Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3 and 212

[EOIR No. 127P; AG Order No. 2315–2000]

RIN 1125–AA29

Executive Office for Immigration Review; Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

SUMMARY: This rule would create a uniform procedure for applying the law as enacted by the Antiterrrorism and Effective Death Penalty Act of 1996 (AEDPA). This rule would allow certain aliens in deportation proceedings that commenced before April 24, 1996, to apply for relief pursuant to section 212(c) of the Immigration and Nationality Act (INA).

DATES: Written comments must be submitted on or before August 17, 2000.

ADDRESSES: Please submit written comments, original and two copies, to Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305–0470. Comments are available for public inspection at the above address by calling (703) 305–0470 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION:

What has Happened to Aliens Seeking Section 212(c) Relief Since Enactment of AEDPA?

Before the comprehensive revision of the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3009, section 212(c) of the INA provided that aliens who were lawfully admitted for permanent residence, who temporarily proceeded abroad voluntarily and not under an order of deportation, and who were returning to a lawful unrelinquished domicile in the United States of seven consecutive years, could be admitted to the United States in the discretion of the Attorney General. 8 U.S.C. § 1182(c) (1994). Although section 212(c) by its terms applied only to aliens in exclusion proceedings (*i.e.,* aliens seeking to enter at the border), it had been construed for many years also to allow aliens who were placed in deportation proceedings in the United States to apply for discretionary relief from deportation. See *Matter of Silva,* 16 I. & N. Dec. 26 (Board 1976); *Gonzalez* v. *INS,* 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS,* 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapica-Acuna* v. *INS,* 640 F.2d 223 (9th Cir. 1981); *Francis* v. *INS,* 532 F.2d 268, 273 (2d Cir. 1976).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214, Congress significantly restricted the availability of discretionary relief from deportation under section 212(c). Section 440(d) of AEDPA amended section 212(c) of the INA to provide that section 212(c) ''shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).'' AEDPA § 440(d), as amended by IIRIRA section 306(d). The effect of section 440(d) of AEDPA was to render ineligible for relief under INA section 212(c) aliens deportable because of convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, and multiple crimes of moral turpitude.

AEDPA did not contain a provision expressly stating whether section 440(d) was to be applied to criminal aliens who were placed in deportation proceedings, were convicted, or who committed the crimes rendering them deportable before AEDPA was passed. In *Matter of Soriano,* Interim Decision 3289 (Board 1996), the Board of Immigration Appeals (Board) held that section 440(d) of AEDPA did not apply to aliens who had applied for section 212(c) relief before AEDPA was passed, but did apply to all other aliens covered in the provision, even those whose criminal conduct or conviction occurred before AEDPA was issued.

At the request of the Immigration and Naturalization Service (INS), the Attorney General vacated the Board's decision in *Soriano* and certified the question to herself. On February 21, 1997, the Attorney General concluded that section 440(d) applied to (and thereby rendered ineligible for section 212(c) relief) all aliens who had committed one of the specified offenses and who had not finally been granted section 212(c) relief before AEDPA was passed. As construed in that decision, AEDPA section 440(d) rendered ineligible for section 212(c) relief even those aliens who were already in deportation proceedings and who had already applied for section 212(c) relief at the time AEDPA was passed.

How Have the Federal Courts Ruled on the Issue?

Following the Attorney General's decision in *Soriano,* the Board and Immigration Court denied applications for relief under section 212(c) filed by aliens who fell within the categories identified in AEDPA section 440(d), regardless of the date of the alien's crime, conviction, deportation proceedings, or application for section 212(c) relief. Numerous aliens challenged their final orders of deportation in both district courts and courts of appeals, arguing that AEDPA section 440(d) should not be applied ''retroactively'' to their cases, and that the Attorney General had erred in her construction of AEDPA section 440(d) in *Soriano.*

The *Soriano* issue has given rise to widespread litigation in almost every circuit. Only the D.C. Circuit has yet to decide a case on the *Soriano* issue. Eight circuits—the First, Second, Third,

Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits—have now disagreed with the Attorney General's holding in *Soriano.* Seven of the eight circuits have held that section 440(d) of AEDPA does not apply to aliens who filed applications for section 212(c) relief before AEDPA was passed. *See Goncalves* v. *Reno,* 144 F.3d 110, 126–33 (1st Cir. 1998), *cert. denied,* 526 U.S. 1004 (1999); *Henderson* v. *INS,* 157 F.3d 106, 128–30 (2d Cir. 1998), *cert. denied sub nom. Reno* v. *Navas,* 526 U.S. 1004 (1999); *Sandoval* v. *Reno,* 166 F.3d 225, 239–42 (3d Cir. 1999); *Tasios* v. *Reno,* 204 F.3d 544, 547–52 (4th Cir. 2000); *Pak* v. *Reno,* 196 F.3d 666, 674–76 (6th Cir. 1999); *Shah* v. *Reno,* 184 F.3d 719, 724 (8th Cir. 1999); *Magana-Pizano* v. *INS,* 200 F.3d 603, 610–11 (9th Cir. 1999); *Mayers* v. *INS,* 175 F.3d 1289, 1301–04 (11th Cir. 1999).

The First Circuit has gone further and held that AEDPA section 440(d) likewise does not apply to aliens who were placed in deportation proceedings before AEDPA was passed, even if they did not actually request section 212(c) relief until after AEDPA was passed. *See Wallace* v. *Reno,* 194 F.3d 279, 285–88 (1st Cir. 1999). Other circuits have either likewise so held or strongly implied in their reasoning. *See Henderson,* 157 F.3d at 129–31; *Sandoval,* 166 F.3d at 241–42; *Mayers,* 175 F.3d at 1304; *see also Shah,* 184 F.3d at 724 (adopting reasoning of *Goncalves, Henderson,* and *Mayers*).

By contrast, the Seventh Circuit has held, consistent with the Attorney General's conclusion in *Soriano,* that section 440(d) of AEDPA applies even to aliens who were in deportation proceedings and had applied for section 212(c) relief when AEDPA was enacted. *See Turkhan* v. *Perryman,* 188 F.3d 814, 824–28 (7th Cir. 1999); *see also LaGuerre* v. *Reno,* 164 F.3d 1035, 1040–41 (7th Cir. 1998), *cert. denied,* 120 S. Ct. 1157 (2000).

Aliens have also argued that persons who were placed in deportation proceedings *after* AEDPA was enacted, but who committed their crimes and were convicted before that date, should be eligible for section 212(c) relief, and that AEDPA section 440(d) would be impermissibly retroactive if applied to them.

Three circuits—the Third, Fifth and Tenth—have affirmatively held that AEDPA section 440(d) *does* foreclose section 212(c) relief for aliens who were placed in proceedings after AEDPA was enacted, even if their criminal offenses were committed before the enactment of AEDPA. *See DeSousa* v. *Reno,* 190 F.3d 175, 185–87 (3d Cir. 1999); *Requena-Rodriguez* v. *Pasquarell,* 190 F.3d 299, 306–08 (5th Cir. 1999); *Jurado-Gutierrez* v. *Greene,* 190 F.3d 1135, 1147–52 (10th Cir. 1999), *cert. denied sub nom Palaganas-Suarez* v. *Greene,* 120 S. Ct. 1539 (2000). The Seventh Circuit has necessarily adopted that position as well. *See Turkhan,* 188 F.3d at 824–28 (holding that section 440(d) bars relief for *all* criminal aliens who had not been granted section 212(c) relief at the time AEDPA was enacted, necessarily including all those whose convictions occurred prior to AEDPA but whose deportation proceedings were initiated after enactment of AEDPA).

The Ninth Circuit has concluded that aliens who are deportable based on a qualifying criminal conviction entered prior to AEDPA but after a full trial are properly covered by AEDPA section 440(d) and therefore ineligible for section 212(c) relief. *See Magana-Pizano,* 200 F.3d at 610–11. The Ninth Circuit also held, however, that because of concerns about retroactivity and reliance, it could not exclude the possibility that section 440(d) should not be applied to an alien who pleaded guilty or nolo contendere to his disqualifying criminal offense and who can show that the plea ''was entered in reliance on the availability of discretionary waiver under § 212(c).'' *Id.* at 613. The court therefore remanded the case to the district court to determine whether the alien could show such reliance. *See id.* at 609. The First Circuit has issued a similar ruling, holding that section 440(d) does not apply in a case where an alien pleaded guilty to and was convicted of a qualifying offense before AEDPA was enacted but was placed in proceedings afterwards, if the alien could show that he entered his guilty plea in reliance on the state of the law before AEDPA's enactment. *See Mattis* versus *Reno,* —F.3d—, 2000 WL 554957, at *5-*9 (1st Cir. May 8, 2000). The First Circuit found no evidence of such reliance in that case, however. *See id.* at *9.

Additionally, the Fourth Circuit held that the statute is inapplicable, because of perceived retroactivity concerns, to an alien who pleaded guilty and was convicted before AEDPA was enacted even if his deportation proceedings were commenced after enactment of AEDPA. The court reasoned that the alien had detrimentally relied upon the availability of discretionary relief from deportation when he entered his guilty plea prior to the enactment date. *See Tasios,* 204 F.3d at 550–52.

Why is the Attorney General Implementing a Rule of Uniform Implementation of AEDPA for Aliens Seeking Section 212(c) Relief?

Issues concerning the construction of AEDPA section 440(d) affect a large number of aliens and are of considerable importance to the Department of Justice, including the INS and the Executive Office for Immigration Review (EOIR).

Approximately 800 aliens who have been found deportable by the Immigration Court and the Board have filed challenges to *Soriano* in federal district court. In addition, a number of cases in which the application of *Soriano* may be dispositive are still pending before the Immigration Court and the Board.

There is an important public interest in the uniform administration of the immigration laws. The Constitution grants Congress the power to establish ''an uniform Rule of Naturalization,'' U.S. Const. art. I, § 8, cl. 4, and it is generally desirable as well that immigration rules be consistent throughout the country to minimize distinctions among aliens based solely on geographical factors. There is also an important public interest in the completion of proceedings involving criminal aliens. The Department of Justice therefore sought to have the Supreme Court definitively resolve the *Soriano* issue October Term 1998 by petitioning for a writ of certiorari from the First Circuit's decision in *Goncalves* and the Second Circuit's decision in *Henderson.* On March 8, 1999, the Supreme Court denied those certiorari petitions.

In light of the Supreme Court's denial of certiorari in *Goncalves, Henderson/Navas,* and *LaGuerre* in February 2000, the decisions of eight circuits rejecting the decision in *Soriano,* and the large number of aliens who are affected by the issue, the Attorney General has considered whether the government's interest in the uniform administration of the immigration laws, avoiding unnecessary delays in the completion of proceedings involving criminal aliens, and the reasoning of the courts that have rejected her construction of AEDPA section 440(d) in *Soriano,* warrant a change in the Department's application of AEDPA section 440(d). In the interest of the uniform and expeditious administration of the immigration laws, the Attorney General proposes to acquiesce on a nationwide basis in those appellate decisions holding that AEDPA section 440(d) is not to be applied in the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted.

In particular, the Attorney General proposes to acquiesce in the courts' conclusion, as a matter of statutory construction, that Congress intended that section 440(d) of AEDPA not be applied to deportation proceedings that had been commenced before AEDPA was enacted into law. In reaching that conclusion, the courts generally have applied the first step of the two-step retroactivity analysis set forth by the Supreme Court in *Landgraf* v. *USI Film Products,* 511 U.S. 244 (1994). In the first step of that analysis, the courts inquire whether Congress has specifically addressed the temporal application of a statute. The courts that have rejected *Soriano* have generally relied on two factors to reach the conclusion that Congress specifically addressed the temporal application of AEDPA section 440(d). First, they have observed that Congress expressly made other provisions of AEDPA, such as section 413(f), applicable to pending deportation proceedings, and they have drawn a negative inference from that fact that Congress did not intend section 440(d) to be applied to pending proceedings. Second, examining the legislative history of AEDPA, they have noted that an earlier version of AEDPA in Congress would have applied what became section 440(d) to pending cases, but that provision was deleted by the conference committee. *See Magana-Pizano,* 200 F.3d at 611; *Pak,* 196 F.3d at 676; *Shah,* 184 F.3d at 724; *Mayers,* 175 F.3d at 1302–03; *Sandoval,* 166 F.3d at 241; *Henderson,* 157 F.3d at 129–30; *Goncalves,* 144 F.3d at 128–33.

These factors are specific to AEDPA and concern only the first step of the *Landgraf* analysis. They do not concern the question of whether application of section 440(d) to pending deportation proceedings would be regarded as retroactive under the second step of the *Landgraf analysis.* As to that question, the Attorney General maintains the Department of Justice's longstanding position that questions about an alien's deportability or eligibility for discretionary relief from deportation are matters inherently prospective in nature.

In the absence of adverse appellate precedent, the Attorney General will continue to apply AEDPA section 440(d) in the cases of aliens whose deportation proceedings were commenced *after* AEDPA was enacted into law, even if the alien committed his crime or was convicted of the crime before that date. The appellate decisions rejecting *Soriano* have concluded only that Congress did not intend to apply AEDPA section 440(d) to the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted, and do not (with the exception of the *Mattis, Tasios,* and *Magana-Pizano* decisions from the First, Fourth, and Ninth Circuits, respectively) question its applicability to cases commenced after that date.

The interpretation of AEDPA that would be changed by this proposed rule has, of course, affected many aliens whose deportation proceedings were commenced before enactment of AEDPA but who were unable to obtain section 212(c) relief in those proceedings because of the *Soriano* decision. This rule provides a mechanism for such aliens who now have a final order of deportation to reopen their immigration proceedings if they would have been eligible to apply for section 212(c) relief but for the *Soriano* decision.

The Attorney General has considered the important interest in avoiding delays in deportation proceedings and, on balance, has decided to define the class of aliens eligible for reopening under this proposed rule in categorical terms. For aliens who have a final order of deportation, based on established principles requiring exhaustion of all available administrative remedies, this rule could properly be written to limit relief on reopening only to those aliens who can show that they had affirmatively applied for relief under section 212(c) in their prior immigration proceedings and had appealed an immigration judge's adverse decision to the Board of Immigration Appeals. However, this rule does not require that eligible aliens make a specific factual showing that they previously applied for section 212(c) relief notwithstanding the *Soriano* decision, or appealed an immigration judge's adverse decision to the Board. Instead, this proposed rule is drafted in order to relieve both the government and the alien of the burdens of litigating such factual issues in each case at the motion to reopen stage. In light of the highly unusual circumstances of the *Soriano* litigation, the interest in expeditious enforcement of the immigration laws will be more effectively served by focusing attention on the merits of the claims for discretionary relief from deportation with respect to aliens in the defined class who otherwise would have been eligible to seek section 212(c) relief in their immigration proceedings but for the *Soriano* precedent.

Who is Eligible to Apply for Section 212(c) Relief?

Under this proposed rule, eligible aliens in pending immigration proceedings may apply for section 212(c) relief if their immigration proceedings were commenced prior to the enactment of AEDPA. This rule also provides a 90-day period for a defined class of aliens who had been adversely affected by the *Soriano* decision to file a motion to reopen in order to apply for section 212(c) relief. This special reopening rule would cover aliens who:

(1) had deportation proceedings before the Immigration Court commenced before April 24, 1996;

(2) are subject to a final order of deportation;

(3) would presently be eligible to apply for section 212(c) relief if proceedings were reopened and section 212(c) as in effect on April 23, 1996 were applied; and

(4) either,

(i) applied for and were denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Soriano* (or its rationale), and not any other basis;

(ii) applied for and were denied section 212(c) relief by the Immigration Court and did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale); or

(iii) did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale).

This rule is not intended to apply to an alien who filed an application for section 212(c) relief that was denied by an immigration judge or the Board for reasons other than *Soriano* or its rationale. For example, an alien whose section 212(c) application was denied on the merits or before the AEDPA statute was enacted is not covered by this rule.

This rule is also not intended to apply to aliens outside the United States or aliens with a final order of deportation who have returned to the United States illegally. Moreover, this rule does not provide a basis for such aliens to seek or secure admission or parole into the United States to file a section 212(c) application.

What is Required to be Statutorily Eligible for Section 212(c) Relief?

The alien must be a lawful permanent resident, returning to a lawful, unrelinquished domicile of seven consecutive years, who may be admitted in the discretion of the Attorney General without regard to section 212(a) (other than paragraphs (3) and (9)(C)), who is deportable on a ground that has a

corresponding ground of exclusion, and who has not been convicted of one or more aggravated felonies for which he or she has served an aggregate term of imprisonment of at least five years. *See* INA section 212(c).

How is 7 Years Lawful, Unrelinquished Domicile in the United States Defined in this Rule?

The alien must have lived in the United States as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the INA for at least seven years, as defined in 8 CFR 212.3(f). For purposes of this rule, an alien begins accruing time as of the date of entry or admission as either a lawful permanent resident or lawful temporary resident and the accrual of time ceases when there is a final administrative order in the alien's case, as defined in 8 CFR 240.52 and 3.1(d)(2). When a motion to reopen is filed pursuant to this rule, the alien must have accrued seven years of lawful unrelinquished domicile as of the date of his or her final administrative order which the alien seeks to reopen.

Is There a Fee for Filing this Application?

If the alien has already filed a section 212(c) application and only needs to update the application, no fee is required. If the alien has not filed a section 212(c) application and has a final administrative order, he or she must file a motion to reopen. If the motion to reopen is granted, he or she must pay the fee required by 8 CFR 103.7(b)(1) for Form I–191 (currently $170). *See* 8 CFR 103.7.

An alien in deportation proceedings who has not filed an application shall submit the Form I–191 to the Immigration Court with the appropriate fee receipt attached.

If the case is pending before the Board, the alien must file a copy of the application with the motion and if the motion is granted and the case is remanded to the Immigration Court, the alien must then file the application with the appropriate fee. Nothing in this rule changes the requirements and procedures in 8 CFR 3.31(b), 103.7(b)(1), and 240.11(f) for paying the application fee for a section 212(c) application after a motion to reopen is granted if such an application was not previously filed. Fees must be submitted to the local office of the INS in accordance with 8 CFR 3.31. An applicant who is deserving of section 212(c) relief and is unable to pay the filing fee may request a fee waiver in accordance with 8 CFR 103.7(c).

What is the Procedure for an Applicant who is Currently in Deportation Proceedings Before the Immigration Court or the Board of Immigration Appeals?

Immigration Court. An eligible alien who has a deportation proceeding pending before the Immigration Court should file a section 212(c) application pursuant to this rule, or request a reasonable period of time to submit an application pursuant to this rule. If the alien already has an application on file, he or she may file a supplement to the existing section 212(c) application.

Board of Immigration Appeals. An eligible alien who has a deportation proceeding pending before the Board should file with the Board a motion to remand to the Immigration Court to file a section 212(c) application or to supplement his or her existing section 212(c) application on the basis of his or her eligibility for such relief pursuant to this rule. If the alien appears to be statutorily eligible for relief and meets the other eligibility requirements defined in this rule, the Board shall remand the case to the Immigration Court for adjudication of the section 212(c) application.

What if an Applicant is the Subject of a Final Order of Deportation?

Aliens who have final administrative orders. An alien who is the subject of a final order of deportation who is eligible to apply for section 212(c) relief pursuant to this rule must file a motion to reopen with the Immigration Court or the Board of Immigration Appeals, whichever last held jurisdiction. The front page of the motion and any envelope containing the motion should include the notation ''Special 212(c) Motion.'' The fee for motions to reopen (currently $110) will be waived for aliens eligible for section 212(c) relief pursuant to this rule. The waiver of the fee is only applicable to motions to reopen seeking section 212(c) relief pursuant to this rule. The reopening and remand will be limited to issues concerning the alien's eligibility for relief under section 212(c) and may not address the alien's deportability or any other basis for relief from deportation, unless the Board is also reopening under other applicable provisions of law, in which case the issues may be consolidated for hearing as appropriate and all appropriate motions fees will apply.

If the alien previously filed an application for section 212(c) relief, he or she must file a copy of that application or a copy of a new application and supporting documents with the motion to reopen. If the motion to reopen is granted, an alien who previously filed an application will not be required to pay a new filing fee for the section 212(c) application, Form I–191.

If the alien has not previously filed an application for section 212(c) relief, the alien must submit a copy of his or her completed application and supporting documents with the motion to reopen. If the motion is granted, the alien must then file the application with the appropriate fee.

Cases remanded to the Board. If a case has been remanded to the Board by a federal court based on a judicial decision rejecting the Attorney General's decision in *Soriano,* the Board will comply with the order of the district or circuit court.

What happens if an applicant currently has a Motion to Reopen or motion to reconsider pending before the Immigration Court or the Board?

Immigration Court. If an alien has a pending motion to reopen or reconsider filed with the Immigration Court, he or she must file a new motion to reopen with the Immigration Court to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

Board of Immigration Appeals. If an alien has a pending motion to reopen or reconsider filed with the Board the alien must file a new motion to reopen with the Board to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

New Motion to Reopen. An alien may file only one motion to reopen for purposes of establishing eligibility under this rule. A new motion to reopen filed pursuant to this rule either before the Immigration Court or the Board, as appropriate, must specify whether the alien has any pending motions before the Immigration Court or the Board. All motions to reopen to apply for section 212(c) relief filed pursuant to this rule are subject to the restrictions specified in this rule. The usual time and number restrictions on motions, as articulated in 8 CFR 3.2 and 3.23, shall apply to all other motions.

Is an Alien with a Final Administrative Order of Deportation Required to File a Motion to Reopen under this Rule Within the 90-day Period in Order to Seek Section 212(c) Relief?

This rule is intended to provide a single, straightforward process for the defined class of aliens who were adversely affected by *Soriano* to reopen their immigration proceedings based on the interpretive change announced in this rule.

Accordingly, 8 CFR 3.44 is intended to provide the sole process for eligible aliens who have a final administrative order of deportation to reopen their cases on account of the change in the governing law announced in this rule in order to apply for section 212(c) relief. However, the existing reopening rules in 8 CFR 3.2 and 3.23 allow aliens to seek to reopen their cases notwithstanding the time limits on certain other grounds unrelated to a change in the law. As provided in 8 CFR 3.44(h), this rule would not prevent an alien from filing a motion to reopen under the existing rules based on any other basis or exception.

Does the Filing of an Application for Section 212(c) Relief stay the Execution of a Final Order?

The mere filing of a motion to reopen to apply for section 212(c) relief with the Immigration Court or the Board does not stay the execution of the final order of deportation. To request that execution of the final order be stayed by the INS, the alien must file an Application for Stay of Removal (Form I–246), following the procedures set forth in 8 CFR 241.6.

What Happens if an Application is Denied by the Immigration Court?

If the Immigration Court denies the section 212(c) application of an alien in deportation proceedings before the Immigration Court, the decision may be appealed to the Board along with, and under the same procedures as apply to, other issues, if any, properly before the Board on appeal.

What Happens if an Alien Fails to Appear for a Hearing Before the Immigration Court on a Section 212(c) Application?

An alien must appear for all scheduled hearings before an Immigration Court, unless his or her appearance is waived by the Immigration Court. An alien who is in deportation proceedings before the Immigration Court, and who fails to appear for a hearing regarding a section 212(c) application, will be subject to the applicable statutory and regulatory *in absentia* procedures (*i.e.,* section 242B of the INA as it existed prior to amendment by IIRIRA).

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not, if promulgated, have a significant adverse economic impact on a substantial number of small entities. This rule allows certain aliens to apply for INA section 212(c) relief; it has no effect 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 provision 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 Fairness Act of 1996. *See* 5 U.S.C. 804(2). 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 regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

The regulation 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 six 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

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041, telephone: (703) 305–0470.

Paperwork Reduction Act

This rule will increase the use of Form I–191 but will not result in a material change in the form, and the INS is adjusting the total burden hours of the form accordingly.

List of Subjects

8 CFR Part 3

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

8 CFR Part 212

Administrative practice and procedure, Aliens, Passports and visas, Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 will continue to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 8 U.S.C. 1103, 1252 note, 1324b, 1362, 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002.

2. Section 3.44 is added to subpart C to read as follows:

§ 3.44 Motion to reopen to apply for section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996.

(a) *Standard for Adjudication.* Except as provided in this section, a motion to reopen proceedings to apply for relief under section 212(c) of the Act will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) *Aliens eligible to reopen proceedings to apply for section 212(c) relief.* A motion to reopen proceedings to seek section 212(c) relief under this section must establish that the alien:

(1) Had deportation proceedings before the Immigration Court commenced before April 24, 1996;

(2) Is subject to a final order of deportation,

(3) Would presently be eligible to apply for section 212(c) as in effect on or before April 23, 1996; and

(4) Either—

(i) Applied for and was denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale), and not any other basis;

(ii) Applied for and was denied section 212(c) relief by the Immigration Court, did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale); or (iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale).

(c) *Scope of reopened proceedings.* Proceedings shall be reopened under this section solely for the purpose of adjudicating the application for section 212(c) relief, but if the Immigration Court or the Board reopens on other applicable grounds, all issues encompassed within the reopening proceedings may be considered together, as appropriate.

(d) *Procedure for filing a motion to reopen to apply for section 212(c) relief.* An eligible alien must file either a copy of the original Form I–191 application, and supporting documents, or file a copy of a newly completed Form I–191, plus all supporting documents. An alien who has a pending motion to reopen or reconsider before the Immigration Court or the Board must file a new motion to reopen to apply for section 212(c)relief pursuant to this section. The new motion to reopen shall specify any other motions currently pending before the Immigration Court or the Board that should be consolidated. The Service shall have 45 days from the date of service of the motion to reopen to respond. In the event the Service does not respond to the motion to reopen, the Service retains the right in the reopened proceedings to contest any and all issues raised.

(e) *Fee and number restriction for motion to reopen waived.* No filing fee is required for a motion to reopen to apply for section 212(c) relief under this section. An eligible alien may file one motion to reopen to apply for section 212(c) relief under this section, even if a motion to reopen was filed previously in his or her case.

(f) *Deadline to file a motion to reopen to apply for section 212(c) relief under this section.* An alien with a final administrative order of deportation must file a motion to reopen within 90 days of the effective date of the final rule.

(g) *Jurisdiction over motion to reopen to apply for section 212(c)relief and remand of appeals.*

(1) Notwithstanding any other provisions, any motion to reopen filed pursuant to this section to apply for section 212(c) relief shall be filed with the Immigration Court or the Board, whichever last held jurisdiction over the case.

(2) If the Immigration Court has jurisdiction, and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall adjudicate only the section 212(c) application.

(3) If the Board has jurisdiction and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall remand the case to the Immigration Court solely for adjudication of the section 212(c) application (Form I–191).

(h) *Applicability of other exceptions to motions to reopen.* Nothing in this section shall be interpreted to preclude or restrict the applicability of any other exception to the motion to reopen provisions of this part as defined in 8 CFR 3.2(c)(3) and 3.23(b).

(i) *Limitations on eligibility for reopening under this rule.* This special reopening rule does not apply to:

(1) Aliens who have departed the United States;

(2) Aliens with a final order of deportation who have illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

3. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184,1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

4. Paragraph (g) is added to Section 212.3 to read as follows:

§ 212.3 Application for the exercise of discretion under section 212(c).

* * * * *

(g) *Relief for certain aliens who were in deportation proceedings before April 24, 1996.* Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

Dated: July 12, 2000.

Janet Reno,

Attorney General.

[FR Doc. 00–18210 Filed 7–17–00; 8:45 am]

BILLING CODE 4410–30–U

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R–1077]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board is publishing for comment proposed revisions to Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The proposed revisions implement amendments to the EFTA contained in the Gramm-Leach-Bliley Act that require the disclosure of certain fees associated with automated teller machine (ATM) transactions. The amendments require ATM operators who impose a fee for providing electronic fund transfer services to disclose this fact in a prominent and conspicuous location on or at the ATM. The operator must also disclose that a fee will be imposed and the amount of the fee, either on the screen of the machine or on a paper notice before the consumer is committed to completing the transaction. In addition, when the consumer contracts for an electronic fund transfer service, financial institutions are required to disclose that a fee may be imposed for electronic fund transfers initiated at an ATM owned by another entity.

DATES: Comments must be received by August 18, 2000.

ADDRESSES: Comments, which should refer to Docket No. R–1077, may be mailed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551 or mailed electronically to *regs.comments@federalreserve.gov.* Comments addressed to Ms. Johnson also may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, and to the security control room at all other times. The mail room and the security control room, both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in room MP–500 between 9 a.m. and 5 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.12.

FOR FURTHER INFORMATION CONTACT: Kyung H. Cho-Miller or Natalie E. Taylor, Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve