



QUESTIONS AND ANSWERS

December 6, 2000

The 208 Final Rule

Q: What does the rule do?

A: The rule published today by INS amends the Department of Justice (DOJ) regulations implementing the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), governing asylum and withholding of removal claims. The rule also amends portions of the regulations governing past persecution and cases in which an applicant could avoid future persecution by moving to another part of his or her country.

Q: When were the proposed rules published?

A: On January 3, 1997, INS and EOIR jointly published a proposed rule for implementation of IIRIRA in the Federal Register (62 FR 444). A 30-day comment period followed that publication. Subsequently, on March 6, 1997, INS and EOIR jointly published an interim rule to implement IIRIRA at 62 FR 10312. The interim rule provided a 120-day comment period. The Department received 124 comments on the proposed rule and an additional 39 comments on the interim rule. The final rule published today reflects amendments made based on comments received in response to both the proposed IIRIRA rule and the interim IIRIRA rule.

Q: Does this rule include amendments to the asylum regulations other than those necessitated by IIRIRA?

A: Yes. This rule includes amendments to provide further guidance on cases involving past persecution and internal relocations possibilities. Amendments to provide further guidance on these issues were published as a proposed rule in the Federal Register on June 11, 1998 at 63 FR 31945. DOJ received 35 comments in response to the proposed rule. Today's final rule incorporates amendments based on those public comments.

Q: Why are the regulations governing IIRIRA amendments to asylum and withholding of removal provisions being promulgated separate from the rest of the IIRIRA regulations?

A: DOJ has elected to split part 208 from the rest of the IIRIRA interim regulations so that it can promulgate a final rule that incorporates both comments to the IIRIRA interim rule and comments to the proposed rule regarding past persecution and internal relocation. Also, in the near future DOJ will be publishing a proposed rule concerning the

definition of "persecution" and "particular social group." Those proposals are based in part on certain of the provisions being made final in this rule.

Q: What kinds of changes have been made to the one-year filing deadline rules?

A: In the 1996 IIRIRA legislation, Congress mandated, with certain exceptions, that all asylum applications must be filed within one year of the applicant's arrival in the United States. The filing deadline can be waived only when the applicant demonstrates either changed circumstances that materially affect his or her eligibility for asylum, or the existence of extraordinary circumstances relating to the delay in filing. The regulations published today make changes to the interim rule governing the one-year filing deadline. The rule makes both procedural and substantive adjustments to ensure that individuals with legitimate claims to protection will have the opportunity to apply for asylum. The rule also clarifies how requests for exceptions to the filing deadline must be considered procedurally and it provides for factors that the adjudicator may take into account in determining whether an exception applies. The changes derive from a review of the filing deadline in practice and in response to the public comments.

Q: What adjustments have been made to the changed circumstances and extraordinary circumstances provisions?

A: The regulation adopts language stating that the lists of circumstances that may constitute changed circumstances or extraordinary circumstances are illustrative lists and are not all-inclusive. The rule also sets out additional examples of factors that the adjudicator may consider. For example, the rule recognizes that the death or serious illness of the applicant's legal representative or a member of the applicant's immediate family may constitute extraordinary circumstances for purposes of excusing a late filing. The rule maintains the requirement that where changed or extraordinary circumstances prevented filing within a year, the application must still be filed within a reasonable period.

Q: Does the rule change the presumption that an applicant who has suffered past persecution also has a fear of future persecution?

A: No. This rule leaves intact the important principle of U.S. asylum law that an applicant who establishes that he or she has suffered past persecution on account of a statutorily protected ground -- race, religion, nationality, membership in a particular social group, or political opinion -- is presumed to have a fear of future persecution.

Q: Is the government permitted to rebut the presumption?

A: Yes. Although an applicant who has established past persecution is afforded the presumption of a well-founded fear of future persecution, an Asylum Officer or Immigration Judge may consider evidence that rebuts the presumption and shows that the individual is not in need of international protection, because the individual no longer has a well-founded fear.

Q: What kind of evidence rebuts the presumption?

A: The rule published today states that in past persecution cases, INS may establish by a preponderance of the evidence that there has been a "fundamental change in circumstances" such that the applicant no longer has a well-founded fear of future persecution. The fundamental change may be a change in country conditions or a change in the applicant's personal circumstances. INS may also rebut the presumption by establishing that the applicant can reasonably avoid future persecution by relocating to another part of the country.

Q: What considerations did the Attorney General take into account in making the decision to revise the past persecution and internal relocation rules?

A. In determining how to revise these provisions, DOJ referred to the relevant provisions of the United Nations High Commissioner for Refugee's Handbook on Procedures and Criteria for Determining Refugee Status and precedent court decisions. Although DOJ is not bound by the UNHCR Handbook's provisions, the U.S. Supreme Court has recognized that it can serve as a useful interpretive aid and that it provides significant guidance in construing provisions relating to the protection of refugees. The new regulatory language is consistent with the principles in the UNHCR handbook that fundamental changes may overcome a presumption of future fear. The UNHCR Handbook also recognizes that where reasonable, a decision-maker may consider internal relocation as an option.

Q: Does this rule make it more difficult for people in need of protection to get asylum?

A: No. To the contrary, in response to an INS suggestion, the regulation allows an individual to be granted asylum based on past persecution alone when the applicant establishes compelling reasons arising out of the severity of the past persecution, or when the applicant establishes that there is a reasonable possibility he or she may suffer other serious harm if removed to that country. Additionally, the rule maintains the important principle that once an applicant has established past persecution, it is presumed that he or she has a well-founded fear of persecution, unless the Service can rebut the presumption. The regulation makes clear that in cases in which INS believes the person is no longer in need of protection; INS bears the legal burden to prove that the applicant no longer has a well-founded fear of persecution.

Q: Does the Attorney General have the authority to make these revisions to the regulations?

A: Yes. Under section 208 of the Immigration and Nationality Act, the Attorney General is granted the discretion to determine which "refugees" will be granted asylum in the United States. This rule revises the regulatory language governing the exercise of discretion in past persecution cases and in cases in which internal relocation may be possible. Inherent in the concept of asylum is the principle that an individual requires

international protection because his or her own country can not or will not provide protection. It is properly within the Attorney General's authority and discretion to consider evidence that shows that the individual is not in need of protection.