BAY AREA LEGAL AID
WORKING TOGETHER FOR JUSTICE

Genevieve Richardson
Executive Director

Submitted via www.regulations.gov

September 25, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

RE: RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020, Public Comment Opposing Proposed Rules on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

Our organization, Bay Area Legal Aid, submits this comment urging the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The Notice of Proposed Rulemaking (NPRM) claims that the proposed rules will promote "efficiency," but the proposed changes would strip important due process rights from noncitizens before the immigration court and Board of Immigration Appeals (BIA or Board). The importance of fairness in immigration court proceedings cannot be overstated: for many noncitizens having a fair day in court can mean the difference between living in safety in the United States or being returned to a country where they may be killed. Deportation can also lead to permanent family separation. The U.S. government should ensure that, before it imposes such grave consequences through ordering a person's removal, every noncitizen has a fair hearing and access to a robust appellate review process. We thus urge you to withdraw these proposed rules in their entirety.

Bay Area Legal Aid provides free wrap-around legal services to low income survivors of interpersonal violence (which includes domestic violence, sexual assault, human trafficking, and child abuse) in seven of the nine Bay Area Counties. Survivors come to Bay Area Legal Aid seeking help with a myriad of legal issues, including housing, domestic violence restraining orders, family law, consumer law, health access, access to public benefits, and immigration. Our immigration legal services include U visa petitions for victims of crime, T visa applications for victims of human trafficking, and VAWA-self petitions for survivors of domestic violence. In 2019, we closed 172 immigration relief cases for survivors of domestic violence, sexual assault, and human trafficking. Many of our clients are also eligible for asylum.

Given our mission and our many years of experience working with immigrant survivors of violence, we are deeply concerned that the proposed rule will jeopardize our clients' safety, leaving immigrant survivors of crime vulnerable to removal without critical due process protections. The proposed rule undermines the protections that Congress established to protect survivors and discourages survivors from coming forward to access safety and justice.

Administrative closure has been a reliable tool in providing effective representation for some of our immigrant survivors who are eligible for a U or T nonimmigrant status, but who are in removal proceedings. Being able to obtain administrative closure has allowed our clients to apply for and obtain legal status in the United States without having to rely on their abuser or exploiter to do so. This provides stability to their families. This also ensures that they can get work authorization to support themselves and their minor children. Administrative closure also benefits law enforcement agencies that require the assistance of and/or testimony of immigrant survivors in their investigation and/or prosecution of the domestic violence, sexual assault, child abuse, human trafficking, and other serious crimes.

Because these regulations cover so many topics, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time, as explained below, to respond to every proposed change.

We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

As discussed below, the proposed regulations would dramatically alter the BIA appellate process, would prevent many noncitizens with immediate relatives or asylum eligibility from seeking to have their cases reopened, and would prevent the BIA and immigration judges from administratively closing cases, thereby foreclosing avenues of relief for noncitizens and adding to the Executive Office for Immigration Review's (EOIR) backlog. The public should be given adequate time to consider these dramatic revisions to existing law in order to provide thoughtful and well-researched comments. Instead, DOJ has given no reason for allowing only 30 days for the public to submit comments to these dense and complicated proposed rules rather than the customary 60-day comment period. The shortened comment period presents challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance childcare with work activities.

Under normal circumstances, a minimum of 60 days is needed for the public to engage in meaningful review and analysis of such a comprehensive and nuanced rule per the Administrative Procedure Act.[1] Nevertheless, despite an expanding international health crisis due to the Corona virus (COVID-19) pandemic,[2] the public was only given 30 days to review and submit comments to these proposed rules. That such a short time frame was assigned while amid an international pandemic is alarming. Many organizations like Bay Area Legal Aid had to adjust and alter their channels of services immediately when the "Shelter-in-Place" order was first issued in March 2020.[3] Bay Area Legal Aid transitioned from the traditional forum of engaging with clients and colleagues in person to an online remote work model, which took time.

[1] Administrative Procedure Act, 5 U.S.C. Subchapter II.
[2] See *Global Coronavirus Caseload Passed 7 Million*, The New York Times (Published June 8, 2020; Updated July 10, 2020), available at https://www.nytimes.com/2020/06/08/world/coronavirus-live-updates.html?auth=login-email&login=email.
[3] See Michael Nowels, *Who Can Leave Their Home? Read the 'Shelter in Place' Order for 7 Bay Area Counties*, The Mercury News (March 16, 2020) available at https://www.mercurynews.com/2020/03/16/coronavirus-read-shelter-in-place-order-from-six-bay-area-counties/.

Many service providers, like Bay Area Legal Aid, are still under continued restrictions of shelter-in-place orders or stay at home directives except for essential needs.[4] Even now, we continue to face obstacles of access and availability among our clients, colleagues, support agencies, and networks. Many colleagues bear the additional demands of managing child-care and/or care for ailing relatives while working from home. This has naturally extended the quantity and timeline of work. The scope and consequences of these proposed rules are a matter of life and death for some humanitarian relief in the United States. The gravity of this impact alone warrants more time to properly comment on these regulations and to allow the public to do so without adding to the strain and stress the COVID-19 pandemic has already introduced. For these reasons, we request an extension in the comment period of at least 60 days.

This proposed rule, with its broad changes to EOIR practice, follows closely after DOJ and the Department of Homeland Security's (DHS) proposed rules and new forms, which would bring sweeping changes to long-established asylum rules. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review and Asylum Security Bars and Processing. Significant agency revisions to established practice should be well-thought out and allow the public the opportunity to fully comment. Instead, the agencies have used the summer months during a pandemic to rush through proposed rules which would radically alter procedures that have been in place for decades and leave tens of thousands of noncitizens who could qualify for lawful status with no recourse. For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind It in Its Entirety

Although we object to the agencies' unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations which would greatly reduce the rights of noncitizens appearing before EOIR and would result in increased, permanent family separations and the potential death of asylum seekers who are removed to their home countries to be killed.

8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10—The Proposed Rule Would Prevent the BIA and Immigration Judges from Administratively Closing Cases

Proposed Section 8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10 would explicitly foreclose the BIA and immigration judges' authority to administratively close cases. Administrative closure is an important docketing tool that courts routinely use to prioritize cases most in need of immediate resolution and deprioritize cases where there is not an urgent need for fast resolution. *See Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (explaining how district courts may administratively close cases, such as by removing them from the active docket, as a docket management tool). The elimination of administrative closure means that EOIR adjudicators have no ability to prioritize cases—whether a known terrorist is placed in removal proceedings or a

[4] See *Stay Home Q&A*, California All (last updated September 21, 2020) available at https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed September 25, 2020).

grandmother who has a pending application for relief with United States Citizenship and Immigration Services (USCIS), and is supporting her family but has overstayed her visa is placed in removal proceedings, all are treated as equal priorities. Stripping adjudicators of the ability to prioritize and deprioritize cases in this way is irrational; rather than increasing "efficiency," the proposed rule will add cases to the backlog and prevent adjudicators from managing their own dockets.

Further, the proposed rule would make it more difficult for immediate relatives of U.S. citizens to obtain provisional waivers and legalize their immigration status. Noncitizens who are in removal proceedings cannot obtain a provisional waiver unless their removal proceedings are administratively closed. By explicitly stripping judges and the BIA of the ability to administratively close cases, DOJ has used a backdoor to end provisional waiver eligibility for many noncitizens who are in removal proceedings.

Eliminating administrative closure would also result in harsh consequences for the most vulnerable noncitizens seeking humanitarian relief over which USCIS has exclusive jurisdiction. Children who are pursuing Special Immigrant Juvenile Status (SIJ), crime victims pursuing U visas and trafficking victims pursuing T visas, may all face removal before USCIS adjudicates their applications for relief. As USCIS has slowed down processing of almost all types of applications,[5] it is especially unfair for EOIR to speed up its case adjudications while stripping immigration judges of the ability to administratively close cases to allow noncitizens to pursue permanent relief that only USCIS can grant.

At Bay Area Legal Aid, we have used administrative closure in representing immigrant survivors in removal proceedings, who are eligible for a U or T nonimmigrant status. Administrative closure has allowed our clients to apply for and obtain legal status in the United States without having to rely on their abuser or exploiter to do so. For example, one client was placed in removal proceedings in 2013 and able to access legal counsel for the first time only after she had been placed in proceedings. At that time, we discovered she was eligible for U nonimmigrant status, having survived domestic violence and cooperated with law enforcement in the investigation of that crime. The court administratively closed her removal proceedings, which allowed her time to apply for U nonimmigrant status, for her teenaged children to consular process from Mexico on U-3 derivative visas and reunite with her here in the United States, and for her to apply for adjustment of status, which is now pending. Had her removal case not been administratively closed, she may have been removed to Mexico where she and her children still fear retaliatory violence from her abuser.

Doing away with administrative closure would strip immigrant survivors of the ability to pursue immigration relief for which they are eligible, and which was specifically created to protect them from further abuse and exploitation. Such immigrant survivors would be subject to deportation. If removed, many of them would be at further risk of harm by their abusers or exploiters, who could travel to their countries of nationality and injure and/or kill them with few, if any, consequences.

[5] *See* American Immigration Lawyers Association, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, (Jan. 30, 2019) https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays.

In addition, federal, state, and local law enforcement agencies who rely on the information, assistance, and testimony of immigrant survivors in the police and criminal investigations and/or prosecutions would be impacted negatively by the resulting deportations. As such, the proposed rule would have the opposite effect of the Congressional intent in creating humanitarian relief for immigrant survivors. More specifically, Congress enacted the Victims of Trafficking and Violence Protection Act ("VTVPA") of 2000 to create the U and T nonimmigrant status to combat violent and serious crimes against immigrants because, by doing so, perpetrators would be held accountable and the community would be safer.

With respect to the T nonimmigrant status, section 102(a) of the VTVPA of 2000 states that the act's purpose is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[6] Furthermore, per section 102(b)(24), "To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses."[7] Undermining the due process rights of trafficking survivors prevents them from seeking protection and thus contravenes Congress's intent in enacting the VTVPA of 2000.

In section 1513 of the VTVPA, Congress announced that the purpose of the U nonimmigrant status program was to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, and trafficking" and "other crimes" committed against foreign nationals, "while offering protection to victims of such offenses and keeping with the humanitarian interests of the United States."[8] This visa was "to encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes against the latter."[9]

8 CFR § 1003.1(d)(3)(iv)—The Proposed Rule Would Prevent the BIA from Remanding Cases for Further Fact-Finding in all but the Most Limited Circumstances

The proposed rule at 8 CFR § 1003.1(d)(3)(iv) would make it easier for the BIA to rely on facts that did not constitute part of the immigration judge's decision-making to uphold a denial in a case. We are especially concerned about the effects of this new proposed rule on *pro se* appellants.[10] The proposed rule would specifically strip the BIA of the ability to remand a case *sua sponte* for further factfinding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. For noncitizens who are unrepresented, this means that even if an immigration judge (IJ) clearly failed to develop the record adequately and even if the Board Member reviewing the case sees that there is a clear avenue for relief on which the IJ did

[6] VTVPA, Pub. L. No. 106-386, 102(a), 114 Stat. 1464-1548 (2000).
[7] VTVPA, Pub. L. No. 106-386, 102(b)(24), 114 Stat. 1464-1548 (2000).
[8] See VTVPA, Pub. L. No. 106-386, 1502(a)(3), 114 Stat. 1464-1548 (2000).
[9] Id.
[10] According to the last available DOJ Statistical Yearbook, roughly 20 percent of all BIA appeals are by *pro se* appellants. DOJ, *Statistical Yearbook Fiscal Year 2018*, at 38, https://www.justice.gov/eoir/file/1198896/download. EOIR statistics show that overall, 37 percent of pending cases in immigration court are unrepresented. EOIR, *Current Representation Rates*, (Apr. 15, 2020) https://www.justice.gov/eoir/page/file/1062991/download.

not ask any questions, the Board Member would have no authority to prevent a manifest injustice and remand the case for further fact-finding. This provision appears designed to quickly, and with finality, remove those without representation who would be least likely to understand that they have the ability to seek remand and would therefore most heavily rely on EOIR to protect their rights.

Even where noncitizens are represented, it would be almost impossible in most cases to successfully argue for remand to the BIA. The proposed rule would impose a long list of requirements which must be met before the BIA could potentially remand a case. Under 8 CFR § § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if all of the following conditions are met:

(1) The party seeking remand preserved the issue by presenting it before the immigration judge;
(2) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;
(3) The additional factfinding would alter the outcome or disposition of the case;
(4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and
(5) One of the following circumstances is present in the case:
    (i) The immigration judge's factual findings were clearly erroneous, or
    (ii) Remand to DHS is warranted following de novo review.

Under this vastly circumscribed regulatory system, it would no longer be possible to win remand for some of the most common reasons cases are currently remanded. For example, there is no provision to remand the case based on changes in the law that now require further factfinding,[11] nor is there an ability to remand based on the IJ's failure to develop the record, even if the noncitizen appeared *pro se* before the IJ. If the respondent did not know what they needed to present to carry their burden, they would not have "attempted to adduce the additional facts before the immigration judge" as would be required for the BIA to remand a case by the proposed rule. Moreover, proceedings could only be remanded if the IJ's factual findings were "clearly erroneous," again leaving no ability for the BIA to remand if the IJ's fact findings were simply inadequate. We are very concerned that immigration judges, faced with performance metrics that require them to adjudicate 700 cases per year,[12] would have little incentive to take the time to develop the record in *pro se* cases where there is no possibility that the case could be remanded for failure to do so.

To illustrate the negative impact this proposed rule would have on immigrant survivors if the BIA would be deprived of their ability to remand cases to the IJ, consider the case of one of our

[11] For example, in the past three years, decisions by the Attorney General have substantially altered accepted norms in asylum law. As a result of Matter of A-B- and Matter of L-E-A-, every particular social group must be proved through the three prong cognizability test. There are many cases pending at the BIA which predated at least one of these decisions where the IJ may have relied on precedent in effect at the time. The intervening precedent requires remand so that asylum-seekers can present evidence in the first instance that the IJ did not require at the time of the hearing. Under the proposed rule, there is no ability for the BIA to remand for this reason.

[12] *See*, CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018) https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas.

clients, who is an approved VAWA Self-Petitioner with a final order of removal issued in absentia. Our client was unrepresented when she was initially ordered removed and never received notice of her immigration court hearing, nor of her final order of removal. Later, she filed a VAWA Self-Petition based on having been physically and psychologically abused by her United States citizen husband, which was granted. Our client wants to legalize her status and stabilize her situation. She proactively filed a motion to reopen, but the IJ denied it with a one-sentence statement that good cause had not been established, with no other reasons or facts cited in the opinion. Upon appeal, the BIA found that the IJ's decision did not contain sufficient findings of fact and conclusions of law to allow for meaningful appellate review. The BIA stated that the IJ had not addressed with particularity the contentions raised by our client her motion to reopen. The BIA remanded the case to the immigration court for further consideration of the motion to reopen. While the master calendar hearing remains pending due to the COVID-19 pandemic, were this proposed rule to go into effect, our client would be without recourse and would be deported. This would traumatize her further, after having already endured the pernicious trauma of the domestic violence she suffered at the hands of her now United States citizen ex-husband. She could also run the risk of being separated from her minor children, all United States citizens, who would have to go live with their abusive father.

8 CFR § 1003.1 (d)(7)(iii), (iv)—The Proposed Rule Would Prevent the BIA from Remanding Cases in Most Circumstances and Would Improperly Limit the IJ's Review When the Case Is Remanded

This section of the proposed rule, combined with section 8 CFR § § 1003.1(d)(3)(iv) discussed above, would strip the BIA of its ability to remand cases in most circumstances. The BIA would be barred from remanding in "the totality of circumstances" or *sua sponte*, unless there is a jurisdictional issue. Put simply, if a Board Member sees that there was a grave injustice in the adjudication by the immigration judge, but the record was not sufficiently developed to grant relief, the BIA will have no choice but to uphold the denial.

Furthermore, the BIA would be barred under the proposed rule from remanding even if there is a change in the law, unless the change affected grounds of removability—under the proposed rule, there would be no ability for the BIA to remand based on new grounds of relief available to the noncitizen. Thus, for example, an asylum seeker could have been denied based on existing law at the time of the immigration hearing, Congress or the circuit court, may have changed the asylum eligibility criteria while the appeal was pending, making the asylum seeker potentially eligible for relief, but the BIA would be foreclosed from remanding the case to the IJ.[13] We strongly oppose this provision, which would result in the BIA upholding almost all decisions that come before it. As a result, thousands of noncitizens would be left in permanent limbo, such as individuals with withholding of removal who could never reopen proceedings even if they have an approved immediate relative petition or receive derivative asylum status through an immediate relative.

The proposed rule would further severely limit the issues that an IJ could consider if a case is remanded. Under 8 CFR § 1003.1 (d)(7)(iv), the BIA would be authorized to remand a case to

[13] Of course, in such a circumstance, if the record was sufficient to grant, the BIA could do so, but if further factfinding were required, the applicant would be foreclosed from relief.

the IJ and the IJ could not consider any other issues beyond the issue(s) specified on remand, even though the BIA would simultaneously divest itself of jurisdiction. Thus, if a new avenue of relief became available in the intervening months or years when the noncitizen is waiting for a new individual hearing, or if the noncitizen identified another error in the prior decision, the IJ would be foreclosed from considering those issues. The result would be to tie the IJ's hands to order removal even when there is an avenue of relief available and to deprive the noncitizen of the opportunity to seek all available opportunities to obtain legal status.

At Bay Area Legal Aid, we have had undocumented, immigrant survivor clients contact us for representation in a restraining order proceeding. We evaluate all immigrant survivors for potential eligibility for humanitarian relief. At times, the clients are not initially eligible for such relief but may become so during our representation in another matter. For example, several of our clients who received our help in obtaining a domestic violence restraining order against their abuser were not eligible at first for U nonimmigrant status because they had not made a police report about the abuse. Nevertheless, their abusers violated their restraining orders. Our clients reported the violations and assisted law enforcement in the resulting investigations and/or prosecutions. Such violations fell into the category of domestic violence, which is a qualifying crime for U nonimmigrant status, rendering our clients eligible for such relief. At least two of our clients and their derivative children obtained U nonimmigrant status. They have since obtained lawful permanent residence. One such client has naturalized.

8 CFR § 1003.1 (d)(7)(v)—The Proposed Rule Creates a Double-Standard, Allowing the BIA to Remand a Case at Any Time Based on Derogatory Evidence the Government Presents, While Explicitly Preventing Remand for New and Favorable Evidence Presented by Noncitizens

8 CFR § 1003.1 (d)(7)(v) specifies that the BIA cannot remand a case when a noncitizen presents new evidence on appeal; instead the only avenue to potentially present new evidence is through a motion to reopen. We are concerned about the effects of this proposed rule on *pro se* respondents who may incorrectly label their submissions to the BIA and be foreclosed from consideration of their new evidence as a result.

Pro-se litigants face extraordinary challenges in defending themselves in removal proceedings. Many, new to the United States, lack knowledge about the judicial system and institutions they must navigate. Limited English proficiency and in some cases limited literacy skills in any language are additional obstacles as well as limited financial resources which prevent them from hiring counsel or interpreters. These obstacles are compounded by the extraordinary trauma that many pro-se litigants have suffer, as a result of persecution in their home countries and in many cases from the additional hardships of the migration journey itself. Post-Traumatic-Stress-Disorder (PTSD) can severely disrupt day-to-day life and interfere with basic administrative tasks.[14] A survivor with PTSD may find it very difficult to cope at all. Making phone calls and scheduling appointments to seek legal services becomes impossible, let alone filling in forms and compiling supporting documentation. Furthermore, many may fear and distrust seeking

[14] *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution*. Tahirih Justice Center. October 2009. https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf

assistance from government officials due to having been persecuted by the government in their home country.

Further, there is no justification for respondents having to formally move to reopen while allowing the government, which will always be represented by counsel, from obtaining a remand without making a formal motion. This double standard gives the appearance of impropriety and favoritism toward one party in the proceedings.

8 CFR § 1003.1 (e)(1), (8)—The Proposed Rule Favors Speed over Fairness

Under the proposed rule, initial screening for summary dismissal must be completed within 14 days of filing and a decision must be issued within 30 days. Given the number of cases pending before the BIA, we are concerned that this mandatory timeframe will lead to erroneous dismissals. The BIA staff conducting initial screening would not know until they have screened the case whether or not it falls within one of the eight categories that could be summarily dismissed. Adding arbitrary, mandatory adjudication timeframes will put pressure on the screeners to review cases quickly rather than accurately and may result in erroneous dismissals.

For cases not subject to summary dismissal, the proposed rule, 8 CFR § 1003.1 (e)(8), creates mandatory adjudication deadlines, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single Member or three Member decision. We are concerned that these timeframes are mandatory and that Board Members will make mistakes as they emphasize speed rather than fairness in reviewing case records.

8 CFR § 1003.1(e)(8)(v) requires any case that has been pending for more than 355 days to be referred to the Director for him to render a decision. The proposed rule also specifies that the Director cannot further delegate this authority. Given that at the end of fiscal year 2019 there were over 70,000 cases pending before the BIA,[15] a body comprised of 23 Members, each Member would have to complete 3,043 cases per year to comply with the 355-day deadline. It would not be possible for Board Members to adequately review this number of cases in this timeframe. Moreover, since it is faster for a single Member to affirm an IJ decision than for that Member to refer a case for three-Member review (which is required to overturn an IJ decision), the Board Members will have an incentive to decide and deny cases themselves rather than determine that the cases require three Member review.[16]Furthermore, this section of the proposed rule essentially creates a "mini-attorney general" allowing the Director, a political appointee, rather than a career adjudicator, to personally adjudicate hundreds or thousands of cases.

8 CFR § 1003.1(k)—The Proposed Rule Would Allow IJs Who Disagree with BIA Remands to Certify Those Cases to the EOIR Director, Further Politicizing EOIR

[15] *See* DOJ, *EOIR Adjudication Statistics*, https://www.justice.gov/eoir/page/file/1248501/download.

[16] The National Immigration Judges Association has questioned whether performance quotas conflict with the judicial canon of ethics. *See* National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* at 8 (Apr. 18, 2018) ("In addition to putting the judges in the position of violating a judicial ethical canon, such quotas pits their personal interest against due process considerations.")

We strongly oppose the so-called "quality assurance" provision proposed by 8 CFR § 1003.1(k). This provision would allow IJs who disagree with a BIA remand, to certify the case to the EOIR Director, a political appointee. Rather than promoting "quality assurance," this proposed rule undermines the integrity of the BIA. Any adjudicator who is overturned on appeal or who receives a remand, may disagree with the decision of the appellate body, but it is fundamental to our system of jurisprudence that appellate bodies have authority to review decisions by triers of fact. While the proposed rule states that the process should not be used "as a basis solely to express disapproval of or disagreement with the outcome of a Board decision," the bases on which an IJ can certify a case to the Director are so broad—including, for example, that the IJ believes that the BIA decision is contrary to law, or is "vague"—that an IJ who simply disagrees could construct an argument that would fall under these rules.[17] Rather than promoting quality assurance, this proposed rule would undermine the authority and integrity of the BIA and allow IJs who are ideologically aligned with the Director to circumvent the BIA.

8 CFR § 1003.2(c)(3)(vii)—The Proposed Rule Would Remove Time and Number Limitations on Motions to Reopen by the Government, but Not by Respondents

Under 8 CFR § 1003.2(c)(3)(vii), DHS would be specifically exempted from time and number bars on motions to reopen before the BIA, while noncitizens would be bound by these strict limitations. EOIR is an adjudication system and as such it should not apply different rules to the two parties that appear before it. While the government may in some instances have good cause to file beyond time and number limitations, noncitizens also have good cause to do so when, among other reasons, new relief becomes available, when they suffered ineffective assistance of counsel in the past, or when extraordinary circumstances warrant reopening. Moreover, the reason for the time and number limitations is that courts generally favor finality of judgments. By allowing the government to move to reopen with no limitations whatsoever, no litigant who ever appeared in immigration court could ever feel fully secure that the grant of relief they received from the court will not be relitigated in the future.

Ultimately, this section of the proposed rule creates a disincentive for immigrant survivors to participate in the process. Those who would come forward to reopen their cases to seek humanitarian relief will be denied and potentially removed, thereby punishing them for seeking relief. Some survivors may just choose to remain with their abusers and suffer in silence to ensure that they can remain in the United States and are not separated from their minor United States citizen children.

8 CFR § 1003.2(a) and § 1003.23(b)(1)—The Proposed Rule Would Largely Eliminate the BIA's and the Immigration Judge's *Sua Sponte* Authority to Grant Motions to Reopen

The proposed rule, 8 CFR § 1003.2(a), would remove the existing sentence, "The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."

[17] It was precisely this type of irregular procedure that led to the attorney general's decision in *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018). In that case, the BIA had remanded a decision to Judge Couch after he had denied asylum to a woman who had survived domestic violence. *See* Center for Gender and Refugee Studies, *Backgrounder and Briefing on Matter of A-B-*, (Aug. 2018), https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b.

In its place, the proposed rule would only allow the BIA to reopen proceedings based on a motion filed by one of the parties. Given the constraints on motions to reopen filed by noncitizens, this provision would greatly reduce respondents' ability to have motions to reopen granted that are untimely or that are number-barred, even in circumstances where the noncitizen could not have filed the motion earlier. Under the rules, with very limited exceptions, a noncitizen may only file one motion to reopen and must file that motion within 90 days of the final order. As a result, noncitizens who later become eligible for relief, for example, noncitizens who obtain an approved immediate immigrant relative petition, an approved application for SIJS status, or derivative asylum status through a spouse or parent, would be foreclosed from reopening their removal orders.

Furthermore, this proposed rule, like the others in this rulemaking, would eliminate the discretion of Board Members to remedy injustices. Even if a Board Member sees that there is a good reason to reopen a case or that failing to do so would result in a manifest injustice, this rule would strip the BIA of its authority to reopen.

Similarly, proposed 8 CFR § 1003.23(b)(1) would eliminate the sentence, "An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." In its place, would be a similar change to the BIA rule change, only allowing the IJ to reopen on their own motion to correct a typographical or ministerial error. As with the BIA, the IJ would only be permitted to reopen a case if one of the parties moves for reopening, however, such motions are subject to time and number bars, for respondents. Thus, even if a noncitizen becomes eligible for relief, the IJ would be unable to reopen the proceeding in most circumstances without relying on the *sua sponte* authority which the proposed rule would eliminate. On the other hand, DHS is not subject to time and number bars in submitting motions to reopen, thus unfairly allowing one party access to further EOIR review while permanently shutting out the other.

Certain immigrant survivors who have obtained humanitarian relief may be unable to have final orders of removal be terminated because they are time-barred or because the DHS attorney may refuse to join a motion to reopen for no good reason. In those instances, the IJ having sua sponte authority to reopen a case may be the only recourse for a survivor to get their final orders of removal terminated so that they can adjust status, travel outside the United States and/or naturalize. Thus, the proposed rule creates further challenges and destabilization for immigrant survivors and punishes them for being the victims of abuse and/or exploitation and seeking humanitarian relief.

8 CFR § 1003.3(c)—The Proposed Rule Would Upend Ordinary Appellate Practice

As with many of the proposed rules in this NPRM, 8 CFR § 1003.3(c) would privilege speed over fairness. In almost every appellate adjudication system in the United States, the appellant files a brief and the appellee is then able to respond to the arguments raised in that brief.[18] The prejudice in the proposed rule to the appellee, who will not know what argument to focus on in

[18] We acknowledge that the BIA already has simultaneous briefing in cases where the respondent is detained, but understand the greater need for adjudication speed where the respondent's liberty interest is at stake.

their brief, far outweighs any alleged efficiency that EOIR would gain through this process. In many cases, an appellant may include multiple issues in their Notice of Appeal but only brief one or two of those issues. With simultaneous briefing, the appellee would have to address every issue raised in the Notice of Appeal, even if those issues are never briefed. This is unfair to the appellee, and would result in overburdened counsel for both respondents and DHS having to brief issues that will never be considered by the BIA. Furthermore, if there are many issues raised in the Notice of Appeal, there is a greater likelihood that the appellee will have to submit a motion asking to enlarge the page limit on their brief so that they can address issues that may never be raised in the appellant's brief, further resulting in wasted resources by the BIA in adjudicating these motions.

The proposed rule would also make it almost impossible to file a reply brief. The rule would allow only 14 days to file a reply brief, with the BIA's permission, but the 14 day period would begin running from the due date of the initial brief. Since there is no requirement that the parties receive the other party's brief on the due date, it is common practice for respondent's counsel and DHS to serve their briefs on opposing counsel via regular mail. Since there is not a universal e-filing system at EOIR, litigants must rely on the U.S. postal service or private courier services to make paper filings. In the best of circumstances, it often takes five days to receive mail from the U.S. postal service, and there are currently historic delays occurring at the U.S. postal service,[19] which mean that the opposing party may not receive the other party's brief until just before the 14 day timeframe has run out. To file a reply brief, the appellant would need to file a motion seeking leave to file a reply and file the reply brief within a few days from receiving the opposition brief. This timeframe would make it virtually impossible for a practitioner, who would have to drop all other case work to comply, to ever file a reply brief.

Finally, this section of the proposed rule would greatly reduce the amount of time that the BIA is permitted to give for extensions. Under the current rule, the BIA is authorized to give up to 90 days to file a brief or reply brief for good cause shown. Despite this regulatory allowance, it has been longstanding practice of the BIA to generally only give a 21-day extension upon request.

Under the proposed rule, this time frame would be slashed to a maximum extension of 14 days, with only one possible extension permitted. As with the issues discussed above concerning reply briefs, by the time an appellant receives a response as to whether or not the extension is granted, the 14 days would likely be almost expired. Moreover, where a litigant successfully demonstrates "good cause," there may be many issues that prevent filing within 14 days, including serious medical issues or a death in the family. There is no reason to eliminate the BIA's authority to grant any extension beyond 14 days no matter how exigent the circumstances may be.

We are very concerned that these time restrictions will lead to fewer noncitizens who appeared *pro se* in immigration court finding counsel for their appeals. It is extremely difficult for an attorney who did not appear before the immigration court to decide whether or not to take on an appeal before they can review the transcript. These difficulties are further exacerbated for

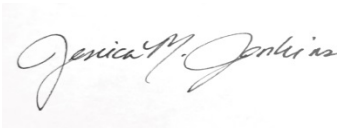
[19] Todd C. Frankel, *Postal Problems Could Continue Despite Suspension of Policies Blamed for Mail Delays*, THE WASHINGTON POST, Aug. 19, 2020, https://www.washingtonpost.com/business/2020/08/19/postal-problems-could-continue-despite-suspension-policies-blamed-mail-delays/.

individuals in detention facilities who likely have to mail copies of the transcript to potential counsel, which adds more delay while the 21-day clock is ticking. If attorneys cannot receive a reasonable extension to review the record and prepare a quality brief, it is unlikely they would take on the case, thus leaving more noncitizens without counsel during an appellate process in which they are very unlikely to succeed on their own.

Conclusion

These proposed rules rewrite many aspects of long-established immigration court and appellate practice. The agency should have given the public at least 60 days to respond to these far-reaching changes and, therefore, should rescind the rulemaking on this basis alone. Substantively, the proposed rules would prize speed over fairness. The proposed rules will make it more difficult for unrepresented noncitizens to obtain counsel, and more difficult for unrepresented noncitizens to prevail on appeal. They will further make it more difficult for noncitizens to successfully reopen proceedings, even when they have relief available, unfairly establishing finality when there are removal orders, but allowing DHS to reopen cases with no limitations. The proposed rules would strip the BIA of authority, especially its discretionary authority, while vesting further power in the EOIR Director. If published in their current form, the proposed rules will further erode due process in immigration court and BIA proceedings. We urge you to rescind them.

Thank you very much for your consideration of our comments. Should you have any questions, you can contact us at MSaint-Saens@baylegal.org or at (510) 903-2611.



Jessica Jenkins, Esq.
Senior Immigration Staff Attorney

Mélody Saint-Saëns, Esq.
Regional Immigration Counsel