

# Rules and Regulations

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## DEPARTMENT OF JUSTICE

### 8 CFR Parts 1003 and 1208

[EOIR No. 140I; AG Order No. 2755–2005]

RIN 1125–AA44

#### Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals

**AGENCY:** Executive Office for Immigration Review, Justice.

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

**SUMMARY:** This rule amends Department regulations governing removal and other proceedings before immigration judges and the Board of Immigration Appeals when a respondent has applied for particular forms of immigration relief allowing the alien to remain in the United States (including, but not limited to, asylum, adjustment of status to that of a lawful permanent resident, cancellation of removal, and withholding of removal), in order to ensure that the necessary identity, law enforcement, and security investigations are promptly initiated and have been completed by the Department of Homeland Security prior to the granting of such relief.

**DATES:** *Effective date:* This rule is effective April 1, 2005.

*Comment date:* Written comments must be submitted on or before April 1, 2005.

*Request for Comments:* Please submit written comments to MaryBeth Keller, General Counsel, Executive Office for Immigration Review (EOIR), 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA44 on your correspondence. You may view an electronic version of this rule at <http://www.regulations.gov>. You may also comment via the Internet

to EOIR at [eoir.regs@usdoj.gov](mailto:eoir.regs@usdoj.gov) or by using the <http://www.regulations.gov> comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125–AA44 in the subject box. Comments are available for public inspection at the above address by calling (703) 305–0470 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

**SUPPLEMENTARY INFORMATION:** An immigration judge or the Board of Immigration Appeals (Board) may grant relief from removal under a variety of provisions of the Immigration and Nationality Act (Act). Among the common forms of relief are adjustment of status to lawful permanent resident (LPR) status, asylum, waivers of inadmissibility, cancellation of removal, withholding of removal, and deferral of removal under the Convention Against Torture.<sup>1</sup> In considering an application for relief the applicant bears the burden of establishing his or her eligibility for the relief sought and, for discretionary forms of relief, that he or she merits a favorable exercise of discretion. For almost all forms of relief from removal, it must be established that the applicant has not been convicted of particular classes of crimes, and that he or she is not otherwise inadmissible or ineligible under the relevant standards.

The Department of Homeland Security (DHS) conducts a variety of identification, law enforcement, and security investigations and examinations to determine whether an alien in proceedings has been convicted of any disqualifying crime, poses a national security threat to the United States, or is subject to other investigations. Since September 11, 2001, DHS and its predecessor agencies have expanded the scope of identity, law enforcement, and security investigations and examinations before granting of immigration status to aliens.

<sup>1</sup> Withholding of removal under 241(b)(3) of the Act and CAT deferral are not forms of “relief from removal” per se, but instead are restrictions on or protection from removal of an alien to a country where he or she would be threatened or tortured. In this **SUPPLEMENTARY INFORMATION**, the Department uses the term “relief from removal,” and appropriate variations, to include withholding and CAT deferral, for the ease of the reader.

Moreover, because circumstances are subject to change over time, DHS may be required to update the results of its background investigations if the current determinations have expired. As the National Commission on Terrorist Attacks upon the United States (“9/11 Commission”) has emphasized, “[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.” *The 9/11 Commission Report*, ed. W.W. Norton & Co. (2004), at 383. The Attorney General agrees with the Secretary’s determination that the expanded background and security checks on aliens who seek to come to or remain in this country are essential to meet this challenge, regardless of whether the alien applies affirmatively with DHS or seeks immigration relief during removal proceedings within EOIR’s jurisdiction.

In general, these investigations and examinations can be completed in a timely fashion so as to permit the adjudication of adjustment and other applications before the immigration judges without delay. Because DHS initiates the immigration proceedings, in most cases DHS has ample time to undertake the necessary investigations if it has obtained the alien’s biometric<sup>2</sup> and other biographical information<sup>3</sup> prior to or at the time of filing of the Notice to Appear (NTA). In the instance when an NTA has been issued without biometrics and other biographical information having been taken at all (such as when DHS’s U.S. Citizenship and Immigration Services (USCIS) issues the NTA upon denial of a petition or application for change of nonimmigrant status at a service center

<sup>2</sup> Biometrics currently include digital fingerprints, photographs, signature, and in the future may include other digital technology that can assist in determining an individual’s identity and conducting background investigations.

<sup>3</sup> Other biographical information refers to data which may include such items as an individual’s name; address; place of birth; date of birth; marital status; social security number (if any); alien registration number (if any); prior employment authorization (if any); date of last entry into the United States; place of last entry; manner of last entry; current immigration status and eligibility category. Currently, such biographical information is required by the DHS Form I–765, Application for Employment Authorization, or other DHS or EOIR forms. In the future, other information may be required by DHS in order to complete identity, law enforcement, or security investigations or examinations.

or when an applicant fails to appear for a scheduled biometrics fingerprinting appointment with USCIS), this rule contemplates that DHS will be given the opportunity to obtain respondent's biometrics and other biographical information from the respondent before a merits hearing. In addition, particularly when substantial time may have elapsed during the pendency of immigration proceedings, the validity of a fingerprint response received by USCIS may have elapsed and, under current arrangements with outside law enforcement and investigative agencies, fingerprints may need to be taken again by DHS to complete updated background checks.

When an alien in proceedings files an application for relief, such as an application for asylum or adjustment of status, DHS is on notice that further inquiry into criminal and national security records may be required. Because the immigration judges schedule in advance the date of the hearing on the merits of the alien's application, a time that is ascertainable from the hearing notices served on the government counsel, DHS is routinely on notice of the date by which these inquiries, investigations and examinations must be completed in time for a final decision by the immigration judge on the pending applications for relief. When an alien files an application in immigration proceedings for relief from removal, the immigration judge ordinarily will be able to consider the time that DHS indicates it will likely require to conduct the background and security inquiries and investigations before setting the date for the merits hearing. The immigration judge also can take into consideration that DHS's ability to obtain full results from the law enforcement and intelligence agencies that are not within its control may require additional time beyond that initially indicated by the government.

There are, as noted, occasions where an investigation being conducted or updated by DHS requires additional time. Historically, DHS has had the ability to file a motion for a continuance under the rules applicable to proceedings before immigration judges, 8 CFR 1003.29, but that general provision leaves numerous questions unanswered in the complicated area of criminal history checks and national security investigations. The current regulations are also unclear as to the scope of an immigration judge's authority to act to grant relief in situations where a background investigation is ongoing.

The national security requires that immigration judges or the Board should not grant applications for adjustment to LPR status, asylum, or other forms of immigration relief without being advised by DHS of the results of the investigations, including criminal and intelligence indices checks. The Department and DHS recognize the need for coordination of processes so as to permit these appropriate identity, background, and security investigations to be completed by DHS prior to the granting of immigration relief that is within the jurisdiction of the immigration judges and the Board. This rule provides a means to ensure that the immigration judges and the Board will not grant relief before DHS has completed its investigations.

The Department and DHS also recognize that the need to protect national security and public safety must be balanced against the desire for law abiding aliens to have their requests for immigration relief adjudicated in a prompt and timely fashion. However, there have been instances when aliens in removal proceedings were granted some form of immigration relief but USCIS did not automatically and immediately learn about their need for an immigration document. Furthermore, DHS determined that in some cases the law enforcement checks were not completed prior to the grant. Since USCIS must run background checks on any alien who will receive an immigration document reflecting the alien's immigration status or authorization to work, this process creates a waiting period for aliens that in most cases could have been avoided. This process also is not acceptable to the grantees, some of whom have been named or represented in litigation against the government complaining of delays. Recent cases include *Santillan v. Ashcroft*, No 04-2686 (N.D. Cal.) (requesting relief for proposed nationwide class); *Padilla v. Ridge*, No. M-03-126 (S.D. Tex.) (requesting relief for proposed class of aliens in three districts of Texas). The Department and DHS have determined that the best method for avoiding these delays is to run law enforcement checks prior to immigration relief being granted. Further, these checks should be conducted in advance of any scheduled merits hearing before the immigration judge wherever possible.

This rule enables and requires immigration judges to cooperate with DHS in: (1) Instructing aliens on how to comply with biometric processing requirements for law enforcement checks; (2) considering information resulting from law enforcement checks;

and (3) instructing aliens who have been granted some form of immigration relief regarding the procedures by which to obtain documents from DHS. This rule also creates a more efficient process, saving time for the immigration judge, respondent, and others, by implementing a process that enables the Department to adjust its hearing calendars when the required law enforcement checks have not been completed prior to a scheduled hearing. This improvement to the system is immediately necessary to reduce the time that grantees must wait to receive their documents after the completion of immigration proceedings, and decrease the chances that an alien who is a danger to public safety or national security will be granted relief from removal.

#### **Systems Utilized To Conduct Identity, Background and Security Checks**

There is no need for this rule to specify the exact types of background and security checks that DHS may conduct with respect to aliens in proceedings. DHS and other agencies are actively involved in streamlining and enhancing the systems of information that contain information on terrorist and other serious criminal threats.

Generally, however, the majority of required checks are returned in a matter of days or weeks. Yet there are instances where another agency may inform DHS that a check reveals some sort of positive "indicia" on an individual, and it may take a longer period of time for those agencies to complete their investigations and convey this information to DHS for a determination of relevancy under the immigration laws. Additional time may be required if it is necessary to obtain additional fingerprints. In other instances, the "indicia" may require that DHS obtain or provide notice to the individual that he or she must obtain and present DHS with all records of court proceedings. A longer period of time may also be necessary to complete background checks where individuals have common names that may require individualized reviews of the records of all similarly named individuals or where there are variations in the spelling of names due to translation discrepancies. Finally, there may be demands on DHS to conduct a disproportionate number of investigations in a short time based upon current events, such as an emergent mass migration, that may have an impact on various agencies' capacity to conduct identity, background and security investigations in a timely manner.

### Requirement for Aliens in Proceedings To Provide Biometrics and Other Biographical Information

The Act imposes a general obligation on aliens who are applicants for admission to demonstrate clearly and beyond doubt that they are entitled to admission and are not inadmissible under section 212(a) of the Act (8 U.S.C. 1182(a)). Almost all of the various forms of relief from removal require the applicant to demonstrate either that he or she is admissible under applicable legal standards, or that he or she has not been convicted of certain disqualifying offenses or engaged in other specified conduct. The results of the DHS background and security checks are obviously quite relevant to a determination of an alien's admissibility or eligibility with respect to the requested immigration relief. Moreover, an applicant for any form of immigration relief in proceedings bears the burdens of proof—*i.e.*, the burden of proceeding and the burden of persuasion—in demonstrating that he or she is eligible for such relief and, if relevant, that he or she merits a favorable exercise of discretion for the granting of such relief. 8 CFR 1240.8(d); *see, e.g., Matter of Lennon*, 15 I&N Dec. 9, 16 (BIA 1974), remanded on other grounds sub nom. *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975) (adjustment of status to that of a lawful permanent resident).

For adjustment of status, section 245(a) of the Act requires that an applicant meet three conditions in addition to a favorable exercise of discretion: (1) He or she must make an application for adjustment of status; (2) he or she must be eligible to receive a visa and be admissible for permanent residence; and (3) an immigrant visa must be immediately available at the time of application. Thus, it is first and foremost the applicant's responsibility to file a complete application for adjustment of status (DHS Form I-485) and submit the required supporting documentation (including the respondent's biometric and other biographical information) to establish eligibility to receive a visa and admissibility to the United States. Other forms of relief such as asylum, withholding of removal, or cancellation of removal also place the burden of proof on the alien, and require the alien to file the proper application for relief and submit all of the necessary supporting documentation in the

proceedings before the immigration judge, as provided in 8 CFR 1240.8(d).<sup>4</sup>

The rule therefore specifically provides that applicants for immigration relief in proceedings before the immigration judges have the obligation to comply with applicable requirements to provide biometrics and other biographical information.

For aliens who are not in proceedings and who seek to apply for asylum or for adjustment of status or some other status, the alien files the appropriate form directly with USCIS, and USCIS then informs the alien when and where the alien (and any covered family members) should go to provide biometrics and other biographical information. Fingerprints normally are taken by USCIS at an Application Support Center (ASC).

However, a different approach is needed where the respondent in proceedings applies for asylum, adjustment of status, or other forms of relief that are available in removal proceedings, such as cancellation or withholding of removal. In these instances, where the immigration proceedings have already begun, respondents file the appropriate application forms and related documents in the proceedings before the immigration judge, rather than with USCIS.

At a master calendar hearing or other hearing at which the immigration judge addresses issues relating to whether a respondent is removable, the immigration judge normally reviews with the respondent possible forms of relief from removal, including asylum, adjustment of status, cancellation of removal, or other forms of relief or protection, if the respondent is potentially eligible. 8 CFR 1240.11. At that hearing, or at a subsequent master

hearing, the immigration judge normally establishes a date by which the application must be filed with the immigration judge and served on DHS, and a later date for a hearing at which the immigration judge will consider the application.

This rule provides that applications for adjustment of status, cancellation or withholding of removal, or other forms of relief covered by this rule will be deemed to be abandoned for adjudication if, after notice of the requirement to provide biometrics or other biographical information to DHS, the applicant fails without good cause to provide the necessary biometrics and other biographical information to DHS by the date specified by the immigration judge. As noted, in many cases, the alien will already have provided biometrics or other biographical information in connection with the removal proceedings prior to the master calendar hearing or other hearing at which the alien indicates an intention to seek immigration relief. However, in those instances where the respondent has not yet provided biometrics or other biographical information to enable DHS to conduct those checks or where DHS notifies the immigration judge or the Board that checks have expired and need to be updated, it is clear that the application cannot be granted by the immigration judge or the Board.

In those instances, until the respondent and any covered family members appear at the appropriate location to provide DHS their biometrics or other biographical information, the application cannot be granted or may be found to be abandoned if there is a failure to comply without good cause by the date specified by the immigration judge. Thereafter, once the biometric and other biographical information is provided as required, DHS should be allowed an adequate time to complete the appropriate identity, law enforcement, and security investigations before the application is scheduled for decision by the immigration judge.

This approach clearly places the responsibility for taking the initiative to provide biometrics or other biographical information in a timely manner on the respondent who is seeking relief, consistent with the respondent's burdens of proceeding and persuasion. By requiring the respondent to provide biometrics or other biographical information to DHS in a timely manner or risk a finding that the application has been abandoned, this rule will facilitate the prompt adjudication of cases.

In general, aliens in proceedings who are obligated to provide biometrics or other biographical information can do

<sup>4</sup> For asylum applicants, the current regulations at 8 CFR 1208.10 and the instructions to the Form I-589, Application for Asylum and for Withholding of Removal, already provide notice that an individual and any included family members 14 years of age and older cannot be granted asylum until the required identity, background, and security checks have been conducted. The regulations at 8 CFR 1208.10 and the instructions to the Form I-589 at Part 1, IX, page 9, clearly notify asylum applicants before an immigration judge that failure to comply with fingerprint and other biometrics requirements will make the applicant ineligible for asylum and may delay eligibility for work authorization. The regulations at 8 CFR 1208.3 (Form of application) and the Form I-589 Instructions, Part 1, sections V, VI, VII, X, XI and XII at pages 5 through 10, also specify what constitutes a complete application for asylum and for withholding of removal or protection under the Convention Against Torture. The results of the background and security checks are relevant for an alien's eligibility for withholding of removal, and for determining whether an alien seeking protection under the Convention Against Torture is eligible only for deferral of removal under 8 CFR 1208.17.

so by making appropriate arrangements with local DHS offices. In many cases, this will involve visiting an ASC, the same place to which an applicant would be directed if he or she had filed an affirmative application for asylum or adjustment of status directly with USCIS.

Upon the applicant's filing of an application for relief with the immigration court or USCIS's referral of the application to an immigration judge, unless DHS informs the immigration judge that new biometrics are not required, DHS will provide the alien with a standard biometrics appointment notice prepared by an appropriate DHS office. USCIS District Directors and Immigration and Customs Enforcement Counsel, in consultation with the Office of the Chief Immigration Judge, will develop scheduling procedures and standardized appointment notices for each location. The DHS fingerprint notice will be hand-delivered to the alien by DHS and the notice may be used for multiple family members, but the notice must contain at least the alien registration number, receipt number (if any), name, and the form number pertaining to the relief being sought for each person listed. Locally established procedures will ensure that applicants for relief from removal receive biometrics services in a time period compatible with DHS resources and the scheduled immigration proceedings. The immigration judge shall specify for the record when the respondent receives the notice and the consequences for failing to comply with biometrics processing. On the other hand, aliens who are currently in detention—either immigration custody under section 236 of the Act (or other provision of law) during the pendency of the removal proceedings, or in a federal, state, or local correctional facility based on a criminal conviction—will not have such flexibility. In the case of any detained alien, DHS will make the necessary arrangements to obtain biometrics and other biographical information if that has not already been collected in a manner that can be re-used by DHS for updating checks.

#### **Failure To File a Complete Application for Relief in a Timely Fashion**

The rule also codifies the existing Board precedent that failure to file or to complete an application in a timely fashion constitutes abandonment of the application. Where an immigration judge has set a deadline for filing an application for relief, the respondent has already in fact appeared at a hearing. His statutory right to be present has been fulfilled. The Board has long

held that applications for relief under the Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of Jean*, 17 I&N Dec. 100 (BIA 1979) (asylum), *modified*, *Matter of R-R*, 20 I&N Dec. 547 (BIA 1992); *Matter of Jaliwala*, 14 I&N Dec. 664 (BIA 1974) (adjustment of status); *Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969) (visa petition); *see also Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987) (exclusion proceedings). Accordingly, the rule specifies that the immigration judge shall issue an appropriate order denying or premitting the requested relief if the application is not timely filed or is not completed in a timely manner.

With respect to a failure to provide biometrics or other biographical information, the rule allows an immigration judge to excuse the failure to comply with these requirements within the time allowed if the applicant demonstrates that such failure was the result of good cause. This language is taken from the current provision in 8 CFR 1208.10 pertaining to applications for asylum and is consistent with the general obligation placed on the alien to satisfy this requirement. For detained aliens, though, it is the obligation of DHS to obtain the necessary biometrics and other biographical information.

#### **Covered Forms of Immigration Relief**

The Department notes that current law prohibits the immigration judges from granting asylum to any alien prior to the completion of identity, law enforcement, and security investigations. Section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)), expressly provides that

asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General [or the Secretary of Homeland Security] and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.

Since the applicants have the obligation to submit a complete application and supporting documentation for the requested immigration relief, as discussed above, and the results of the DHS background and security checks are obviously of great relevance in evaluating issues relating to admissibility, qualifications, and discretion, the Attorney General has concluded that it is sound public policy to impose the procedural requirements of this rule relating to submission of biometric and other biographical information and completion of the DHS

background and security checks prior to the granting of adjustment to LPR status, cancellation or withholding of removal, or other forms of relief permitting the alien to remain in the United States. Granting permanent resident status is an important step with substantial benefits that has special procedures for rescinding such status under section 246 of the Act (8 U.S.C. 1256). Other forms of relief allow the alien to remain legally in the United States and should not be granted, as a matter of sound public policy, until the applicant has complied with applicable requirements relating to biometrics and other biographical information, and until DHS has had the opportunity to complete the necessary identity, law enforcement, and security investigations that are relevant to a determination of whether the alien should be granted the requested immigration relief.

Accordingly, the rule provides a procedural requirement that the immigration judges or the Board may not grant any form of immigration relief allowing the alien to reside in the United States without ensuring that DHS has completed the identification, law enforcement, and security investigations and examinations first. This will ensure that the results of such background checks or other investigations have been reported to and considered by the immigration judges or the Board before the issuance of any order granting an alien's application for immigration relief that permits him or her to remain in the United States. The rule does not expand the circumstances in which the immigration judges or the Board have authority to grant relief, but is applicable in any case to the extent they do have such authority. Section 1003.47(b) identifies the principal forms of immigration relief covered by this rule, including:

- Asylum under section 208 of the Act;
- Adjustment of status to that of an LPR under section 209 or 245 of the Act (8 U.S.C. 1159, 1255) or any other provision of law;<sup>5</sup>

<sup>5</sup> Section 245 of the Act is the principal provision relating to adjustment of status, but section 209 provides the exclusive procedure for adjustment of status for refugees and asylees. *See* 8 CFR 1209.1, 1209.2; *Matter of Jean*, 23 I&N Dec. 373, 376 n.7, 381 (A.G. 2002). Among the other laws relating to adjustment of status are the following, although the immigration judges do not exercise authority at present over all of them: Cuban Adjustment Act, Public Law 89-732, §§ 1-5, 80 Stat. 1161 *et seq.* (Nov. 2, 1966); Indochinese Adjustment Act, Public Law 95-145, §§ 101-107, 91 Stat. 122 (Oct. 28, 1977); Virgin Islands Adjustment Act, Public Law 97-271, 76 Stat. 1157 (Sept. 30, 1982); Soviet and Indochinese Parolees Adjustment Act, Public Law 101-167, § 599E, 101 Stat. 1263 (Nov. 21, 1989); H-1 Nonimmigrant Nurses Adjustment Act, Public

- Conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act (8 U.S.C. 1186a, 1186b);
- Waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act (8 U.S.C. 1159, 1182, 1227) or other provisions of law;
- Cancellation of removal under section 240A of the Act (8 U.S.C. 1229b), suspension of deportation under former section 244 of the Act, relief from removal under former section 212(c) of the Act, or any similar form of relief;<sup>6</sup>
- Withholding of removal under section 241(b)(3) of the Act (8 U.S.C. 1231) or withholding or deferral of removal under the Convention Against Torture;
- Registry under section 249 of the Act (8 U.S.C. 1259); and
- Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

In addition to those provisions specifically listed, this rule covers any other form of relief granted by the immigration judges or the Board that allows the alien to remain in the United States.

#### **Allowing Time for DHS To Complete Background Checks and Investigations**

The Department wishes to avoid unnecessary delays that may frustrate the timely adjudication of any case simply because of a failure to conduct or complete the investigations or indices checks. This rule provides a means to ensure that DHS will have an appropriate opportunity to conduct the necessary investigations including an alien's submission of his or her biometric or other biographical information, before the application is granted by the immigration judge. This rule does not impose a unilateral definition of what the investigations and examinations will constitute in every case; it remains the province of DHS to determine what identity, law

enforcement, and security investigations and indices checks are required (this may vary over time and from case to case) and when those investigations and indices checks are complete. After providing a reasonable period of time for DHS to initiate the necessary investigations and to await the results from other law enforcement and intelligence agencies, as necessary, the immigration judge will then be able to address the requested forms of immigration relief on the merits. The Department recognizes that DHS cannot always know the exact period of time that will be required to complete all checks and investigations because the information often is within the control of non-DHS agencies, such as the Federal Bureau of Investigation or the Central Intelligence Agency. The national security of the country and public safety of its residents depend on swift responses, as does the efficient administration of the immigration laws.

If, for any reason, DHS is not ready to present the results of its identity, law enforcement, and security investigations by the time of the scheduled final hearing, then it will be up to DHS to make a request for a continuance (in advance of the hearing if possible) and to explain, to the extent practical, the time needed for completion. In some cases for example, where DHS is conducting an ongoing investigation of the respondent's identity or issues raised by other law enforcement agencies who may themselves have pending investigations, or indicates that a United States Attorney is presenting evidence to a grand jury concerning the respondent, multiple continuances would be justified by the ongoing criminal process into which neither DHS nor the immigration judge can intrude. This process contemplates that, if DHS indicates that it is unable to complete the identity, law enforcement, or security investigation because of a pending investigation of the respondent—either by DHS or by any other agency—then DHS will be able to obtain a further continuance to complete the pending investigation.

The Attorney General has delegated authority to immigration judges in the past to close cases administratively in certain contexts, particularly in those cases where DHS, rather than the immigration judge, has substantive authority over a particular form of relief. See 8 CFR 1240.62, 1245.13, 1245.15, 1245.21. However, the regulations do not authorize the immigration judge to close cases administratively solely because the respondent is subject to investigation or indices checks. Administrative closure causes a case to

fall out of the regular calendar, undermining an assurance that the case will be resolved in a timely manner. Instead, this rule contemplates that cases awaiting the completion of an identity, law enforcement, or security investigation should remain on an active calendar and should be on schedule for a hearing on a particular date. Instead of administrative closure, the Department anticipates that the continuance process described in this rule will deal with the necessary delays inherent in completing identity, law enforcement, and security investigations and examinations for certain respondents.

The Department recognizes the importance of completing the investigations and indices checks in advance and allowing an adequate opportunity for DHS or other agencies to complete the necessary steps regarding the background investigations. On occasion, immigration judges have attempted to "order" DHS to complete investigations by a specific date, an authority that was never delegated by the Attorney General when the functions of the former Immigration and Naturalization Service were a part of the Department of Justice, and an authority that the Attorney General does not now delegate to immigration judges.

However, the Department believes that it is also important for the immigration judge to be able to move cases toward completion. The Department believes that the rule properly balances the respective and competing interests in that very small number of affected cases where DHS is not able to complete the necessary identity, law enforcement, and security investigations of the alien in time for the scheduled hearing on the merits of the alien's application for immigration relief.

In some cases, the continuance of a merits hearing would impose significant burdens on the court, the respondent, or witnesses, and this rule does not prohibit an immigration judge from proceeding with a merits hearing in the absence of a report from DHS that all background investigations are complete. In such cases, the immigration judge may hear the case on the merits but may not render a decision granting any covered form of relief. Instead, the immigration judge should schedule an additional master hearing on a date by which investigations are expected to be completed.

#### **Procedures for Cases on Appeal Before the Board**

This rule also provides new procedures codified at § 1003.1(d)(6) to

Law 101-238, § 2, 103 Stat. 2099 (Dec. 15, 1989); Chinese Student Protection Act of 1992, Public Law 102-404, 106 Stat. 1969 (Oct. 9, 1992); Polish and Hungarian Parolees Adjustment Act of, Public Law 104-208, Div. C, § 646, 110 Stat. 3009-709 (Sept. 30, 1996); Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, § 202, 11 Stat. 2193 (Nov. 19, 1997); Haitian Refugee Immigration Fairness Act (HRIFA), Public Law 105-277, Div. A, § 101(h) [Title IX, § 902], 112 Stat. 2681-538 (Oct. 21, 1998); Syrian Adjustment Act, Public Law 106-378, 114 Stat. 1442 (Oct. 27, 2000); and Indochinese Parolees Adjustment Act, Public Law 106-429, § 101(a), 114 Stat. 1900 (Nov. 6, 2000).

<sup>6</sup> This includes special rule cancellation of removal under NACARA § 203.

take account of those cases where the Board is considering relief from removal that is subject to the provisions of § 1003.47(b), to ensure that the Board does not affirm or grant such relief where the identity, law enforcement, and security investigations or examinations have not been conducted or the results of prior background checks have expired and must be updated.

In most of the currently pending cases (sometimes referred to as pipeline or transitional cases), there is no indication in the record whether or not DHS ever conducted the identity, law enforcement, and security investigations or examinations with respect to the respondent. In such cases, the Board will not be able to issue a final decision granting any application for relief that is subject to the provisions of § 1003.47, because the record is not yet complete. After consideration of the issues on appeal, the Board will remand the case to the immigration judge with instructions to allow DHS to complete the necessary investigations and examinations and report the results to the immigration judge.

In the future, though, once the provisions of § 1003.47 take effect, the Department recognizes that for those cases appealed to the Board involving applications for relief, DHS will have completed the appropriate background checks either in advance of the filing of the NTA or prior to the immigration judge's decision. The issue on appeal therefore will be whether those checks are current and whether new information has developed since completion of the initial background checks that would affect the appeal and the underlying application for relief.

Based upon the consideration that DHS will have run background checks at least once prior to the time the Board is considering an appeal, this rule provides a new limitation that the Board cannot grant an application for relief if DHS notifies the Board that the background checks have expired and need to be updated or if the background checks have uncovered information bearing on the merits of the alien's application for relief. Because DHS (not the immigration judge or the Board) determines the requirements and timing for updating previous investigations or examinations, and DHS may decide to revise such standards and requirements over time, it is appropriate to require DHS to notify the Board in those cases where DHS has determined that the results of the previous checks have expired and must be updated. However, in view of the time needed for the Board to complete its case adjudications, the

Department acknowledges that in many (perhaps most) appeals the results of the previous identity, law enforcement, and security investigations or examinations will no longer be current under the standards established by DHS and must be updated before the Board has completed its adjudication process. (Under the current regulations in 8 CFR 1003.1(e), the Board is required to adjudicate cases within 90 days after the completion of the record on appeal for cases assigned to a single Board member, or within 180 days after completion of the record on appeal for cases assigned to a three-member panel. Those time frames, however, do not include the time needed to complete the record on appeal, including transcription of the proceedings before the immigration judge and completion of briefing by the parties.)

In those cases where DHS advises the Board that the results of earlier investigations are no longer current under DHS's standards, the Board will not be able to issue a final decision granting or affirming any form of relief covered by § 1003.47. Except as provided in § 1003.1(d)(6)(iv) of this rule, the Board will then choose one of two alternatives in order to complete the adjudication of the case in the most expeditious manner. In many such cases, after consideration of the merits of the appeal, the Board will issue an order remanding the case to the immigration judge to permit DHS to update the results of the previous identity, law enforcement, and security investigations or examinations and report the results to the immigration judge. In the alternative, after consideration of the merits of the appeal, the Board may provide notice to both parties that in order to complete the adjudication of the appeal the case is being placed on hold to allow DHS to update biometrics and other biographical information processing requirements and any remaining identity, law enforcement, and security investigations. (The rule also includes a conforming amendment to the existing time limits for the Board's disposition of appeals). Under the provisions of § 1003.1(d)(6) and § 1003.47(e), as added by this rule, DHS is obligated to complete the investigations as soon as practicable and to advise the Board promptly whether or not the investigations have been completed and are current.

This rule does not disturb the Board's authority to take administrative notice of the contents of official documents as provided in 8 CFR 1003.1(d)(3)(iv). If there are any issues to be resolved relating to any information bearing on

the respondent's eligibility (or, if the relief is discretionary, whether that information supports a denial in the exercise of discretion), DHS may file a motion with the Board to remand the record of proceedings to the immigration judge. Where the Board cannot properly resolve the appeal without further factfinding, the record may be remanded to the immigration judge.

In the short term, the Department anticipates that remanding cases to the immigration judge may be the most efficient means to complete or update results for pipeline or transitional cases, since that process will facilitate DHS's ability to obtain new biometrics from the respondent for the purpose of updating previous identity, law enforcement, and security investigations or examinations. Over time, however, as DHS is able to improve its internal procedures for updating the results of previous investigations or examinations without the need for aliens to provide a new set of fingerprints, the Department expects that the Board and DHS should be able to make much greater use of the procedure for holding pending appeals where necessary in order to allow the opportunity for DHS to update prior results without requiring a remand.

In any case that is remanded to the immigration judge pursuant to § 1003.1(d)(6), the Board's order will be an order remanding the case and not a final decision, in order to allow DHS to complete or update the identity, law enforcement, and security investigations or examinations of the respondent(s). The immigration judge will then consider the results of the completed or updated investigations or investigations before issuing a decision granting or denying the relief sought. If DHS presents additional information as a result, the immigration judge may conduct a further hearing as needed to resolve any legal or factual issues raised. The immigration judge's decision following remand may be appealed to the Board as provided by §§ 1003.1(b) and 1003.38 if there is any new evidence in the record as a result of the background investigation.

Section 1003.1(d)(6)(iv) of this rule, however, provides that the Board is not required to remand or hold a case under § 1003.1(d)(6) if the Board decides to dismiss the respondent's appeal or deny the relief sought. In any case where the results of the DHS investigations or examinations would not affect the disposition of the case—for example, where the Board determines that the respondent's appeal should be dismissed or the alien is ineligible for

the relief sought because of a criminal conviction or is unable to establish required elements for eligibility such as continuous physical presence, extreme hardship, good moral character, or past persecution or a well-founded fear of future persecution—there is no reason to delay the Board's disposition of the case. The results of the identity, law enforcement, or security investigations or examinations may be relevant to the exercise of discretion in granting or denying relief in some cases, but not in cases where the respondent is unable to establish eligibility in any event.

The Department recognizes that the implementation of this rule will mean that many cases may be continued by the immigration judges or remanded or placed on hold by the Board pending the completion or updating of the necessary identity, law enforcement, and security investigations or examinations by DHS. This is particularly true for the pipeline or transitional cases that are already pending as of the date this rule takes effect. Nevertheless, the Department has determined that the security of the United States is of the utmost importance and requires that aliens not be granted the forms of relief covered by § 1003.47 unless the identity, law enforcement, and security investigations and examinations have been conducted by DHS and are up-to-date. The Department is therefore publishing this rule as an interim rule. Moreover, after the initial implementation period, it is expected that the number of cases where immigration judges will continue a case under § 1003.47(f) or where the Board is required to hold or remand a case under § 1003.1(d)(6) will diminish over time. The Department anticipates that in the future DHS will be able to improve its procedures for conducting and updating its investigations or examinations in such a manner as to minimize the delays in the adjudicatory process.

### Granting of Relief

When the immigration judge or the Board grants relief entitling respondent to a document from DHS evidencing status, the decision will include either an oral or written notification to the respondent to appear before the appropriate local DHS office for preparation of such document or to obtain required biometric and other biographical information for preparation of such document. In the past, the lack of such a notification by immigration judge and Board decisions and the ambiguity of an Immigration and Customs Enforcement counsel's responsibility to provide such instruction relating to a function of CIS

have resulted in confusion on the part of the alien about the process for receiving such document. It is expected that the local DHS office will promptly direct the respondent to submit to any biometric processing necessary to prepare documents in keeping with biometric and other requirements of the law.

### Conforming Amendments to Part 1208

This rule makes conforming amendments to 8 CFR part 1208 to ensure consistency with the provisions of § 1003.47 as added by this rule. The rule amends § 1208.4 to provide that an asylum application filed in proceedings before an immigration judge is considered to have been filed regardless of when biometrics are completed, as provided in § 1003.47. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause under § 1003.47(c) and (d) and amended 8 CFR 1208.10.

This rule also revises the language of § 1208.10 to eliminate confusing and unnecessary language that pertains to the processing of asylum applications by asylum officers in USCIS rather than by the immigration judges. Retention of such provisions pertaining solely to DHS's asylum office procedures—including the reference to a failure to appear for an asylum interview before an asylum officer, the waiver of the right to an adjudication by an asylum officer, and providing a change of address to the Office of International Affairs—is unnecessary and inappropriate in the Attorney General's regulations in part 1208 that now govern consideration of asylum cases by the immigration judges and the Board.<sup>7</sup> (Such provisions, of

course, are still retained in the DHS regulations in 8 CFR part 208 relating to the consideration of asylum applications by asylum officers.)

There is no need for lengthy provisions in § 1208.10 pertaining to an alien's failure to appear for a hearing before an immigration judge because the Act already provides clear procedures for dealing with a failure to appear, including the issuance of an order of deportation or removal *in absentia* in appropriate cases, and also a process for seeking rescission of an *in absentia* order. See section 240(b)(5) and former section 242B(c) of the Act. There is also no need for discussion of a change of address in this context because the Act and the regulations already include clear provisions relating to the obligation of aliens to provide a current address to the Attorney General in connection with the immigration proceedings. Accordingly, after a brief reference to the consequences for an alien's failure to appear for a deportation or removal proceeding, § 1208.10 is revised to focus on the issue of a failure to comply with requirements to provide biometrics and other biographical information, consistent with the provisions of § 1003.47.

This rule also makes a conforming amendment in § 1208.14 to require compliance with the requirements of § 1003.47 concerning identity, law enforcement, and security investigations before an immigration judge can grant asylum. This change codifies the existing statutory requirement in section 208(d)(5)(A)(i) of the Act and cross-references the procedural requirements in § 1003.47.

### Voluntary Departure

Section 240B of the Act (8 U.S.C. 1229c) authorizes DHS (prior to the initiation of removal proceedings) or an immigration judge (after the initiation of removal proceedings) to approve an alien's request to be granted the privilege of voluntary departure in lieu of being ordered removed from the United States. Although a grant of voluntary departure does not authorize an alien to remain indefinitely in the United States, it permits the alien to

separate from the regulations of the new DHS that continue to be codified in 8 CFR chapter I. 68 FR 9824 (February 28, 2003); see also 68 FR 10349 (March 5, 2003). As a result of the shared authority over asylum matters, and in view of the limited time available to implement the necessary changes, the Attorney General's new regulations duplicated the asylum and withholding of removal regulations in part 208 into a new part 1208 in chapter V. The Department of Justice and DHS are now engaged in the process of amending their respective regulations to eliminate unnecessary provisions pertaining to the authority of the other agency.

<sup>7</sup> Pursuant to the Homeland Security Act of 2002, Public Law 107-296, on March 1, 2003, the functions of the former Immigration and Naturalization Service were transferred from the Department of Justice to DHS. Although the responsibility for the Asylum Officer program was transferred to USCIS, the immigration judges and the Board remained under the authority of the Attorney General and retained their preexisting authority with respect to applications for asylum and withholding of removal filed or renewed by aliens in removal proceedings. Since both the Secretary of Homeland Security and the Attorney General are vested with independent authority over asylum matters and certain other matters under the Immigration and Nationality Act, it was necessary for the Attorney General to promulgate a new set of regulations pertaining to the authority of the immigration judges and the Board, separate from the previous INS regulations. Accordingly, on February 28, 2003, the Attorney General published regulations reorganizing title 8 of the Code of Federal Regulations, creating a new chapter V for regulations of the Department of Justice, which is



remain in the United States until the expiration of the period of voluntary departure—generally, up to 120 days if voluntary departure is granted prior to the completion of immigration proceedings pursuant to 8 CFR 1240.26(b) and up to 60 days if granted at the conclusion of the proceedings before the immigration judge pursuant to 8 CFR 1240.26(c).

The identity, law enforcement, and security checks conducted by DHS are also relevant in connection with the granting of voluntary departure by an immigration judge, whether during the pendency of removal proceedings or at the completion of those proceedings. This is so because the results of the investigations may be relevant with respect to the exercise of discretion by the immigration judge in deciding whether or not to grant voluntary departure, and also in view of the requirement that an alien must demonstrate good moral character to obtain voluntary departure at the conclusion of removal proceedings. *See* 8 CFR 1240.26(c). A grant of voluntary departure is a valuable benefit because it allows an alien who departs the country within the allowable period to avoid the adverse future consequences under the immigration laws attributable to having been ordered removed.

On the other hand, the Department recognizes the importance of granting of voluntary departure in proper cases, whether voluntary departure is granted prior to the conclusion of immigration proceedings or in lieu of an order of removal, without causing unnecessary delays in the process. As a practical matter, the DHS background and security checks may be completed routinely in many cases in a timely manner, if DHS captures the alien's biometrics or other biographical information and initiates the necessary investigations prior to or at the time of issuing and filing the NTA, but there will be some cases as noted above where completion of the background or security checks may require a significant additional period of time.

Accordingly, this rule does not propose to require the immigration judges to wait until being advised by DHS that it has completed the appropriate identity, law enforcement, and security investigations before the immigration judges can grant voluntary departure. However, the rule recognizes that DHS may affirmatively seek additional time to complete such investigations in some cases prior to the granting of voluntary departure, and allows the immigration judges to decide such requests for a continuance on a case-by-case basis.

This rule also makes an accommodation in the existing time limits with respect to the granting of voluntary departure prior to the conclusion of removal proceedings, where the alien makes a request for voluntary departure no later than the master calendar hearing at which the case is initially calendared for a merits hearing, as provided in 8 CFR 1240.26(b)(1)(i)(A). In such a case, where the DHS investigations have not yet been completed, the immigration judge may grant a continuance to await the results of DHS's investigations before granting voluntary departure. The granting of a continuance will thereby extend the 30-day period, as currently provided in § 1240.26(b)(1)(ii), for the immigration judge to grant a request for voluntary departure prior to the conclusion of removal proceedings.

#### Custody Redeterminations

In view of the distinct nature of custody redetermination hearings before the immigration judges, and the exigencies of time often associated with such hearings, this rule does not propose to apply the same procedures for custody hearings as for removal proceedings. *See* 8 CFR 1003.19(d) (custody and bond hearings separate and apart from removal proceedings).

Although some background or security investigations may require weeks or months to resolve certain sensitive or difficult issues, as noted above, the initial determinations relating to holding aliens in custody during the pendency of removal proceedings against them must be made on a more expedited basis. Under its existing regulations, DHS generally must make a decision on the continued detention of an alien within 48 hours of apprehending the alien, except in the case of an emergency or other extraordinary circumstances requiring additional time. 8 CFR 287.3(d). Thereafter, unless the alien is subject to detention pursuant to section 236(c) of the Act or other special circumstances, the alien can immediately request a hearing before an immigration judge to seek a redetermination of the conditions of custody, as provided in 8 CFR 1003.19.

The Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process," *Demore v. Kim*, 538 U.S. 510, 523 (2003), and has recognized that "Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General." *Reno v. Flores*, 507

U.S. 292, 306 (1993); *see also Carlson v. Landon*, 342 U.S. 524, 538–40 (1952). Under section 236 of the Act (8 U.S.C. 1226), an alien has no right to be released from custody during the pendency of removal proceedings, and both DHS, in making custody decisions, and the Attorney General, the Board, and the immigration judges, in conducting reviews of custody determinations, have broad discretion in deciding whether or not an alien has made a sufficient showing to merit being released on bond or on personal recognizance pending the completion of removal proceedings.

As recognized by the Supreme Court, section 236(a) does not give detained aliens any *right* to release on bond. Rather, the statute merely gives the Attorney General the authority to grant bond *if* he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted. The extensive discretion granted the Attorney General under the statute is confirmed by its further provision that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." Section 236(e) of the INA. Even apart from that provision, the courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond under this and like provisions. Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.

*Matter of D-J*, 23 I&N Dec. 572, 575–76 (A.G. 2003) (citations omitted; emphasis in original).

The existing regulations provide that an immigration judge, in reviewing a custody determination by DHS, may consider any relevant information available to the immigration judge or any information presented by the alien or by DHS. 8 CFR 1003.19(d). There can be no doubt that the results of DHS's identity, law enforcement, and security investigations can be quite relevant with respect to a redetermination of custody conditions by the immigration judge for aliens detained in connection with immigration proceedings. The custody decisions should be made on the basis of as complete a record as possible under the circumstances, but must be made promptly in light of applicable legal standards.

Accordingly, § 1003.47(k) of the rule provides that the immigration judges, in scheduling a custody redetermination hearing in response to an alien's request under 8 CFR 1003.19(b), should take into account, to the extent practicable consistent with the expedited nature of such cases, the brief initial period of time needed by DHS to conduct the



automated portions of its identity, law enforcement, and security checks prior to a custody redetermination by an immigration judge.

This rule contemplates that DHS may have an opportunity to present at least the results of automated checks, to the extent practicable, but does not require the immigration judges to wait until being advised by DHS that it has completed all appropriate identity, law enforcement, and security investigations before the immigration judges can order an alien released on bond or personal recognizance. However, the rule specifically provides that DHS may affirmatively request that the immigration judge allow additional time to complete such investigations in particular cases prior to the issuance of a custody decision, and the immigration judge will decide such requests for a continuance on a case-by-case basis.

Allowing a brief initial period of time for DHS to complete the automated portions of its background and security checks, and providing a process for DHS to request additional time in particular cases to resolve issues in those investigations, is sound public policy in order to ensure that the immigration judges' decisions are based on as complete a record as possible under the circumstances. Moreover, this approach may also be expected to reduce the number of instances in which an immigration judge's custody decision is subject to an automatic stay pending appeal to the Board—*i.e.*, in those cases where DHS as a matter of discretion chooses to invoke the provisions of 8 CFR 1003.19(i)(2) because of concerns relating to the unresolved identity, law enforcement, or security investigations.

Under this rule, though, there will be cases where the immigration judge may issue a custody decision without waiting for DHS to complete all portions of its identity, law enforcement, or security checks, particularly where there is some delay in completing those investigations. In any case (whether through the background and security checks or otherwise) where DHS subsequently discovers information reflecting a clear change of circumstances with regard to the reasons for detaining an individual during the pendency of the removal proceedings, the Department notes that DHS is free to decide to cancel the alien's bond and take the alien back into custody under section 236 of the Act, under established procedures. *See* 8 CFR 236.1(c)(9), 1236.1(c)(9); *Matter of Sugay*, 17 I&N Dec. 637, 639 (BIA 1981) (finding “without merit [the alien's] counsel's argument that the District Director was without authority to revoke

bond once an alien has had a bond redetermination hearing” before an immigration judge); *see also Matter of Valles-Perez*, 21 I&N Dec. 769, 772 (BIA 1997) (“the regulations presently provide that when an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision.”). An alien whose bond has been revoked after previously being ordered released by an immigration judge can then seek a new custody determination. *See Ortega de los Angeles v. Ridge*, No. CV 04–0551–PHX–JAT (JI) (D. Ariz. Apr. 27, 2004).

Consistent with the district court's accurate interpretation of the existing regulatory language in *Ortega*, this rule also revises § 1003.19(e) to clarify this provision and codify the Department's interpretation that it only relates to subsequent requests for bond redeterminations made by the alien.

#### Good Cause Exception

The Department has determined that good cause exists under 5 U.S.C. 553(b)(B) and (d)(3) to make this rule effective April 1, 2005, for several reasons. Protecting national security and public safety has long been a focus of U.S. immigration law. Applicants for immigration benefits are always subject to some form of law enforcement check to assess their eligibility for the benefits or determine their inadmissibility to, or removability from, the United States. The September 11, 2001, attack and the 9/11 Commission's report, however, have highlighted the urgent need for immediate reforms to certain immigration processes, including the process by which the Department, DHS, and other law enforcement agencies initiate, vet, and resolve law enforcement checks.

Both the Department and DHS have expanded the number and types of law enforcement checks conducted on aliens seeking immigration benefits. However, vulnerability exists in the manner in which immigration benefits are given, particularly when an immigration status is granted or document is issued prior to completion of the required law enforcement checks or investigations by DHS, the Department, or other law enforcement agencies. The 9/11 Commission highlighted many of the dangers posed by terrorists, including their mobility, and recommended improved immigration controls that would ensure, among other things, that terrorists cannot obtain travel documents. Certain immigration statuses granted by DHS and the

Department and certain documents issued by USCIS authorize aliens not only to work in the United States but also to travel freely to and from the United States. Issuance of this interim rule will enable DOJ and DHS to detect aliens who may pose a threat to the United States before they would otherwise be granted relief from removal that would permit them to continue residing in the United States and to obtain documents from DHS that permit them to board planes and other vessels or work in jobs in the U.S. that could facilitate their plans to commit terrorist acts. In addition, possession of an employment authorization document demonstrates that an alien's presence in the U.S. is “under color of law,” which not only can facilitate travel within the U.S., but also can cause a law enforcement officer or security official (public or private) not to follow up on an encounter with the individual.

The significance of completing law enforcement checks prior to the granting of applications for relief from removal by EOIR adjudicators or issuance of immigration documents by DHS cannot be overestimated. DHS reports that through the law enforcement check process it has discovered that certain applicants were: (1) Attempting to procure missile technology for a foreign government with terrorist ties; (2) previously deported for attempted drug smuggling; (3) serving as an executive officer of a designated foreign terrorist organization; (4) subject to outstanding warrants for rape and other aggravated felonies; and (5) escaped prisoners from Canada and other countries who were subject to extradition. If the Department had granted an application for relief from removal, such as lawful permanent resident status, without being apprised of results from law enforcement checks or investigations, it is likely that individuals such as these would have gained the freedom to move throughout the United States (and possibly travel internationally) and to further any criminal efforts or terrorist activities that could affect America's safety and threaten national security.

Congress has provided DHS and the Department with authority in certain instances to rescind, revoke, or terminate an immigration status that was illegally procured or procured by concealment of a material fact or by willful misrepresentation. *See, e.g.* sections 205, 246, and 340 of the Act (8 U.S.C. 1155, 1256, and 1451). However, the process for rescission, revocation, or termination of an immigration status or document in many instances can be prolonged for several months or years, particularly in those cases requiring

judicial review. Even when DHS places aliens in removal or rescission proceedings or seeks to terminate or revoke an immigration status previously granted, the aliens in most instances retain their immigration status, even if granted in error, while such proceedings are ongoing and until concluded. As a result, the potential for harm increases the longer an alien retains an immigration status or document that he or she is not lawfully entitled to or should not have been issued in the first instance. Therefore, it is imperative that DHS run background checks before applications for immigration relief or protection from removal are granted or immigration documents are issued.

While we expect that public comments may help the Department to improve its process, the urgency of putting a better system in place outweighs the opportunity for notice and comment before any improvement is made. Accordingly, the Department finds that it would be impracticable and contrary to the public interest to delay implementation of this rule to allow the prior notice and comment period normally required under 5 U.S.C. 553(b)(B) and (d)(3). The Department nevertheless invites written comments on this interim rule and will consider any timely comments in preparing the final rule.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. It does not have any impact on small entities as that term is defined in 5 U.S.C. 601(6).

#### **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.

#### **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 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 United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is considered by the Department of Justice to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

#### **Executive Order 13132**

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.

#### **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.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval, any reporting requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### **List of Subjects**

##### *8 CFR Part 1003*

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and function (Government agencies).

##### *8 CFR Part 1208*

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

■ Accordingly, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

### **PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

■ 1. The authority citation for 8 CFR part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386; 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

■ 2. Section 1003.1 is amended by redesignating paragraph (d)(6) as paragraph (d)(7), adding a new paragraph (d)(6), and revising paragraph (e)(8)(i), to read as follows:

#### **§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.**

\* \* \* \* \*

(d) \* \* \*

(6) *Identity, law enforcement, or security investigations or examinations.*

(i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete

adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(e) \* \* \*

(8) \* \* \*

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

\* \* \* \* \*

■ 3. Paragraph (e) of § 1003.19 is revised to read as follows:

**§ 1003.19 Custody/bond.**

\* \* \* \* \*

(e) After an initial bond redetermination, an alien's 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.

\* \* \* \* \*

■ 4. Section 1003.47 is added to read as follows:

**§ 1003.47 Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal.**

(a) *In general.* The procedures of this section are applicable to any application for immigration relief, protection, or restriction on removal that is subject to the conduct of identity, law enforcement, or security investigations or examinations as described in paragraph (b) of this section, in order to ensure that DHS has completed the appropriate identity, law enforcement, or security investigations or examinations before the adjudication of the application.

(b) *Covered applications.* The requirements of this section apply to the granting of any form of immigration relief in immigration proceedings which permits the alien to reside in the United States, including but not limited to the following forms of relief, protection, or restriction on removal to the extent they are within the authority of an immigration judge or the Board to grant:

(1) Asylum under section 208 of the Act.

(2) Adjustment of status to that of a lawful permanent resident under sections 209 or 245 of the Act, or any other provision of law.

(3) Waiver of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, or any provision of law.

(4) Permanent resident status on a conditional basis or removal of the conditional basis of permanent resident status under sections 216 or 216A of the Act, or any other provision of law.

(5) Cancellation of removal or suspension of deportation under section 240A or former section 244 of the Act, or any other provision of law.

(6) Relief from removal under former section 212(c) of the Act.

(7) Withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture.

(8) Registry under section 249 of the Act.

(9) Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

(c) *Completion of applications for immigration relief, protection, or restriction on removal.* Failure to file necessary documentation and comply with the requirements to provide biometrics and other biographical information in conformity with the applicable regulations, the instructions to the applications, the biometrics notice, and instructions provided by DHS, within the time allowed by the

immigration judge's order, constitutes abandonment of the application and the immigration judge may enter an appropriate order dismissing the application unless the applicant demonstrates that such failure was the result of good cause. Nothing in this section shall be construed to affect the provisions in 8 CFR 1208.4 regarding the timely filing of asylum applications or the determination of a respondent's compliance with any other deadline for initial filing of an application, including the consequences of filing under the Child Status Protection Act.

(d) *Biometrics and other biographical information.* At any hearing at which a respondent expresses an intention to file or files an application for relief for which identity, law enforcement, or security investigations or examinations are required under this section, unless DHS advises the immigration judge that such information is unnecessary in the particular case, DHS shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures. The immigration judge shall specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements of this section. Whenever required by DHS, the applicant shall make arrangements with an office of DHS to provide biometrics and other biographical information (including for any other person covered by the same application who is required to provide biometrics and other biographical information) before or as soon as practicable after the filing of the application for relief in the immigration proceedings. Failure to provide biometrics or other biographical information of the applicant or any other covered individual within the time allowed will constitute abandonment of the application or of the other covered individual's participation unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in detention.

(e) *Conduct of investigations or examinations.* DHS shall endeavor to initiate all relevant identity, law enforcement, or security investigations or examinations concerning the alien or beneficiaries promptly, to complete those investigations or examinations as promptly as is practicable (considering, among other things, increased demands placed upon such investigations), and to advise the immigration judge of the

results in a timely manner, on or before the date of a scheduled hearing on any application for immigration relief filed in the proceedings. The immigration judges, in scheduling hearings, shall allow a period of time for DHS to undertake the necessary identity, law enforcement, or security investigations or examinations prior to the date that an application is scheduled for hearing and disposition, with a view to minimizing the number of cases in which hearings must be continued.

(f) *Continuance for completion of investigations or examinations.* If DHS has not reported on the completion and results of all relevant identity, law enforcement, or security investigations or examinations for an applicant and his or her beneficiaries by the date that the application is scheduled for hearing and disposition, after the time allowed by the immigration judge pursuant to paragraph (e) of this section, the immigration judge may continue proceedings for the purpose of completing the investigations or examinations, or hear the case on the merits. DHS shall attempt to give reasonable notice to the immigration judge of the fact that all relevant identity, law enforcement, or security investigations or examinations have not been completed and the amount of time DHS anticipates is required to complete those investigations or examinations.

(g) *Adjudication after completion of investigations or examinations.* In no case shall an immigration judge grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations under this section until after DHS has reported to the immigration judge that the appropriate investigations or examinations have been completed and are current as provided in this section and DHS has reported any relevant information from the investigations or examinations to the immigration judge.

(h) *Adjudication upon remand from the Board.* In any case remanded pursuant to 8 CFR 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues, including issues relating to credibility, if relevant. The immigration judge shall then enter an order granting or denying the immigration relief sought.

(i) *Procedures when immigration relief granted.* At the time that the immigration judge or the Board grants

any relief under this section that would entitle the respondent to a new document evidencing such relief, the decision granting such relief shall include advice that the respondent will need to contact an appropriate office of DHS. Information concerning DHS locations and local procedures for document preparation shall be routinely provided to EOIR and updated by DHS. Upon respondent's presentation of a final order from the immigration judge or the Board granting such relief and submission of any biometric and other information necessary, DHS shall prepare such documents in keeping with section 264 of the Act and regulations thereunder and other relevant law.

(j) *Voluntary departure.* The procedures of this section do not apply to the granting of voluntary departure prior to the conclusion of proceedings pursuant to 8 CFR 1240.26(b) or at the conclusion of proceedings pursuant to 8 CFR 1240.26(c). If DHS seeks a continuance in order to complete pending identity, law enforcement, or security investigations or examinations, the immigration judge may grant additional time in the exercise of discretion, and the 30-day period for the immigration judge to grant voluntary departure, as provided in § 1240.26(b)(1)(ii), shall be extended accordingly.

(k) *Custody hearings.* The foregoing provisions of this section do not apply to proceedings seeking the redetermination of conditions of custody of an alien during the pendency of immigration proceedings under section 236 of the Act. In scheduling an initial custody redetermination hearing, the immigration judge shall, to the extent practicable consistent with the expedited nature of such cases, take account of the brief initial period of time needed for DHS to conduct the automated portions of its identity, law enforcement, or security investigations or examinations with respect to aliens detained in connection with immigration proceedings. If at the time of the custody hearing DHS seeks a brief continuance in an appropriate case based on unresolved identity, law enforcement, or security investigations or examinations, the immigration judge in the exercise of discretion may grant one or more continuances for a limited period of time which is reasonable under the circumstances.

**PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 5. The authority citation for part 1208 is revised to read as follows:

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

■ 6. Section 1208.4 is amended by adding two new sentences at the end of paragraph (a)(2)(ii), to read as follows:

**§ 1208.4 Filing the application.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(ii) \* \* \* The failure to have provided required biometrics and other biographical information does not prevent the "filing" of an asylum application for purposes of the one-year filing rule of section 208(a)(2)(B) of the Act. See 8 CFR 1003.47.

\* \* \* \* \*

■ 7. Section 1208.10 is revised to read as follows:

**§ 1208.10 Failure to appear at a scheduled hearing before an immigration judge; failure to follow requirements for biometrics and other biographical information processing.**

Failure to appear for a scheduled immigration hearing without prior authorization may result in dismissal of the application and the entry of an order of deportation or removal *in absentia*. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in custody.

■ 8. Section 1208.14 is amended by adding a new sentence at the end of paragraph (a) to read as follows:

**§ 1208.14 Approval, denial, referral, or dismissal of application.**

(a) \* \* \* In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations.

\* \* \* \* \*

Dated: January 26, 2005.

**John Ashcroft,**  
*Attorney General.*

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