

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

EOIR Docket No. 181; AG Order No. 3563-2015

RIN 1125-AA78

Separate Representation for Custody and Bond Proceedings

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

ACTION: Final rule.

SUMMARY: This final rule adopts, without change, the proposed rule “Separate Representation for Custody and Bond Proceedings” as published in the Federal Register on September 17, 2014. Specifically, this final rule amends the Executive Office for Immigration Review (EOIR) regulations relating to the representation of an individual in custody and bond proceedings before EOIR by allowing a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the individual’s proceedings before the Immigration Court.

DATES: This rule is effective December 7, 2015.

FOR FURTHER INFORMATION CONTACT: Jean King, General Counsel,
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SUPPLEMENTARY INFORMATION:

I. Public Participation

On September 17, 2014, the Department published in the Federal Register a rule proposing to amend EOIR's regulations relating to representation of aliens in custody and bond proceedings. 79 FR 55659. The comment period ended November 17, 2014. The Department received ten comments. For the reasons set forth below, the proposed rule is adopted as a final rule without change.

II. Background

The Immigration and Nationality Act (INA) provides that aliens appearing before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." INA sec. 240(b)(4) (8 U.S.C. 1229a(b)(4)); *see also* INA sec. 292 (8 U.S.C. 1362). In order to represent an individual before EOIR, a representative must file a Notice of Entry of Appearance with the Immigration Court or the Board of Immigration Appeals (Board). *See* 8 CFR 1003.17, 1003.3(a)(3). A representative who enters his or her appearance before the Immigration Court is the representative of record for the individual in all of the individual's proceedings, including removal or deportation proceedings and, if the individual is detained, custody and bond proceedings. Under the current rules, to the extent a representative wishes to represent an individual solely in custody and bond proceedings, and not in any other proceedings before the Immigration Court, he or she must file a motion to withdraw representation after the individual's custody and bond proceedings conclude. *Cf. Matter of N-K- & V-S-*, 21 I&N Dec. 879, 880, 881 n.2 (BIA 1997). Whether to grant or deny that motion is within the sole discretion of the immigration judge presiding over the particular case. *See* 8 CFR 1003.17(b).

In order to authorize a representative to enter an appearance solely for custody and bond proceedings before the Immigration Court, this final rule amends EOIR's regulations at 8 CFR 1003.17 to explicitly allow for separate appearances in custody and bond proceedings. Permitting such separate appearances is expected to encourage more attorneys and accredited representatives to agree to represent individuals who would otherwise appear pro se at their custody and bond proceedings, which, in turn, will benefit the public by increasing the efficiency of the Immigration Courts.

Under the current regulations, representatives are already required to file a Notice of Entry of Appearance on Form EOIR-28 in any proceeding before an immigration judge. *See* 8 CFR 1003.17. Under this final rule, representatives will continue to be required to file a Form EOIR-28 in custody and bond proceedings as required by 8 CFR 1003.17. However, as described herein, EOIR is amending the Form EOIR-28 to require a representative to indicate if he or she is entering an appearance for custody and bond proceedings only, any other proceedings only, or for all proceedings.

The effective date for this rule, December 7, 2015, has been designated to coincide with the date on which EOIR's case management system will permit separate entries of appearance in custody and bond proceedings. Separate appearances will not be permitted prior to the effective date.

III. Comments and Responses

As noted above, the Department received ten comments in response to the proposed rule. One comment was from the Executive Director of the Catholic Legal Immigration Network; one was from the American Immigration Lawyers Association; one was from the Executive Director of the National Immigrant Justice Center; one was

from a clinical professor at the Louisiana State University Law Center; one was from a group of law students; five were from individual commenters. All ten commenters expressed universal support for promulgation of this final rule. Where the commenters also provided suggested modifications to the rule or otherwise offered suggestions for implementation of the rule, the Department has summarized those comments below and responded to them. The comments are addressed by topic because some commenters raised multiple subjects and some comments overlapped.

Comment. Two commenters suggested that EOIR consider expanding the proposed rule to allow for certain types of limited appearances. Specifically, one commenter suggested that EOIR expand the rule to allow limited appearances on behalf of children in immigration proceedings during the time they are in the custody of the Department of Health and Human Services, as a means to permit *pro bono* attorneys and legal service providers to represent these children without requiring them to remain the attorney of record after the child is released to family in another part of the country. The other commenter suggested that EOIR expand the rule to allow limited appearances for distinct and finite purposes, including but not limited to motions to reopen, motions for change of venue, or motions to remand.

Response. EOIR declines to incorporate, into the final rule, any expansion to allow limited appearances as requested by these commenters. As noted in the preamble to the proposed rule, under EOIR's regulations, custody and bond proceedings are separate and apart from removal and deportation proceedings. *See* 79 FR 55659, 55660 (Sep. 17, 2014) (*citing* 8 CFR 1003.19(d); *Matter of Guerra*, 24 I&N Dec 37, 40 n.2 (BIA 2006); *Matter of R-S-H-*, 23 I&N Dec 629, 630 n.7 (BIA 2003)). This final rule is

intended only to effectuate that separation by allowing attorneys or representatives to appear on behalf of an individual in his or her custody and bond proceedings without being held responsible for appearing, filing documents, receiving notices, or any of the other duties enumerated in 8 CFR 1292.5(a) in the alien's other proceedings, unless and until the attorney or representative files a Notice of Entry of Appearance in such proceedings. Such separation is consistent with the Board's precedential decision *Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986), as a separate appearance in custody and bond proceedings would not be considered a "limited" appearance, which is generally understood to refer to a limit in the scope of representation required by a representative. By contrast, this final rule requires a representative of record to represent an individual in all aspects of each separate type of proceeding, unless the immigration judge grants a motion to withdraw or substitute counsel.

Comment. Three of the commenters expressed concerns regarding the information collection necessary to implement the rule. First, one commenter expressed concerns that the changes to the information collection necessary to implement the rule might delay finalization and implementation of the rule, and suggested that, in the interim, EOIR provide guidance to the immigration courts and liberally grant motions to withdraw so as not to delay implementation. Another commenter requested the addition of check boxes on the Form EOIR-28 to allow practitioners to indicate their type of appearance as well as an attestation that the practitioner explained the scope of his or her representation to his or her client and that the practitioner has obtained his or her client's consent. A third commenter similarly suggested that EOIR either add check boxes on the

Form EOIR-28 to allow a practitioner to indicate for which proceedings they are entering an appearance or create a new appearance form solely for custody and bond proceedings.

Response. In response to the first commenter's concern, EOIR notes that it has been working expeditiously to implement the necessary changes to the information collection for the final rule, which will eliminate the need for interim guidance. In response to the second and third commenter's concerns, while EOIR believes that it could be burdensome and inefficient to require practitioners to submit a new type of appearance form solely for custody and bond proceedings, it is amending the current Form EOIR-28 so that it may be used for entering an appearance in all types of proceedings before EOIR. Specifically, EOIR is revising the Form EOIR-28 to include check boxes for practitioners to indicate whether they are entering an appearance for all proceedings; custody and bond proceedings only; or all proceedings other than custody and bond proceedings. Regarding the third commenter's concern as to client consent to separate appearances, EOIR notes that the current Form EOIR-28 contains a check box for the practitioner to indicate that he or she has received the respondent's consent for representation. EOIR is also adding language to the revised Form EOIR-28 clarifying that the practitioner, by entering his or her appearance before EOIR, acknowledges that the practitioner will be subject to the disciplinary rules and procedures at 8 CFR 1003.101 *et seq.*, including, pursuant to 8 CFR 292.3(h)(3) and 1003.108(c), publication of the name of the practitioner and any finding(s) of misconduct by EOIR. EOIR believes that the check box regarding alien consent, coupled with this additional language clarifying the applicability of EOIR's disciplinary rules and procedures to practitioners

entering an appearance before EOIR, will ensure that a practitioner will make an individual in proceedings before EOIR aware of the scope of his or her representation.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate "small entities," as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

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

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 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 enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity.

The benefits of this final rule include increased representation of detained individuals by permitting a representative to enter an appearance before the Immigration Court for the discrete task of securing a bond or release from detention, without requiring the representative also to represent the individual in all of the individual’s immigration proceedings. The public will benefit from this amendment to the regulations, because the amendment will make it easier for individuals who may not be able to afford to hire an attorney for all of their proceedings before the Immigration Court to at least be able to be represented during their custody and bond proceedings. The Department anticipates that this rule will also have a positive economic impact on the Department, because increasing the number of individuals who are represented in their custody and bond proceedings will enable immigration judges to adjudicate proceedings in a more effective and timely manner, adding to the overall efficiency of immigration proceedings. The Department does not foresee any burdens to the public or the Department.

E. Executive Order 13132 (Federalism)

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

F. Executive Order 12988 (Civil Justice Reform)

This rule has been prepared in accordance with the standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The information collection requirement (Form EOIR-28) contained in this rule has been previously approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act (OMB Number 1125-0006). This final rule contains revised recordkeeping and reporting requirements. Specifically, EOIR will collect additional information on the Form EOIR-28 indicating the type of proceeding(s) for which an attorney or representative is entering his or her appearance. For this reason, EOIR has submitted the information collection request to OMB for review and clearance in accordance with review procedures of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. EOIR received written comments regarding this information collection as noted above. Notice of OMB approval for this information collection will be published in a future Federal Register document. The estimated public burden associated with this collection is 17,510 hours. It

is estimated that 175,101 responses will be received annually, and that each respondent will take 6 minutes to complete the form.

List of Subjects

8 CFR Part 1003

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

Accordingly, for the reasons stated in the preamble, part 1003 of chapter V of title 8 of the Code of Federal Regulations is revised to read as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 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.

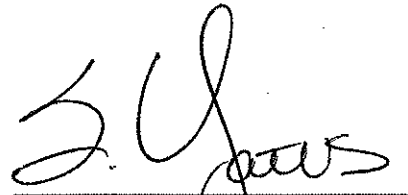
2. Revise paragraph (a) of section 1003.17 to read as follows:

§ 1003.17 Appearances

(a) In any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Entry of Appearance on Form EOIR-28 with the Immigration Court, and shall serve a copy of the Notice of Entry of Appearance on the DHS as required by 8 CFR 1003.32(a). The entry of appearance of an attorney or representative in a custody or bond proceeding shall be separate and apart

from an entry of appearance in any other proceeding before the Immigration Court. An attorney or representative may file an EOIR-28 indicating whether the entry of appearance is for custody or bond proceedings only, any other proceedings only, or for all proceedings. Such Notice of Entry of Appearance must be filed and served even if a separate Notice of Entry of Appearance(s) has previously been filed with the DHS for appearance(s) before the DHS.

September 15, 2015
Date



Sally Quillian Yates
Deputy Attorney General