

make substantive changes to INS rules; the Attorney General can make substantive changes to EOIR rules, and the Secretary and the Attorney General can consult each other when contemplating changes in those rules that affect both EOIR and INS.

B. General Comments

The rule makes no substantive change in the regulations. The rule is a technical rule dividing the regulations for purposes of the transfer of authorities under the HSA. For the ease of public understanding, the structure of chapter V has been created in parallel to the existing structure of chapter I. Accordingly, for example, in asylum proceedings before immigration judges, applicable provisions of chapter I, part 208 (e.g., 8 CFR 208.15(a)) are established in parallel in chapter V, part 1208 (e.g., 8 CFR 1208.15(a)). In creating this parallel structure, the Attorney General is attempting to provide as simple a format as possible for all to understand the legal effect of the transfer, while minimizing the confusion that might occur in practice before the Service and EOIR. Under this technical restructuring, incorrect citation to a regulation that has been transferred into Chapter V will be considered inconsequential. Similarly, until EOIR updates its forms, the references to sections of chapter I should be considered to be references to chapter V, as appropriate.

The rule transfers those parts and sections that deal with procedures before the immigration judges and Board of Immigration Appeals to chapter V. This transfer permits future amendment of the rules without unnecessary conflict with provisions relating to the INS. Similarly, the elimination of those provisions from chapter I that deal with proceedings before EOIR permits the amendment of the substantive regulations of the Service by the Department of Homeland Security without unnecessary conflict with the Attorney General's regulations for EOIR.

The rule duplicates a number of parts and sections that affect both the Service and EOIR, such as the asylum regulations. These provisions necessarily require coordination between the INS and EOIR. The Department of Justice has been guided by the principles of the HSA in duplicating only those provisions that directly affect the authority of EOIR, but has also necessarily duplicated some provisions that affect INS until a further and more detailed division can be accomplished in consultation with the Department of Homeland Security. In

this sense, the rule is interim in nature in that further division and elimination of a substantial number of sections is expected in the near future. The inclusion of a section in this duplication process should be understood as a temporary measure to ensure continuity, not as a permanent disposition of authority in the Department of Justice.

The rule also makes a number of specific technical amendments to continue existing authority that cannot be made by simply moving or duplicating sections. For example, the precedent decisions of the Board of Immigration Appeals and the INS are published in *Administrative Decisions under the Immigration and Nationality Laws of the United States*, cited as "I&N Dec." However, there is no rule that currently provides for the publication of Service decisions outside of 8 CFR 103.3, and that provision is incomplete. Accordingly, a provision has been added to chapter I, part 1, providing for the determination of precedent decisions within the Department of Homeland Security and publication of such decisions by EOIR in *Administrative Decisions under the Immigration and Nationality Laws of the United States*.

C. Parts and Sections Affecting EOIR Moved

Part 3, and almost all of part 240, are moved to chapter V because these provisions directly affect only the Executive Office for Immigration Review and proceedings before EOIR. A more general revision of these separated provisions is contemplated in the future to further refine the adjudicatory process, but this rule makes no substantive change in jurisdiction or procedure.

D. Parts and Sections Affecting INS and EOIR Duplicated

A larger number of parts and sections that are currently in chapter I are duplicated in chapter V because they establish processes that are common to both the INS and EOIR. In some cases, for convenience, an entire part has been moved because substantial portions effect common procedure, even though particular sections may affect only the INS or only EOIR. A concerted decision has been made to carry forward the duplication of entire parts to ensure continuity, even though the Attorney General and the Secretary may later amend their respective regulations to further separate the procedures and clarify those sections that affect each agency. It is not manageable at this time to detail a complete paragraph-by-paragraph jurisdictional split between

INS and EOIR, and the duplication assures that interpretation will be consistent until coordinated decisions are made respecting these procedures. Thus, for example, part 208, relating to asylum and related forms of relief, is duplicated in part 1208, even though specific subsections relate only with procedure before INS and other subsections relate only to procedure before EOIR. Further disposition of these sections will be made in future rulemaking.

E. Specific Technical Amendments

A number of technical amendments are required to effect a proper division of the authorities from chapter I. In certain instances, new sections must be written, and in others cross-references are required. This is particularly true where only one section or paragraph refers to processes within EOIR, but otherwise the part or section refers only to processes of INS. For example, a number of INS processes result in a decision on an application that may be renewed before an immigration judge or an appeal taken to the Board of Immigration Appeals. Where the part or section is otherwise entirely within the scope of the functions transferred to DHS, only a technical amendment may be necessary to provide for the appeal with the appropriate cross-reference. The major technical changes—which go beyond these cross-references—and the continuity that these changes provide are described below.

Existing 8 CFR § 3.1(g) provides that precedent decisions of the Board of Immigration Appeals and the Attorney General are binding on all Service officers. This historical specification was made by the Attorney General in the course of his overall management of the Service. However, because of the transfer of functions of the Service to the Department of Homeland Security, it is necessary to specify this result in the ongoing regulations of the Service, as well as EOIR. The provision of § 3.1(g) is, therefore, duplicated in chapter I, part 1, § 103.37(g). This restatement of the binding effect of precedent decisions effectuates the clear intent of the Congress in section 1101(2) of the HSA, as amended, amending section 103 of the Immigration and Nationality Act, 8 U.S.C. 1103, by adding subsection (g), and in transferring the Service to DHS while leaving the immigration adjudicatory functions of EOIR under the Attorney General.

Moreover, it is necessary to clarify that the Secretary of Homeland Security may refer cases or questions of law to the Attorney General for decision at any time, both generally, and pursuant to