

September 25, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
Department of Justice

Andrew Davidson, Asylum Division Chief
Refugee, Asylum and International Affairs Directorate
U.S. Citizenship and Immigration Services
Department of Homeland Security

**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**

Dear Assistant Director Reid and Division Chief Davidson:

HIAS respectfully submits this comment in response to the Department of Justice, Executive Office for Immigration Review (DOJ/EOIR) proposed rule (Proposed Rule), *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*.¹ Issued on August 26, 2020, the Proposed Rule would strip important due process rights from noncitizens before the immigration court and Board of Immigration Appeals (BIA). The Proposed Rule would dramatically reshape the immigration court system by restricting the ability of immigrants to mount an effective appeal, stripping them of second chances, and putting unprecedented power in the hands of a single employee.

HIAS opposes the Proposed Rule in its entirety because it 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.

We also wish to note that the Department did not provide enough time for the comment period in response to this Proposed Rule. 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."² There is no reasonable justification that the public was not given 60 days to provide comment at this time. Additionally, the shortened comment period presents particular 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.

HIAS objects to restrictive changes to the U.S. asylum system, such as those proposed in this Proposed Rule, because we are the American Jewish community's refugee organization. We were founded in

¹ <https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure>

² [Emphasis added]. Executive Order 12866 58 Fed. Reg. 190 (September 30, 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

1881, making us the oldest refugee serving organization in the United States. For much of our history, we assisted Jewish refugees. However, as the nature of refugee flows and crises changed, so did our work. We now work with refugees, asylum seekers and other forcibly displaced people, of all faiths from around the world. We partner with the U.S. federal government, as well as a network of 17 local organizations, and vast networks of community supporters, in welcoming resettled refugees to the United States.

HIAS also seeks to secure various forms of humanitarian relief for the clients we serve in the New York and Washington, DC metro areas. Our clients include asylum seekers, as well as abused and neglected children, and survivors of human trafficking and other violent crimes. Many of our clients are children and women who were forced to flee gang violence, as well as LGBTQ individuals whose governments refused to protect them. In addition, HIAS serves asylum seekers on both sides of the U.S./Mexico border. Through our robust pro bono program, and with the assistance of our four offices in Mexico, we provide legal support services to asylum seekers stuck in Mexico due to the Migration Protection Protocols (MPP), and refer cases to our legal fellows on the U.S. side of the border in California and Texas, as well as pro bono attorneys across the country.

For the reasons that HIAS details below, the Department should immediately withdraw the Proposed Rule in its entirety.

Please do not hesitate to contact HIAS with any question or for further information.

Sue Kenney-Pfalzer

Director, Border & Asylum Network, HIAS

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). By stripping adjudicators of the ability to prioritize and deprioritize cases, the proposed rule wastes DOJ and Department of Homeland Security (DHS) time and resources, unnecessarily contributing to significant backlogs instead of reducing them and preventing adjudicators from managing their own dockets.

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,³ 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.

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.

601A waivers would be unavailable for people in removal proceedings without administrative closure. The INA was not written to prohibit people in removal proceedings from being able to pursue a 601A waiver, and such a change in regulations would cause more stress on the immigration courts and the immigration judges. HIAS attorneys have had multiple clients who benefitted from administrative closure because it enabled them to apply for a 601A provisional waiver. Several clients who now have approved I-130 petitions benefitted from administrative closure, and two clients were able to get Temporary Protected Status (TPS) due to administrative closure, then were able to receive asylum after filing affirmative applications.

A HIAS attorney had a Mexican client with a spouse and children who were U.S. citizens. The client was granted a U-visa and his removal proceedings were administratively closed. USCIS granted him a 601A waiver because they found that his spouse and children would suffer

³ 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>.

extreme hardship if he was not granted a waiver. If administrative closure were not an option for him, and he was able to voluntarily depart the United States, he would have had to go through the process at a consulate to file a 601 waiver. This would have caused him to be separated from his family for one to two years, causing them to suffer extreme hardship. If he were not offered voluntary departure and instead ordered removed, he would have had to wait in Mexico for 10 years and apply for an I-212 waiver before he would be able to come back to the United States to join his wife and children.

Another HIAS attorney has a client from Honduras whose wife is a Legal Permanent Resident and they have a U.S. citizen child. He submitted an I-130 petition, relying on the 601A waiver being available to him. He also has a pending asylum application because he has a fear of persecution in Honduras but he is willing to go back if it would only be short trip with the promise of returning to the U.S. as a permanent resident, but not if it's going to take months or years. As he is the primary breadwinner for the family, any time away would be devastating for his family and they will likely be forced to apply for public benefits. If he's not able to pursue a 601A waiver, he will have to continue to pursue his asylum claim, thus adding to the court backlog.

HIAS' partner organization, ProBAR, assisted a client to obtain DACA and later the client's removal proceedings were administratively closed upon joint request by the parties. The request was not on the basis of a judicially approved settlement agreement, or an existing regulation allowing for administrative closure, as would be required by the proposed rule. DACA is of course not identified as a regulation or judicially-approved settlement that would permit administrative closure in the Attorney General's opinion in *Matter of Castro-Tum*, <https://www.justice.gov/eoir/page/file/1064086/download>, pp. 6-8.

ProBAR also represented an unaccompanied minor and filed an affirmative asylum application with USCIS on her behalf. As a result, her removal proceedings were administratively closed as she awaits her asylum interview. The client has been able to live a normal life because she has maintained a work permit.

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.⁴ The proposed rule would specifically strip the BIA of the ability to remand a case *sua sponte* for further fact-finding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction.

⁴ 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>.

For noncitizens who are unrepresented, the consequences of the proposed rule are even more dire. A recent national study found only 37% of immigrants facing removal were represented by an attorney in cases in immigration court. Additionally, about 86% of immigrants in detention went unrepresented. It is already exceedingly difficult for respondents without counsel to navigate the enormous complexity of the U.S. immigration system. Under the proposed rule, unrepresented asylum seekers who have a strong case for protection may nevertheless be denied.

Under the proposed rule, 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 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 fact-finding 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 fact-finding would alter the outcome or disposition of the case;
- (4) The additional fact-finding 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 fact-finding,⁵ 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.

⁵ 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.

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,⁶ 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.

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.⁷ 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 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.

⁶ See, CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018) <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>.

⁷ 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.

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.

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,⁸ 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.⁹ Furthermore, this section of the proposed

⁸ See DOJ, *EOIR Adjudication Statistics*, <https://www.justice.gov/eoir/page/file/1248501/download>.

⁹ 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*

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

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.¹⁰ 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 re-litigated in the future.

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.”)

¹⁰ 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>.

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.” In its place, the proposed rule would only allow the BIA to reopen proceedings based on a motion filed by one of the parties. The rule claims that this change is necessary to “bring finality to immigration proceedings,” but it ignores an equally important goal of immigration law: ensuring due process. *Sua sponte* motions to reopen/reconsider are a vital tool for curing errors and injustices that may have occurred during removal proceedings and allow judges to grant relief to immigrants who qualify. Eliminating access to this key safety net will lead to intolerable results.

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.

Sua sponte motions to reopen allow respondents to get an immigration judge to weigh in on the merits of reopening, like with U visa approvals, when DHS stonewalls. Without it, DHS could force people with approved U Visas wishing to adjust status to forever have removal orders that shouldn't be on their records. It also bars them from naturalizing because they're still in proceedings if they have an unexecuted removal order.

A HIAS attorney had two clients who needed Motions to Reopen and Terminate because of approved Violence Against Women Act (VAWA) petitions. Essentially, both clients started the immigration process with their abusive spouses who then stopped participating. In one of the cases, the wife knew she had court but was too scared to go and was ordered removed in absentia. In the other case, the husband hid the court notices and the client was ordered removed without ever knowing she was in removal proceedings. The HIAS attorney only found out seven years later because he checked with the automated case information number using the alien number from the client's old work permit. In both cases, DHS didn't submit an opposition, but wouldn't sign on to a joint motion. Because the court granted the Motions to Reopen, both women were able to adjust and one is now a U.S. citizen.

Another HIAS attorney has a client who has lived in the U.S. for more than twenty years and has U.S. citizen children. His wife is a stay-at-home mother and he is the primary breadwinner for the family. He was the victim of a crime that made him eligible for a U Visa, and he also became eligible for asylum due to changed personal circumstances as well as issues with the service of his Notice to Appear and subsequent hearing notices by the court, and he is now eligible for EOIR 42B Cancellation of Removal. He was arrested at a routine check-in, when his wife was eight months pregnant with their daughter. He was detained for two months. The HIAS attorney filed a *sua sponte* Motion to Reopen, which was granted, and he was able to meet his baby for the first time at his bond hearing when she was six days old. Although ICE wouldn't let him hold or touch his daughter, they did let his wife stand in front of him with the baby while he wept. Since then, he has been reunited with his family and has a hearing for his Cancellation of Removal case in 2023.

The HIAS Border Fellow at ProBAR in McAllen, TX, represented a minor who had been placed in the Migrant Protection Protocols (MPP) program with his abusive father. The client's father had forced the minor client back and forth across the border using violence and threats, eventually forcing him to move to a house in McAllen. They missed their fifth MPP hearing and were order removed in absentia. The Border Fellow filed a Motion to Reopen on behalf of the minor client. The motion was granted, and the Border Fellow then filed a T-visa application for client which remains pending.

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.¹¹ The prejudice in the proposed rule to the appellee, who will not know what argument to focus on in 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

¹¹ 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.

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,¹² 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.

The proposed rule views parties as if in a vacuum without other pressing deadlines. For example, in an appeal case, an attorney at HIAS' partner organization, ProBAR, recently received the standard 21-day extension. This allowed the attorney, who was simultaneously managing other deadlines and client emergencies, to have sufficient time to review the record and brief the strongest arguments possible. Contrary to § IV.A (last paragraph) of the proposed rule, while 21 days, as opposed to 14, can make a significant difference in the time an attorney has to prepare a thorough argument for BIA review, it is unlikely the seven days' delay would

¹² 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/>.

impact the BIA's ability to expeditiously address its caseload. In fact, in light of the BIA's large caseload, allowing parties time to present thorough filings will assist the BIA in efficiently attending to its caseload.

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 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 should therefore 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.