

§ 3.39

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

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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]

§ 3.42 Review of credible fear determination.

(a) *Referral.* Jurisdiction for an Immigration Judge to review an adverse credible fear finding by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by the Service of Form I-863, Notice of Referral to Immigration Judge. The Service shall also file with the notice of referral a copy of the written record

of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of an adverse credible fear determination. This record shall not be merged with any later proceeding pursuant to section 240 of the Act involving the same alien.

(c) *Procedures and evidence.* The Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the review. The testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. If an interpreter is necessary, one will be provided by the Immigration Court. The Immigration Judge shall determine whether the review shall be in person, or through telephonic or video connection (where available). The alien may consult with a person or persons of the alien's choosing prior to the review.

(d) *Standard of review.* The immigration judge shall make a *de novo* determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien could establish eligibility for asylum under section 208 of the Act or withholding under section 241(b)(3) of the Act or withholding under the Convention Against Torture.

(e) *Timing.* The Immigration Judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on Form I-869, Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* If an immigration judge determines that an alien has a credible fear of persecution or torture, the immigration judge shall vacate the order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. Subsequent to the order being vacated, the Service shall issue and file Form I-862, Notice to Appear, with the Immigra-

tion Court to commence removal proceedings. The alien shall have the opportunity to apply for asylum and withholding of removal in the course of removal proceedings pursuant to section 240 of the Act. If an immigration judge determines that an alien does not have a credible fear of persecution or torture, the immigration judge shall affirm the asylum officer's determination and remand the case to the Service for execution of the removal order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.

(g) *Custody.* An Immigration Judge shall have no authority to review an alien's custody status in the course of a review of an adverse credible fear determination made by the Service.

[62 FR 10335, Mar. 6, 1997, as amended at 64 FR 8487, Feb. 19, 1999]

§ 3.43 Motion to reopen for suspension of deportation and cancellation of removal pursuant to section 203(c) of the Nicaraguan Adjustment and Central American Relief Act (NACARA).

(a) *Standard for adjudication.* Except as provided in this section, a motion to reopen proceedings under section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) *Aliens eligible to reopen proceedings under section 203 of NACARA.* A motion to reopen proceedings to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, must establish that the alien:

(1) Is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(2) Was or would be ineligible:

(i) For suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or