

Rules and Regulations

Federal Register

Vol. 70, No. 166

Monday, August 29, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 842

RIN 3206-AK84

Retirement Credit for Certain Government Service Performed Abroad

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comment.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement a section of the Foreign Relations Authorization Act, Fiscal Year 2003 affecting the Federal Employees Retirement System. These regulations describe how individuals who performed certain Government service at a United States diplomatic mission, consular post, or other Foreign Service post abroad after December 31, 1988, and before May 24, 1998, can get retirement credit for that service under the Federal Employees' Retirement System.

DATES: This interim rule is effective August 29, 2005. We must receive your comments by October 28, 2005.

ADDRESSES: You may submit comments, identified by RIN number 3206-AK84, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: combox@opm.gov. Include RIN number 3206-AK84 in the subject line of the message.
- Mail: Mary Ellen Wilson, Manager, Retirement Group, Office of Personnel Management; 1900 E Street, NW., Washington, DC 20415-3200.
- FAX: (202) 606-0990.

FOR FURTHER INFORMATION CONTACT: Jim Giuseppe, (202) 606-0299.

SUPPLEMENTARY INFORMATION: Section 321 of Public Law 107-228, 116 Stat. 1380, the Foreign Relations Authorization Act, Fiscal Year 2003, allows retirement credit under the Federal Employees' Retirement System (FERS) for certain Government service performed abroad under a temporary appointment. Service performed after December 31, 1988, and before May 24, 1998, under a temporary appointment pursuant to sections 309 and 311 of the Foreign Service Act of 1980, may now be creditable under FERS provided all of the following conditions set out in section 321 are satisfied.

- The service must have been performed at a United States diplomatic mission, consular post (other than a consular agency), or other Foreign Service post abroad.

- The individual who performed the service must have satisfied all eligibility requirements under regulations of the Department of State (as in effect on September 30, 2002) for a family member limited non-career appointment at the time the service was performed. Individuals not employed by the Department of State while performing such service shall be treated as if they were so employed for the purposes of this requirement.

- The service would have been creditable under FERS had it been performed before 1989 and had the appropriate service credit deposit been paid.

- The service cannot otherwise be creditable under FERS or any other retirement system for employees of the United States Government (disregarding title II of the Social Security Act).

- The service must have totaled 90 days or more.

- The individual who performed the service must file an application to pay a deposit for the service no later than 36 months after the effective date of these regulations, and pay the deposit. The deposit equals the amount of FERS employee deductions that would have been withheld from the individual's basic pay had the service been subject to FERS deductions, plus interest. If the individual who performed the service is deceased, any person who is or would be eligible for a survivor annuity under FERS based on the service of the individual can apply for the service credit and pay this deposit.

- The department or agency where the individual performed the service

must pay a deposit for the service. The deposit the department or agency owes equals the FERS Government contributions that would have been due had the service been subject to FERS, plus interest.

These provisions allowing FERS service credit for certain Government service performed abroad differ from other FERS provisions that allow service credit for service not subject to FERS retirement deductions in three important respects. First, they specify a specific location where the service must have been performed—at a United States diplomatic mission, consular post, or other Foreign Service post abroad as defined under the Foreign Service Act of 1980. Second, they require the application of Department of State regulations in determining if the service is creditable. And third, they require that Government contributions accompany the deposit that individuals have to pay for the service. The department or agency where the individual performed the service must pay those Government contributions. While individuals may have performed this service at any number of departments or agencies, including the Departments of Defense, Commerce, and Agriculture, and the United States Agency for International Development, we believe that most of the individuals affected by this legislation worked for the Department of State.

Because of these unique service credit provisions, we have established a process for obtaining service credit for certain Government service performed abroad that differs from the normal process used for establishing service credit for other types of civilian service. Where normally the Office of Personnel Management (OPM) determines whether service is creditable for FERS retirement purpose, these regulations recognize that the Department of State is in a better position than OPM to interpret the Foreign Service Act and the Department of State's own regulations to determine if the service is creditable. And where normally the individual applying for service credit for civilian service applies to OPM and pays a deposit to OPM, these regulations require that the individual apply for service credit to the department or agency where the individual performed the service (the Department of State in most cases) and pay the deposit to that

department or agency. The department or agency must then submit the individual's deposit to OPM, along with the Government contributions, so that OPM receives the full payment for the service at the same time.

When the Department of State or other appropriate department or agency responsible for processing the application for service credit under these regulations (hereinafter the employing entity) receives an application from an individual for certain Government service performed abroad, it must determine if the service qualifies for service credit under Section 321 of Public Law 107-228. (If the employing entity is not the Department of State, it may need to consult with the Department of State if there are any questions about whether or not the service is creditable.) The employing entity must then compute the amount of the deposit the individual owes for the service and notify the individual of the amount due. It must also compute the amount of the Government contributions it owes for the service; collect the deposit from the individual; and immediately forward both the individual's deposit and the Government contributions to OPM in a manner prescribed by OPM. If the employing entity finds that the service is not creditable under Section 321 of Public Law 107-228, it must provide the individual with a written decision explaining the reason why the service is not creditable and explaining the individual's rights to appeal the decision to the Merit Systems Protection Board (MSPB).

When the employing entity is not the Department of State, the Department of State must provide whatever assistance is necessary to help the employing entity determine if the service performed abroad is creditable under Section 321 of Public Law 107-228. If the employing entity no longer exists, the Department of State must assume most of the employing entity's duties related to these regulations. The only exception is that the Department of State, when performing these duties for an employing entity that is no longer in existence, does not have to forward the actual Government contributions to OPM. If the Department of State finds that the service is not creditable, it must provide the individual with a written notice that explains the reason why the service is not creditable and explains the individual's rights to appeal to the MSPB.

Individuals eligible to make the deposit must pay the deposit to the appropriate employing entity in one lump sum within 180 days of being

notified of the amount of the deposit. The employing entity must then forward the individual's deposit along with the Government deposit and all relevant information relating to the period of service to OPM in a manner prescribed by OPM. If the individual making the deposit is currently receiving a retirement or survivor annuity, OPM will recompute the annuity to include credit for the service and pay the additional annuity resulting from the service credit retroactive to the date the annuity began. If the individual making the deposit is not currently receiving a retirement or survivor annuity, OPM will evaluate whether or not the individual qualifies to begin receiving an annuity with the additional service credit. If an individual becomes eligible to receive an annuity with the additional service credit, OPM will send the individual the appropriate application for benefits. After the individual returns the application, OPM will begin to pay the annuity as of the earliest date that the annuity could commence, subject to the commencing date provisions in chapter 84 of title 5 United States Code.

Therefore, OPM is amending 5 CFR part 842, subpart C, the subpart concerning credit for service. Specifically, subpart C is amended at 5 CFR 842.304 and 842.305.

In § 842.304, paragraph (e) is added outlining the conditions for crediting certain Government service performed abroad.

In § 842.305, paragraph (j) is added outlining how the individual and employer deposits for the service should be processed.

Waiver of Notice of Proposed Rulemaking

Under section 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and to make these rules effective in less than 30 days. The processing of deposits for certain Government service performed abroad under these regulations will affect only a relatively limited number of qualifying individuals' retirement eligibility or eligibility for survivor benefits, and the amounts of their retirement or survivor benefits. We recognize that notice and comment may be waived when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Publication of a general notice of proposed rulemaking in this situation would be contrary to the public interest because it would unnecessarily and unreasonably delay the availability of

the potential benefits of Public Law 107-228, and because no individual or group will suffer any detriment, financial or otherwise, because of the application of this regulation without notice and comment. The application of these regulations benefits a specific group of individuals by revising an existing regulatory provision that is contrary to the benefit enacted by the Congress. The application of this regulation before public comment is consistent with the limited interest in this matter by the general public and in which the interest of the affected public, those seeking FERS retirement credit for certain Government service earned while working abroad, would be set back by any unnecessary requirement of advance notice.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Lists of Subjects in 5 CFR Part 842

Air traffic controllers, Alimony, Firefighters, Government employees, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Linda M. Springer,

Director.

■ For the reasons stated in the preamble, the Office of Personnel Management amends 5 CFR part 842 as follows:

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

■ 1. The authority citation for part 842 is revised to read as follows:

Authority: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under sections 3 and 7(c) of Pub. L. 105-274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under section 102(e) of Pub. L. 104-8, 109 Stat. 102, as amended by section 153 of Pub. L. 104-134, 110 Stat. 1321-102; Sec. 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105-33, 111 Stat. 251, and section 7(b) of Pub. L. 105-274, 112 Stat. 2419; Sec. 842.108 also issued under section 7(e) of Pub. L. 105-274, 112 Stat. 2419; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 1313(b)(5) of Pub. L. 107-296, 116 Stat. 2135; Secs. 842.304 and 842.305 also

issued under section 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under section 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under section 4005 of Pub. L. 101–239, 103 Stat. 2106 and section 7001 of Pub. L. 101–508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under section 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under section 226(c)(2) of Public Law 108–176, 117 Stat. 2529.

Subpart C—Credit for Service

■ 2. In § 842.304, add paragraph (e) to read as follows:

§ 842.304 Civilian service.

* * * * *

(e) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998.* (1) *Definition.* In this section, *certain Government service performed abroad* is service performed at a United States diplomatic mission, consular post (other than a consular agency), or other Foreign Service post abroad under a temporary appointment pursuant to sections 309 and 311 of the Foreign Service Act of 1980 (22 U.S.C. 3949 and 3951).

(2) *Conditions for Creditability.* Service credit is allowed under section 321 of Pub. L. 107–228 for certain Government service performed abroad after December 31, 1988, and before May 24, 1998, provided—

(i) The service in the aggregate totaled 90 days or more;

(ii) The individual performing the service would have satisfied all eligibility requirements under regulations of the Department of State (as in effect on September 30, 2002) for a family member limited noncareer appointment (within the meaning of such regulations, as in effect on September 30, 2002) at the time the service was performed, except that, in applying this paragraph, an individual not employed by the Department of State while performing the service shall be treated as if then so employed;

(iii) The service would have been creditable under FERS had it been performed before 1989 and had the deposit requirements of § 842.305 been met;

(iv) The service is not otherwise creditable under FERS or any other retirement system for employees of the U.S. Government (disregarding title II of the Social Security Act);

(v) The individual applying for the service credit submits a written application to make a deposit with the department or agency where the service was performed, and completes the deposit, in accordance with § 842.305(j); and

(vi) The department or agency where the service was performed remits Government contributions for the service to OPM in accordance with § 842.305(j).

(3) *Departments or agencies no longer in existence.* If the department or agency where the individual performed certain Government service abroad no longer exists, the Department of State must process applications for service credit under this section. Government contributions for the service will not need to be remitted to OPM.

■ 3. In § 842.305, add paragraph (j) to read as follows:

§ 842.305 Deposits for civilian service.

* * * * *

(j) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998.*

(1) *Eligibility-current and former employees, and retirees.* A current or former employee, or a retiree who performed certain Government service abroad described in § 842.304(e) may make a deposit for such service, in a form prescribed by OPM.

(2) *Eligibility-survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (j)(1) of this section may make a deposit under this section if the current or former employee, or retiree is deceased and the survivor is eligible or would be eligible for a survivor annuity under FERS based on the service of the current or former employee, or retiree.

(3) *Filing of deposit application.* An individual eligible to make a deposit under paragraphs (j)(1) and (2) of this section for service described in § 842.304(e) must submit a written application to make a deposit for such service with the appropriate office in the department or agency where such service was performed. If the department or agency where the service was performed no longer exists, the individual must submit the written application to the appropriate office in the Department of State.

(4) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before August 29, 2008.

(5) *Amount of deposit.* (i) A deposit under this section must be computed using distinct periods of service. For the purpose of this section, a distinct period

of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for any or all distinct periods of service.

(ii) The amount of deposit under this section equals the amount of deductions from basic pay that would have been required under section 8422 of title 5, United States Code, if at the time the service was performed the service had been subject to FERS deductions under that section, plus interest.

(6) *Forms of deposit.* A deposit under this section must be made as a single lump sum within 180 days of being notified of the deposit amount.

(7) *Processing deposit applications and payments.* (i) The department or agency where the service described in § 842.304(e) was performed must process the deposit applications and payments under this section. If the department or agency where the service was performed no longer exists, the Department of State must process the deposit applications and payments under this section.

(ii) Whenever requested, the Department of State must assist the department or agency responsible for processing deposit applications under this section determine whether the application meets the requirements of § 842.304(e).

(iii) Upon receiving a deposit application under this section, the department or agency must determine whether the application meets the requirements of § 842.304(e); compute the deposit, including interest; and advise the applicant of the total amount of deposit due.

(iv) The department or agency must establish a deposit account showing the total amount due.

(v) When it receives an individual's payment for the service, the department or agency must remit the payment to OPM immediately for deposit to the Civil Service Retirement and Disability Fund in accordance with instructions issued by OPM.

(vi) Once a deposit has been paid in full or otherwise closed out, the department or agency must submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(8) *Government contributions.* (i) The department or agency where service described in § 842.304(e) was performed must pay Government contributions for each period of service covered by a deposit under this section.

(ii) The amount of contributions under this section equals the amount of Government contributions which would have been required for the service under section 8423 of title 5, United States

Code, if the service had been covered under chapter 84 of title 5, United States Code, plus interest.

(iii) The department or agency must remit the amount of Government contributions under this section to OPM at the same time it remits the employee deposit for this service to OPM in accordance with instructions issued by OPM.

(9) *Interest.* Interest must be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest must be computed for each distinct period of service from the midpoint of each distinct period of service. The interest accrues annually on the outstanding deposit and is compounded annually, until the deposit is paid.

(10) *Effect of deposit.* An individual completing a deposit under this section will receive retirement credit for the service covered by the deposit when OPM receives certification that the deposit has been paid in full, and the deposit payment and agency contributions are remitted to the Civil Service Retirement and Disability Fund.

(11) *Appeal rights.* When the department or agency processing an application for deposit under this section determines that the individual is not eligible to make a deposit for a period of service, it must provide the individual with a written decision explaining the reason for the decision and explaining the individual's right to appeal the decision to the Merit Systems Protection Board.

[FR Doc. 05-17053 Filed 8-26-05; 8:45 am]

BILLING CODE 6325-39-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 103

[CIS No. 2245-02 and Docket No. DHS-2004-0021]

RIN 1615-AA88

Adjustment of the Appeal and Motion Fees To Recover Full Costs

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule adjusts the fee for filing appeals of, and motions to reopen or reconsider, any decision under the immigration laws in any type of proceeding other than those described at

8 CFR 1003.1(b), over which the Board of Immigration Appeals (BIA) in the Department of Justice (DOJ) has appellate jurisdiction. The rule also adds a non-substantive modification to the language of the fee regulation in order to enhance clarity.

This rule applies to fees for appeals and motions relating to the types of cases under the jurisdiction of the Administrative Appeals Office (AAO). The AAO is an appellate office of U.S. Citizenship and Immigration Services (USCIS). The BIA remains a component of DOJ, and has appellate jurisdiction over the orders of immigration judges, denials of relative immigrant visa petitions (Form I-130), and decisions involving administrative fines and penalties. This rule does not apply to, or affect in any manner, the fees associated with the BIA. Appeals from denials of all other types of applications, such as Applications for Temporary Protected Status (Form I-821), and petitions, such as Petitions for Amerasian, Widow(er), or Special Immigrant (Form I-360), and any subsequently filed motions, are under the jurisdiction of the AAO.

The fees, deposited into the Immigration Examinations Fee Account (IEFA), are adjusted from \$110 to \$385 to recover the full costs associated with the processing of an appeal, motion to reopen or motion to reconsider. Federal statutes authorize USCIS to establish and collect fees to recover the full cost of processing immigration benefit applications, rather than supporting these services with tax revenue.

Finally, the rule replaces a reference in the regulations to an obsolete form with a reference to the revised version of that form.

DATES: *Effective Date:* This final rule is effective September 28, 2005.

Compliance Date: Applications mailed, postmarked, or otherwise filed, on or after September 28, 2005 require the new fee.

FOR FURTHER INFORMATION CONTACT: Paul Schlesinger, Director, Office of Budget, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 4th Floor, Washington, DC 20529, telephone (202) 272-1930.

SUPPLEMENTARY INFORMATION:

I. Introduction

USCIS published a proposed rule in the **Federal Register** on November 30, 2004, at 69 FR 69546, to adjust the fees for processing of an appeal, motion to reopen or motion to reconsider. The proposed rule was published with a 30-day comment period, which closed on

December 30, 2004. USCIS received 14 comments pertaining to the adjustment of the fees for processing of an appeal or motion to reopen or motion to reconsider.

Comments were received from 13 concerned individuals and one association. All of the relevant comments were carefully considered before preparing this final rule. USCIS' responses to the concerns raised by the commenters primarily are based upon the November 2002 fee review report provided by KMPG Consulting.

The following is a discussion of the comments received for the November 30, 2004 proposed rule and USCIS' response.

II. Summary of Comments

A. Why Is the Fee Increase Necessary?

Eight comments were received expressing dissatisfaction with the size of the fee increase. Three commenters also stated that the increase in appeals and motions of 12% over the last 10 years does not justify the proposed increased fees. USCIS notes, however, that the fee increase is not based upon the 12% increase in the filing of motions and appeals. While the fees for other applications have increased more than threefold during this time, the appeal and motion fee has remained the same.

The increase in fees is necessary so that USCIS can recover the full costs of processing appeals and motions.

Three commenters asserted that the increase in fees should also increase the timeliness and quality of the decisions rendered. Similarly, one commenter suggested that the AAO be added to the USCIS backlog reduction plan, while another indicated support for the proposed increase with the stipulation that the increase be used to fund additional resources for the AAO.

USCIS agrees with commenters that the timeliness and quality of the decisions is important, as are increases in personnel and resources and notes that such considerations were taken into account during the fee review. In response to the commenter's suggestion that the AAO be added to the USCIS backlog reduction plan, we note that the AAO has been a part of the backlog reduction plan since its inception. As indicated in the proposed rule, based on the increase in motion and appeal filings from 1993 to 2002, a fee review was conducted by a consulting firm to determine the fee necessary to ensure that USCIS was able to collect the full cost for processing motions and appeals. According to Office of Management and Budget (OMB) Circular A-25, the "full