 FR 316, Jan. 9, 1971; 40 FR 37207, Aug. 26, 1975; 44 FR 67960, Nov. 28, 1979; 47 FR 16772, Apr. 20, 1982; 48 FR 8039, Feb. 25, 1983; 52 FR 2943, Jan. 29, 1987; 52 FR 24981, July 2, 1987; 55 FR 30680, July 27, 1990; 56 FR 624, Jan. 7, 1991; 57 FR 11570, Apr. 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 29469, June 5, 1995; 60 FR 57313, Nov. 15, 1995; 61 FR 18904, Apr. 29, 1996; 61 FR 59305, Nov. 22, 1996]

§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.* (1) 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 rendered 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, may 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 may be consolidated with, and considered by the

Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, 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.

(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 appears 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, and notwithstanding the provisions in § 1.1(p) of this chapter, 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.

(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 on or before September 30, 1996, 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)(4)(iii);

(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 could not have been discovered or presented at the former hearing; or

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding.

(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 while an appeal is pending before the Board, may 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 may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(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)(4)(iii), 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) *English language, entry of appearance, and proof of service requirements.* 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) *Distribution of motion papers.* (i) 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. Such motion 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.

(ii) 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.

(iii) If the motion 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.

(3) *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)(2)(i) 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)(2)(ii) of this section, the opposing party shall have 13 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 Immigration Court 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.

[61 FR 18904, Apr. 29, 1996; 61 FR 32924, June 26, 1996]

§ 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 those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. An appellant shall be provided 30 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. The alien shall be provided 30 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 alien 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 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.

[61 FR 18906, Apr. 29, 1996]

§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 has 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.

[61 FR 18907, Apr. 29, 1996]

§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.

[61 FR 18907, Apr. 29, 1996]

§ 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)(4)(iii). 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.

[61 FR 18907, Apr. 29, 1996; 61 FR 21065, May 9, 1996]

§ 3.7 Notice of certification.

Whenever, in accordance with the provisions of § 3.1(c), a case is 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 Immigration Court 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 the Immigration Court 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 Immigration Court 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 the Board declined to accept the case.

[61 FR 18907, Apr. 29, 1996]

§ 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 directly 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, an Appeal Fee Waiver Request, (Form EOIR–26A). If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.

[61 FR 18907, Apr. 29, 1996]

Subpart B—Office of the Chief Immigration Judge

§3.9 Chief Immigration Judge.

The Chief Immigration Judge shall be reponsible for the general supervision, direction and scheduling of the Immigration Judges in the conduct of the various programs assigned to them. This shall include:

(a) Establishment of operational policies;

(b) Evaluation of the performance of Immigration Judge offices, making appropriate reports and inspections and taking corrective action where indicated.

[48 FR 8040, Feb. 25, 1983]

§3.10 Immigration Judges.

Immigration Judges shall exercise the powers and duties in this chapter regarding the conduct of exclusion and deportation hearings and such other proceedings which the Attorney General may assign them to conduct.

[48 FR 8040, Feb. 25, 1983]

§3.11 Administrative control offices.

Certain Immigration Judge offices are administrative control offices. These offices create and maintain Record of Proceedings for assigned geographical areas. All documents and correspondence pertaining to a Record of Proceeding shall be filed with the Immigration Court having administrative control over that Record of Proceeding and shall not be filed with any other Immigration Court. A list of administrative control offices with their assigned geographical areas will be made available to the public at any Immigration Court.

[52 FR 2942, Jan. 29, 1987, as amended at 60 FR 34090, June 30, 1995]

Subpart C—Rules of Procedure for Immigration Judge Proceedings

SOURCE: 52 FR 2936, Jan. 29, 1987, unless otherwise noted.

§3.12 Scope of rules.

These rules are promulgated to assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges. Except where specifically stated, these rules apply to all matters before Immigration Judges, including, but not limited to, deportation, exclusion, bond, rescission, departure control proceedings, and disciplinary proceedings under 8 CFR 292.3.

[57 FR 11571, Apr. 6, 1992]

§3.13 Definitions.

As used in this subpart:

Administrative Control means custodial responsibility for the Record of Proceeding as specified in 8 CFR 3.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge including an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; however, if the document to be served is the Order to Show Cause or the Notice of Deportation Hearing, such document shall be served in person to the alien, or by certified mail to the alien or the alien's attorney.

[57 FR 11571, Apr. 6, 1992, as amended at 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995]

§ 3.14 Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service, except for bond proceedings as provided in 8 CFR 3.19 and 8 CFR 242.2(b). When a charging document is filed, a certificate of service that indicates the Immigration Court in which the charging document is filed must be served upon the opposing party pursuant to 8 CFR 3.32.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§ 3.15 Contents of the order to show cause and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 3.26.

(c) *Address and telephone number.* (1) If the alien's address is not provided on the Order to Show Cause, or if the address on the Order is incorrect, the alien must provide to the Immigration Court where the Order to Show Cause has been filed, within five days of service of the Order, a written notice of an address and telephone number at which the alien can be contacted, on Form EOIR–33, change of address form.

(2) Within five working days of any change of address, the alien must provide written notice of the change of address on Form EOIR–33, change of address form to the Immigration Court where the Order to Show Cause has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

(3) The information required by paragraphs (c)(1) and (c)(2) of this section shall include, where applicable, the alien's name, alien registration number, the old address and telephone number, the new address and telephone number, and the effective date of change.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§3.16 Representation.

(a) The government may be represented in proceedings before an Immigration Judge.

(b) The respondent/applicant may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§3.17 Appearances.

(a) In any proceeding before an Immigration Judge in which the respondent/applicant is represented, the attorney or representative shall file a Notice of Appearance on the appropriate EOIR form with the Immigration Court and shall serve a copy of the Notice of Appearance on the Service as required by 8 CFR 3.32(a). Such Notice of Appearance must be filed and served even if a separate Notice of Appearance(s) has previously been filed with the Service for appearance(s) before the Service.

(b) Withdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§3.18 Scheduling of cases.

All cases shall be scheduled by the Immigration Court. The Immigration Court shall be responsible for providing notice of the time, place, and date of the hearing to the government and respondent/applicant.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§3.19 Custody/bond.

(a) Custody and bond determinations made by the service pursuant to part 242 of this chapter may be reviewed by an Immigration Judge pursuant to part 242 of this chapter.

(b) Application for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.

(c) Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order:

(1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;

(2) To the Immigration Court having administrative control over the case; or

(3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

(d) Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service.

(e) After an initial bond redetermination, a request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

(f) The determination of an Immigration Judge with respect to custody status or bond redetermination shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision. An appeal from the determination by an Immigration Judge may be taken to the Board of Immigration Appeals pursuant to §3.38.

(g) While any proceeding is pending before the Executive Office for Immigration Review, the Service shall immediately advise the Immigration Court having administrative control over the Record of Proceeding of a change in the respondent/applicant's custody location or of release from Service custody, or subsequent taking into Service custody, of a respondent/applicant. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent/applicant's current fixed street address, including zip code.

(h) An alien in deportation proceedings who has been convicted of an aggravated felony shall not be released from custody on bond or other conditions. Nevertheless, an alien who has been lawfully admitted to the United States and who establishes to the satisfaction of the Immigration Judge that the alien is not a threat to the community and that the alien is likely to appear at any scheduled hearings, may be released on bond or other conditions designed to guarantee such appearance.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§ 3.20 Change of venue.

(a) Venue shall lie at the Immigration Court where the charging document is filed pursuant to 8 CFR 3.14.

(b) The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue.

(c) No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code, where the respondent/applicant may be reached for further hearing notification.

[57 FR 11572, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§ 3.21 Pre-hearing conferences and statement.

(a) Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.

(b) The Immigration Judge may order any party to file a pre-hearing statement of position that may include, but is not limited to: A statement of facts to which both parties have stipulated, together with a statement that the parties have communicated in good faith to stipulate to the fullest extent possible; a list of proposed witnesses and what they will establish; a list of exhibits, copies of exhibits to be introduced, and a statement of the reason for their introduction; the estimated time required to present the case; and, a statement of unresolved issues involved in the proceedings.

(c) If submission of a pre-hearing statement is ordered under paragraph (b) of this section, an Immigration Judge also may require both parties, in writing prior to the hearing, to make any evidentiary objections regarding matters contained in the pre-hearing statement. If objections in writing are required but not received by the date for receipt set by the Immigration Judge, admission of all evidence described in the pre-hearing statement shall be deemed unopposed.

[57 FR 11572, Apr. 6, 1992]

§ 3.22 Interpreters.

Any person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§ 3.23 Motions.

(a) *Pre-decision motions.* Unless otherwise permitted by the Immigration Judge, motions submitted prior to the final order of an Immigration Judge shall be in writing and shall state, with particularity the grounds therefore, the relief sought, and the jurisdiction. The Immigration Judge may set and extend time limits for the making of motions and replies thereto. A motion shall be deemed unopposed unless timely response is made.

(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 part 3 of this chapter. 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 filed with the Immigration Court 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 acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.

(2) 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)(4)(iii) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(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 on or before July 31, 1996, 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) 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. A motion to reopen will not be granted for the purpose of providing the alien an opportunity to apply for any form of discretionary relief 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 apply 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, and notwithstanding the provisions in 1.1(p) of this chapter, 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.

(i) Except as provided in paragraph (b)(4)(ii) 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 after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later.

(ii) The time and numerical limitations set forth in paragraph (b)(4)(i) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii) 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 conclusion 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.

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

(A) 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

(B) 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.

(iv) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

[52 FR 2936, Jan. 29, 1987, as amended at 55 FR 30680, July 27, 1990. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 61 FR 18908, Apr. 29, 1996; 61 FR 19976, May 3, 1996; 61 FR 21228, May 9, 1996]

§ 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/application.

[61 FR 18908, Apr. 29, 1996]

§ 3.25 Waiver of presence of the parties.

(a) *Good cause shown.* The Immigration Judge may, for good cause, waive the presence of a respondent/applicant at the hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. In addition, *in absentia* hearings may be held pursuant to sections 1252(b) and 1252b(c) of title 8, United States Code with or without representation.

(b) *Stipulated request for order; waiver of hearing.* Notwithstanding any other provision of this chapter, upon the written request of the respondent/applicant and upon concurrence of the government, the Immigration Judge may conduct hearings in the absence of the parties and enter an order of deportation or exclusion on the written record if the Immigration Judge determines, upon a review of the charging document, stipulation document, and supporting documents, if any, that a represented respondent/applicant voluntarily, knowingly, and intelligently entered into a stipulated request for an order of deportation or exclusion. The stipulation document shall include:

(1) An admission that all factual allegations contained in the charging document are true and correct as written;

(2) A concession of deportability or excludability as charged;

(3) A statement that the respondent/applicant makes no application for relief from deportation or exclusion, including, but not limited to, voluntary departure, asylum, adjustment of status, registry, de novo review of a termination of conditional resident status, de novo review of a denial or revocation of temporary protected status, relief under 8 U.S.C. 1182(c), suspension of deportation, or any other possible relief under the Act;

(4) A designation of a country for deportation under 8 U.S.C. 1253(a);

(5) A concession to the introduction of the written statements of the respondent/applicant as an exhibit to the record or proceedings;

(6) A statement that the attorney/representative has explained the consequences of the stipulated request to the respondent/applicant and that the respondent/applicant enters the request voluntarily, knowingly and intelligently;

(7) A statement that the respondent/applicant will accept a written order for his or her deportation or exclusion as a final disposition of the proceedings; and

(8) A waiver of appeal of the written order of deportation or exclusion.

The stipulated request and required waivers shall be signed on behalf of the government and by both the respondent/applicant and his or her attorney or other representative qualified under part 292 of this chapter. The attorney or other representative shall file a Notice of Appearance in accordance with § 3.16(b) of this part.

(c) *Telephonic or video electronic media hearing.* An Immigration Judge may conduct hearings via video electronic media or by telephonic media in any proceeding under 8 U.S.C. 1226, 1252, or

1256, except that contested full evidentiary hearings on the merits may be conducted by telephonic media only with the consent of the alien.

[60 FR 26353, May 17, 1995]

§3.26 In absentia hearings.

(a) In any exclusion proceeding before an Immigration Judge in which the applicant fails to appear, the Immigration Judge shall conduct an *in absentia* hearing if the Immigration Judge is satisfied that notice of the time and place of the proceeding was provided to the applicant on the record at a prior hearing or by written notice to the applicant or to the applicant's counsel of record on the charging document or at the most recent address in the Record of Proceeding.

(b) In any deportation proceeding before an Immigration Judge in which the respondent fails to appear, the Immigration Judge shall order the respondent deported *in absentia* if: (1) The Service establishes by clear, unequivocal and convincing evidence that the respondent is deportable; and (2) the Immigration Judge is satisfied that written notice of the time and place of the proceedings and written notice of the consequences of failure to appear, as set forth in section 242B(c) of the Act (8 U.S.C. 1252b(c)), were provided to the respondent in person or were provided to the respondent or the respondent's counsel of record, if any, by certified mail.

(c) Written notice to the respondent at the most recent address contained in the Record of Proceeding shall be considered sufficient for purposes of this section. If the respondent fails to provide his or her address as required under §3.15(c), no written notice shall be required for an Immigration Judge to proceed with an *in absentia* hearing. This subsection shall not apply in the event that the Immigration Judge waives the appearance of an alien under §3.25.

[59 FR 1899, Jan. 13, 1994]

§3.27 Public access to hearings.

All hearings, other than exclusion hearings, shall be open to the public except that:

(a) Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public;

(b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.

(c) In a proceeding before an Immigration Judge pursuant to section 216(c)(4) of the Act concerning an abused alien spouse or an abused child, the Record of Proceeding and the hearing shall be closed to the public, unless the abused alien spouse or abused child agrees that the hearing and the Record of Proceeding shall be open to the public. In the case of an abused child, the Immigration Judge may decide if the hearing and Record of Proceeding shall be open.

[52 FR 2936, Jan. 29, 1987. Redesignated and amended at 57 FR 11571, 11572, Apr. 6, 1992]

§3.28 Recording equipment.

The only recording equipment permitted in the proceeding will be the equipment used by the Immigration Judge to create the official record. No other photographic, video, electronic, or similar recording device will be permitted to record any part of the proceeding.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§3.29 Continuances.

The Immigration Judge may grant a motion for continuance for good cause shown.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§3.30 Additional charges in deportation hearings.

At any time during the proceeding, additional or substituted charges of deportability and/or factual allegations may be lodged by the Service in writing. The respondent shall be served with a copy of these additional charges and allegations and may be given a reasonable continuance to respond thereto.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§ 3.31 Filing documents and applications.

(a) All documents and applications that are to be considered in a proceeding before an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceeding.

(b) Except as provided in 8 CFR 242.17(e), 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 8 CFR 3.24. Except as provided in § 3.8(a) and (c), 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.

(c) The Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any. If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.

[57 FR 11572, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 61 FR 18908, Apr. 29, 1996; 61 FR 19976, May 3, 1996; 61 FR 21228, May 9, 1996; 61 FR 46374, Sept. 3, 1996]

§ 3.32 Service and size of documents.

(a) Except in *in absentia* hearings, a copy of all documents (including proposed exhibits or applications) filed with or presented to the Immigration Judge shall be simultaneously served by the presenting party on the opposing party or parties. Such service shall be in person or by first class mail to the most recent address contained in the Record of Proceeding. A certification showing service on the opposing party or parties on a date certain shall accompany any filing with the Immigration Judge unless service is made on the record during the hearing. Any documents or applications not containing such certification will not be considered by the Immigration Judge unless service is made on the record during a hearing.

(b) Unless otherwise permitted by the Immigration Judge, all written material presented to Immigration Judges including offers of evidence, correspondence, briefs, memoranda, or other documents must be submitted on 8½″ × 11″ size paper. The Immigration Judge may require that exhibits and other written material presented be indexed, paginated, and that a table of contents be provided.

[52 FR 2936, Jan. 29, 1987. Redesignated and amended at 57 FR 11571, 11572, Apr. 6, 1992]

§ 3.33 Translation of documents.

Any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities.

[59 FR 1900, Jan. 13, 1994]

§ 3.34 Testimony.

Testimony of witnesses appearing at the hearing shall be under oath or affirmation.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§ 3.35 Depositions.

(a) If an Immigration Judge is satisfied that a witness is not reasonably available at the place of hearing and that said witness' testimony or other evidence is essential, the Immigration Judge may order the taking of deposition either at his or her own instance or upon application of a party.

(b) Such order shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence. The Immigration Judge may also issue a subpoena in the event of the refusal or willful failure of a witness within the United States to appear, give testimony, or produce documentary evidence after due notice.

(c) The witness and all parties shall be notified as to the time and place of the deposition by the official designated to conduct the deposition.

(d) Testimony shall be given under oath or affirmation and shall be recorded verbatim.

(e) The official presiding at the taking of the deposition shall note but not rule upon objections, and shall not comment on the admissibility of evidence or on the credibility and demeanor of the witness.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992]

§ 3.36 Record of proceeding.

The Immigration Court shall create and control the Record of Proceeding.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995]

§ 3.37 Decisions.

(a) A decision of the Immigration Judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the Immigration Judge in the presence of the parties and a memorandum summarizing the oral decision shall be served on the parties. If the decision is in writing, it shall be served on the parties by first class mail to the most recent address contained in the Record of Proceeding or by personal service.

(b) A written copy of the decision will not be sent to an alien who has failed to provide a written record of an address.

[57 FR 11573, Apr. 6, 1992, as amended at 59 FR 1900, Jan. 13, 1994]

§ 3.38 Appeals.

(a) Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals as authorized by 8 CFR 3.1(b).

(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 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. 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) The date of filing of the Notice of Appeal (Form EOIR–26) shall be the date the Notice is received by the Board.

(d) A Notice of Appeal (Form EOIR–26) must be accompanied by the appropriate fee or by an Appeal Fee Waiver Request (Form EOIR–26A). If the fee is not paid or the Appeal Fee Waiver Request (Form EOIR–26A) is not filed within the specified time period 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.

(e) Within five working days of any change of address, an alien must provide written notice of the change of address on Form EOIR–33 to the Board. Where a party is represented, the representative should also provide to the Board written notice of any change in the representative's business mailing address.

(f) Briefs may be filed by both parties pursuant to 8 CFR 3.3(c).

(g) In any proceeding before the Board wherein the respondent/applicant is represented, the attorney or representative shall file a notice of appearance on the appropriate form. Withdrawal or substitution of an attorney or representative may be permitted by the Board during proceedings only upon written motion submitted without fee.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 61 FR 18908, Apr. 29, 1996]

§ 3.39 Finality of decision.

Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.

[52 FR 2936, Jan. 29, 1987. Redesignated and amended at 57 FR 11571, 11573, Apr. 6, 1992]

§ 3.40 Local operating procedures.

An Immigration Court having administrative control over Records of Proceedings may establish local operating procedures, provided that:

(a) Such operating procedure(s) shall not be inconsistent with any provision of this chapter;

(b) A majority of the judges of the local Immigration Court shall concur in writing therein; and

(c) The Chief Immigration Judge has approved the proposed operating procedure(s) in writing.

[52 FR 2936, Jan. 29, 1987. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34090, June 30, 1995]

§ 3.41 Evidence of criminal conviction.

In any proceeding before an Immigration Judge,

(a) Any of the following documents or records shall be admissible as evidence in proving a criminal conviction:

(1) A record of judgment and conviction;

(2) A record of plea, verdict and sentence;

(3) A docket entry from court records that indicates the existence of a conviction;

(4) Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction;

(5) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the following: The charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;

(6) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(b) Any document or record of the types specified in paragraph (a) of this section may be submitted if it complies with the requirement of § 287.6(a) of this chapter, or a copy of any such document or record may be submitted if it is attested in writing by an immigration officer to be a true and correct copy of the original.

(c) Any record of conviction or abstract that has been submitted by electronic means to the Service from a state or court shall be admissible as evidence to prove a criminal conviction if it:

(1) Is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository or by a court official from the court in which conviction was entered as an official record from its repository. Such certification may be by means of a computer-generated signature and statement of authenticity; and,

(2) Is certified in writing by a Service official as having been received electronically from the state's record repository or the court's record repository.

(d) Any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

[58 FR 38953, July 21, 1993]