

### § 3.3

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case was completed before the Immigration Judge.

(2) *Distribution of motion papers.* (i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless

a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) *Oral argument.* A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

[61 FR 18904, Apr. 29, 1996; 61 FR 32924, June 26, 1996, as amended at 62 FR 10330, Mar. 6, 1997; 64 FR 56142, Oct. 18, 1999]

### § 3.3 Notice of appeal.

(a) *Filing—(1) Appeal from decision of an Immigration Judge.* A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of an Immigration Judge shall be given notice of his or her right to appeal. An appeal from a decision of an Immigration Judge shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) directly with the Board, within the time specified in the governing sections of this chapter. The appealing parties are only those parties who are covered by the decision of an Immigration Judge and who are specifically named on the Notice of Appeal. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. If the respondent/applicant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR-27) must be filed with the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. The appeal and all

attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A notice of appeal may not be filed by any party who has waived appeal pursuant to § 3.39.

(2) *Appeal from decision of a Service officer.* A party affected by a decision who is entitled under this chapter to appeal to the Board from a decision of a Service officer shall be given notice of his or her right to appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR-29) directly with the office of the Service having administrative control over the record of proceeding within the time specified in the governing sections of this chapter. The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8 and, if the appellant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR-27). The appeal and all attachments must be in English or accompanied by a certified English translation. An appeal is not properly filed until its receipt at the appropriate office of the Service, together with all required documents and fees, and the fee provisions of § 3.8 are satisfied.

(b) *Statement of the basis of appeal.* The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR-26 or Form EOIR-29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 3.1(d)(2)(i). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to

the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. The appellant must also indicate in the Notice of Appeal (Form EOIR-26 or Form EOIR-29) whether he or she desires oral argument before the Board and whether he or she will be filing a separate written brief or statement in support of the appeal.

(c) *Briefs—(1) Appeal from decision of an Immigration Judge.* Briefs in support of or in opposition to an appeal from a decision of an Immigration Judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. An appellant shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a Service officer.* Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file in accordance with a briefing schedule set by that office. The alien shall be provided 30 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the appeal is taken. The Service shall have the same period of time in which to file a reply brief that was initially granted to the alien to file his or her brief. The time to file a reply brief commences from the date upon which the alien's brief was due, as originally set or extended. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for

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filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

(d) *Effect of certification.* The certification of a case, as provided in this part, shall not relieve the party affected from compliance with the provisions of this section in the event that he or she is entitled and desires to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal.

(e) *Effect of departure from the United States.* Departure from the United States of a person who is the subject of deportation proceedings, prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal.

[61 FR 18906, Apr. 29, 1996, as amended at 66 FR 6445, Jan. 22, 2001]

### § 3.4 Withdrawal of appeal.

In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the notice of appeal was filed. If the record in the case has not been forwarded to the Board on appeal in accordance with § 3.5, the decision made in the case shall be final to the same extent as if no appeal had been taken. If the record has been forwarded on appeal, the withdrawal of the appeal shall be forwarded to the Board and, if no decision in the case has been made on the appeal, the record shall be returned and the initial decision shall be final to the same extent as if no appeal had been taken. If a decision on the appeal has been made by the Board in the case, further action shall be taken in accordance therewith. Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been

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taken. Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in § 1.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

[61 FR 18907, Apr. 29, 1996, as amended at 62 FR 10331, Mar. 6, 1997]

### § 3.5 Forwarding of record on appeal.

(a) *Appeal from decision of an Immigration Judge.* If an appeal is taken from a decision of an Immigration Judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board.

(b) *Appeal from decision of a Service officer.* If an appeal is taken from a decision of a Service officer, the record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A Service officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the benefit that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be immediately forwarded to the Board.

[61 FR 18907, Apr. 29, 1996]

### § 3.6 Stay of execution of decision.

(a) Except as provided under § 236.1 of this chapter, § 3.19(i), and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or