HUMAN RIGHTS INITIATIVE OF NORTH TEXAS

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

On behalf of Human Rights Initiative of North Texas (HRI), I submit this comment in response to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) proposed rule, entitled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" initially published in the Federal Register on August 26, 2020 (hereinafter "proposed rule").

HRI is a non-profit legal services agency that represents people fleeing humanitarian abuses from all over the world. Our clients include asylum seekers, immigrants who are survivors of violence and abuse here in the United States, and immigrant children who have fled abuse, abandonment and neglect in their own countries. HRI represents immigrants in removal proceedings and, when required, in matters before the Board of Immigration Appeals (BIA). HRI is increasingly representing clients in matters before the BIA as immigration policy changes have made it even more difficult for immigrants to win the relief to which they are entitled at the immigration court level.

For the reasons outlined in detail below, we strongly oppose the proposed changes.

The rule advances the Administration's oppressive agenda of creating unnecessary procedural barriers for individuals with matters in immigration court or before the BIA, eroding due process and further eviscerating their right to just and fair proceedings. Immigrants who have experienced violence—including horrific domestic violence, sexual assault, and other forms of gender-based abuse—often must navigate a

complex and confusing immigration court system to plead their case. As such, survivors who have a strong case for protection may nevertheless have their case denied, especially if they are unrepresented. The stakes are high: survivors whose cases have been diend are often deported back to extremely dangerous—even life-threatening—situations. It is therefore crucial that immigration proceedings provide all immigrants every opportunity for their fair day in court.

I. DOJ's Timeline for Comments is Insufficent

The proposed rule is extremely problematic in both substance and in form. Executive Order 12866 provides that agencies "should afford the public a ***meaningful opportunity*** to comment on any proposed regulation, which in most cases should include a comment period of ***not less than*** 60 days." DOJ has placed unjustified administrative and personal burdens on organizations like ours by repeatedly providing such an inadequate timeframe in which to submit comments. The importance of a sufficient comment period is even more critical due to the extraordinary changes to working conditions caused by the COVID-19 pandemic.

HRI continues to work remotely due to the COVID-19 pandemic which has impacted our ability to coordinate with other staff, respond to inquiries by potential clients and current clients, and access the resources required in preparing cases. In requiring a 30-day comment period, the DOJ is exploiting the negative impact working remotely has had on immigration advocates by purposefully limiting the comment period so that advocates are not afforded a meaningful opportunity to review the proposed rule and respond in full.

II. The Proposed Rule will Create Unjust Barriers for Immigrants

Over the last several years, DOJ has created significant barriers to immigration relief in a variety of ways—some by way of seismic regulatory overhauls like the asylum rule published on June 15, 2020, others through certification procedures, and other discrete and calculated procedural shifts. This proposed rule is DOJ's latest attempt to leverage bureaucracy to limit access to protections.

A. Limits to Administrative Closure

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. This change would hamper BIA and immigration judges' ability to justly manage their caseload and place additional pressure on them to unnecessarily and prematurely issue removal orders.

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. Immigrants in removal proceedings often have applications pending with the United States Citizenship and Immigration Services (USCIS) while they are simultaneously in removal proceedings. Their applications pending before USCIS

could provide them with a lawful pathway to remain the United States. Historically, immigration judges administratively closed cases to give USCIS the time needed to adjudicate those applications. Following a decision from USCIS, either the immigrant or the Department of Homeland Security (DHS) could move to reopen the case to complete the removal proceedings. This process allowed immigration judges to prioritize cases ripe for adjudication. ***Given the reality of the backlog of cases for both USCIS and EOIR, administrative closure is a reasonable, practical, fair, and efficient tool for immigration judges and the BIA.***

Preventing immigration judges from using that tool will result in deporting immigrants who otherwise have a lawful pathway to stay in the United States. This particularly negatively impacts immigrants who are survivors of violence. Upon deportation, survivors will face hardships including:

- Lack of access to social services, counseling, and safe housing;
- Renewed threats from abusers in countries where protection from domestic and sexual violence may be inadequate or nonexistent;
- Loss of child custody/separation from children or being forced to leave children in the custody of an abuser; and
- Challenges to receiving and responding to critical case correspondence such as requests for additional evidence.

Eliminating administrative closure also harms government interests by directly thwarting Congressional intent in creating survivor-based immigration protections.

We represent immigrants who are eligible for U visas because they are survivors of crime in the United States, who are eligible for VAWA because they are survivors of domestic abuse at the hands of US citizens or Legal Permanent Residents, and immigrant children who are eligible for Special Immigrant Juvenile Status (SIJS) because of the abuse, abandonment or neglect they suffered in their home countries. All of those applications must be filed with USCIS. A subset of U visa and VAWA clients and the vast majority of immigrant children eligible for SIJS are also in removal proceedings.

Congress created those visas because they felt strongly the need to protect immigrants who are survivors of violence. Prohibiting the use of administrative closure flies in the face of Congressional intent because it will place those immigrants back in dangerous situations. For example, if an immigrant child who was granted SIJS but was deported by EOIR before her priority date was current because the immigration judge could not administratively close the case to wait out the priority date, that child will be returned to the very abusive situation she fled that was the basis of the approval of the SIJS. The result is illogical, unfair, and unjust.

The proposed rule's provisions on administrative closure waste DOJ and Department of Homeland Security (DHS) time and resources, unnecessarily contributing to significant backlogs instead of reducing them. In addition, the proposed rule will squander USCIS's limited resources

as applicants will seek expedited review of their matters before they are deported, adding to USCIS's backlog and processing delays.[1]

B. Erosion of Due Process

The proposed rule further erodes due process and harms immigrants by giving more power to non-neutral political appointees. The rule inappropriately allows immigration judges to ask the Attorney General (AG) to review its decisions when they are overruled by the BIA. The AG could then reinstate a judge's decision, upending long standing legal precedent to promote a specific political ideology, as former AG Sessions did in *Matter of A-B-* by narrowing standards for asylum claims involving domestic violence. Moreover, because the proposed rule would prohibit the BIA from remanding cases where there has been a change in the law, immigrants would have no opportunity to submit evidence to meet the new legal standard they will be held to.

The legitimacy of the immigration system requires a neutral, non-partisan adjudication process. Giving the AG more power to single-handedly upend long standing legal precedent is neither neutral nor non-partisan. The AG is not an immigration court judge or a BIA judge and should not have the ability to create case law. If DHS does not agree with the BIA's decision to overturn an immigration judge's decision, it should have to follow the same process an immigrant has to follow: appeal to a circuit court. Providing the Administration with a one-sided opportunity to review a decision because it does not agree from a policy standpoint violates Due Process, which is a central tenet of our judicial system.

C. Limits on Briefs

8 CFR § 1003.3(c) would privilege speed over fairness. The proposed rule drastically limits the time allowed to file and respond to appellate briefs. Under the proposed rule, there will be a very short window of time within which respondents, including survivors, can prepare their own and respond to DHS's legal arguments. This will make it much harder for immigrants to retain pro bono counsel for their appeals, or to convince current counsel to continue representation.

In addition, the limits on briefing deeply prejudice gender-based asylum claims in particular as these cases involve 1) highly technical legal arguments requiring sufficient time to adequately develop; and 2) sensitive facts that survivors of severe trauma need time to process before recounting.

Furthermore, these limits on briefings will result in swift, unlawful refoulement (return) of asylum seekers in violation of US obligations as a state party to the Refugee Convention.

[1] *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.

D. Limits on Remanding for Further Fact Finding

The proposed rule at 8 CFR § 1003.1(d)(3)(iv) would prevent the BIA from remanding cases for further fact-finding in all but the most limited circumstances. 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.

Consequently, it will allow immigration judges to circumvent their duties with impunity. Immigration judges have a duty to fully develop the record, as the BIA recognized in *Matter of E-F-H-L* (vacated on other grounds by *Matter of E-F-H-L-*, 27 I&N 226 (A.G. 2018)). The BIA also recognized this obligation in *Matter of W-Y-C & H-O-B*, where it held that an immigration judge has a duty to "seek clarification" where the respondent's particular social group (PSG) is not clear and to "ensure that the PSG being analyzed is included in his or her decision." 27 I&N Dec. 191 (2018) (quoting *Matter of A-T-*, 25 I&N Dec. 4, 10 (BIA 2009)). In those cases, the BIA remanded the case back to the immigration judge for further fact-finding. Under the proposed rule, they will be unable to do so, resulting in a significant miscarriage of justice.

Circuit courts have also recognized this duty of immigration judges specifically in regard to pro se litigants and have supported remands for further fact-finding. The Ninth Circuit in *Jacinto v. INS* found, "judges "'must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited'" in the cases of pro se litigants. 208 F.3d 725, 733 (2000) (quoting *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985)). The Second Circuit in *Secaida-Rosales v. INS* found "the circumstances surrounding the [asylum] process do not often lend themselves to a . . . comprehensive recitation of an applicant's claim to asylum or withholding, and . . . holding applicants to such a standard is not only unrealistic but also unfair." 331 F.3d 297, 308 (2003), *abrogated in part by* 8 U.S.C. § 1158(b)(1)(B)(iii). Immigration law is complex, and many respondents end up representing themselves before the court. It follows, and the regulations recognize, that immigration judges often have to explain the respondents' rights, the law, and develop the record to ensure due process is met. The proposed rule would impermissibly tie the hands of the BIA to remand for further fact-finding when it is obvious the immigration judge failed in his duty to develop the record.

This is particularly alarming in removal proceedings for immigrants living in Mexico under the Migrant Protection Protocol program. There, immigrants are living in tent camps, unable to access legal representation, and with an already severely diminished ability to obtain the evidence necessary to prove their claims. Further limiting the ability of the BIA to review appeals and prohibiting the submission of new evidence ensures those immigrants will never see a fair day in court.

E. Limits on Reopening and Remanding

8 CFR § 1003.1 (d)(7)(iii), (iv) 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. 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. For example, if Congress or a circuit court changes asylum eligibility while the appeal is pending, making an asylum seeker eligible for relief that the immigration judge rejected, the BIA would be foreclosed from remanding the case back to consider the change in law. The resulting effect is unjust and contrary to established norms of jurisprudence.

The proposed rule would further severely limit the issues that an immigration judge could consider if a case is remanded. Under 8 CFR § 1003.1 (d)(7)(iv), in the limited instances where the BIA would be authorized to remand a case, the immigration judge 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 was waiting for a new individual hearing, or if the noncitizen identified another error in the prior decision, the immigration judge would be foreclosed from considering those issues. The result would be to tie the immigration judge'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.

III. Conclusion

There are myriad issues of concern to our organization that we simply do not have the time nor capacity to address in this comment given the extremely restrictive comment deadlines. We deeply oppose the proposed rule due to the significant, unique, and extremely harmful impact it would have on survivors of violence and pro se applicants. We call on DOJ to promptly withdraw the proposed rule in its entirety.

Thank you for considering these comments in response and **opposition** to this proposed rule. Please contact me at pferguson@hrionline.org or 214-855-0520 to provide any additional information you might need.

Respectfully,

/s/ Pilar Ferguson
Pilar Ferguson
Asylum Program Director