



Migrant Center for Human Rights **Protecting the Persecuted**

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Submitted via www.regulations.gov

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RE: RIN 1125-AA93; EOIR Docket No. 19-0010; A.G. Order No. 4843-2020, Public Comment Opposing Proposed Rule on Procedures for Asylum and Withholding of Removal

The Migrant Center for Human Rights (“Migrant Center”) writes in response to the Department of Justice’s (DOJ) [Proposed Rule on Procedures for Asylum and Withholding of Removal](#) published in the Federal Register on September 23, 2020, which “seeks comment[s] on the proposed rule’s potential [impact]... to practitioners”.

The Migrant Center is a 501(c)(3) non-profit organization that provides legal services to immigrants detained at the South Texas Detention Complex, in Pearsall, Texas. This facility is the third largest in the country and holds up to 1,900 immigrants on any given day. The Migrant Center has served approximately 700 detained immigrants since July 2017, the vast majority asylum seekers. As a non-profit organization, we have extensive expertise in working with *pro se* respondents and therefore are particularly aware of the unique challenges they face in trying to obtain representation and navigate our legal process without counsel. Our first-hand experience also includes familiarity with the particular difficulties asylum seekers face in preparing their cases from inside detention. Our team’s legal expertise includes more than eight years of immigration removal defense litigation experience assisting several thousand asylum seekers and representing dozens in removal proceedings before USCIS and EOIR.



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On behalf of the detained respondents we work with, as well as our legal team, we write to urge your reconsideration of several provisions of the Proposed Rule that we have good reason to believe will have an immediate and profoundly negative effect on the constitutional due process rights of people going through our immigration judicial system, as well as a create a significant, unnecessary burden for our legal team and the immigration court system.

While the Proposed Rule's stated aim is to "effectuate congressional intent to resolve cases in an expeditious manner" this Proposed Rule will not resolve cases more quickly. Our immigration system is already set up to move cases along expeditiously; establishing arbitrary deadlines that by their very nature cannot take into account the circumstances of a particular case, as the Proposed Rule does, will only result in poorly prepared filings and a fundamental denial of due process. Our experience indicates that the Proposed Rule will at best undermine, and at worst eliminate, important due process protections that ensure the fair and just adjudication of immigration cases in an efficient and consistent manner.

Pro se individuals must be taken into account in drafting and implementing any case processing regulation. According to the Proposed Rule, as of August 14, 2020 EOIR had over 560,000 pending applications for asylum and withholding of removal and 72,800 of these respondents were *pro se*.

Access to due process for those in detention must be just as strong as for those outside detention; taking away adjudicators' ability to account for barriers to justice caused by detention, as the Proposed Rule does, is not acceptable. While, according to the Proposed Rule, 87% of respondents may have representation overall,¹ this number is only about 24% for those in

¹ The recent representation numbers for cases filed in fiscal year 2019 are significantly lower – with only about 35% of respondents having counsel overall. This is a sharp decline in percentage terms since 2018 when 57% had counsel (but is an increase in real terms from 192,451 to 223,461 cases). EOIR data available: <https://trac.syr.edu/phptools/immigration/nta/>. Historically representation rates outside detention have hovered around 66% and those inside detention average out to roughly 33%. There have recently been [issues with EOIR's data management](#) such that the reliability of the statistics necessary to get a clear picture of the issue is in some question. Nevertheless, regardless of the exact numbers, the Proposed Rule will, without a doubt, affect tens of thousands of individuals.



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detention, where obtaining any form of legal assistance is particularly challenging (for cases begun in fiscal year 2019, 79,118 out of 104,188 respondents had counsel as of August 31, 2020).

Additionally, although representation certainly assists in more quickly and accurately preparing a case, time is still required to prepare a case well with representation. Rushing attorneys may result in substandard work and make reaching a fair and just outcome more difficult for EOIR adjudicators. It will also likely result in attorneys taking less cases, to the detriment of both respondents and the judicial system, as well as to the American public that has a vested interest in the fair and just administration of the law.

Executive Order 12866, sec. (1)(b)(6) states that “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs”. The negligible benefits of the Proposed Rule certainly do not justify its costs, nor the high risk of due process violations it presents. Although the Administration states that the Proposed Rule would impose only “minimal direct costs on the public, to include the costs associated with attorneys and regulated entities familiarizing themselves with this rule”, and that there will be “[n]o costs to the Department or to respondents” this is simply inaccurate, as we explain below. The Proposed Rule additionally is allegedly “not be expected to increase any burdens on practitioners” somehow reaching the conclusion that because practitioners have a professional responsibility to manage their workload and meet deadlines, changing those deadlines will not affect their workload. At best, shortening deadlines will make it more difficult to comply with ethical duties of competent representation and at worst will result in attorneys taking less cases as they will be unable to meet these new stricter deadlines, effectively cutting off access to counsel.

Sections of the Proposed Rule not discussed below should not be taken as agreement with those sections. Furthermore, we request that the content of any hyperlinks included here be considered (all information referenced without hyperlinks, or otherwise cited, is taken directly from the Proposed Rule).



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A 15-Day Asylum Application Filing Deadline Will Create Confusion, Is a Violation of Due Process, and is Contrary to Judges' Authority

The Proposed Rule takes away judges' discretion to set application filing deadlines in line with docket management responsibilities and the needs to the respondent, and counsel if they have representation, by requiring that asylum applications be submitted 15 days after the first master calendar hearing, except for where good cause is established. A 15-day deadline is laughably unrealistic.

As a preliminary matter, the vast majority of respondents do not have legal representation at their first master calendar hearing, especially those in detention, and the first master calendar hearing may be the first time that they learn about the non-profit organizations on EOIR's list of pro bono legal service providers that may be able to assist them. In the best case scenario it takes 1-2 weeks just to contact, arrange consultations, and reach representation agreements (reviewing and signing documents) with respondents. This is especially difficult for those in detention as attorneys either need to travel several hours to meet with them or take several days to mail documents to them and then several more days to receive the documents back in the mail (or vis-a-versa). For respondents who must rely on non-profit organizations to provide *pro bono* assistance it is especially difficult to obtain help quickly as non-profits such as the Migrant Center typically have long waitlists with limited staff capacity. This rule will unfairly prejudice indigent asylum seekers who often need more time to find and contract with counsel.

Even if a respondent has an attorney at the first master calendar hearing, it will be difficult to prepare an asylum application within 15 days. First, because respondents often hire counsel only shortly before the hearing and the attorneys need time to be able to schedule the case work. Knowing that they will only have 15 days to prepare the asylum application will cause attorneys to reject cases they may have otherwise accepted due to the inability to fit in the case work with such short notice and not knowing if the Immigration Judge will determine attorney prep time to constitute good cause. By creating a mandatory 15-day deadline the Proposed Rule clearly states



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to judges that attorney prep time on its own is not sufficient to grant an extension but that some other level of detailed circumstances must exist. The good cause standard creates more ambiguity and this lack of surety in the judicial process will have a chilling effect on attorney representation. It is important to keep in mind that the Immigration Court is only required to give respondents 10 days notice of their hearing, which is little time to obtain counsel contact information, set up consultations, and compare options. It is also important to keep in mind that if respondents file their applications *pro se* and then seek attorneys, attorneys may be less inclined to accept the case for representation as there could be problems with the application that will make the case more complicated and costly to prepare. For example, a confusingly written testimony statement may require more work to explain and clarify than it would be to start fresh. For ethical and economic reasons, this cost may or may not be able to be passed off to the respondent. It is not a cost that attorneys will likely want to take on out of pocket as this decreases their income per hour rate, a rate already pre-determined as necessary to meet their financial needs.

The Proposed Rule appears to have been prepared in complete ignorance of the complexity involved in completing an asylum application. It typically takes the Migrant Center several meetings to prepare the application, three hours in the most simple of cases where the respondent is highly educated and has already provided us with a form completely filled out and a detailed declaration that simply needs to be reviewed, and up to 20 or more hours in complex cases; where the individual is illiterate, not well-educated, and/or simply is unfamiliar with filling out legal forms; or in situations where the respondent is traumatized by what they experienced, which is often the case. It is unrealistic to expect traumatized individuals, or really anyone, to open up to an unknown attorney about the horrible things they went through at an initial meeting. It takes time to build trust so the asylum seeker feels comfortable enough to discuss persecution like rape and other horrific tortures. Even in the best of cases where the asylum seeker is not highly traumatized by the persecution / torture they suffered in their home country, it takes more than one meeting to establish the trust and confidence needed for the respondent to open up about the danger they face.



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We have had many respondents tell us that we are the first people they have ever spoken to about the most painful parts of their history, such as in the case of rapes they were victims of.

Asylum applications must be submitted in English, a language which few respondents read or write. Due to language difficulties in understanding the questions – some of which are vague (for example, what constitutes a religious organization?) or confusingly formatted (compound questions, reverse order, etc) – and the challenge of writing in English, respondents often require the help of, at a minimum, a bilingual assistant or an interpreter. These challenges are compounded for those who are illiterate – a strict 15-day deadline does not allow any flexibility to take their situation into account (the Proposed Rule does not indicate that this would be sufficient to establish good cause). Finding an interpreter can be challenging and takes time. The Migrant Center has worked with asylum seekers who speak 20 different primary languages from 37 countries, which include different, and sometimes very distinct, dialects. Sometimes we find an interpreter – say in Portuguese – and set up a meeting only to discover that the Brazilian Portuguese of our interpreter and the Angolan Portuguese of our client are too different to proceed with confidence. Again, the Proposed Rule offers no guarantee that the good cause exception would be applied in this circumstance and therefore attorneys will be unnecessarily stressed and anxious not being able to turn in an incomplete application and/or an application with information that the respondent is not aware of (such as that copied from the Asylum Officer’s notes) and not knowing if the Immigration Judge will find the application abandoned and/or find them in violation of their ethical duties. This will have a huge chilling effect on the legal bar’s interest in accepting cases. Additionally, when information is interpreted or translated from a foreign language into English, it then becomes necessary to read it back to the respondent to ensure that it is an accurate interpretation / translation before the respondent signs the application. Even where the respondent speaks English, any revisions discussed or made by the attorney will need to be revised by the respondent before submitting the form to the judge.

The asylum form may seem fairly straight-forward to an educated English-speaker but it is far from simple for non-Americans. Many of the respondents we work with not only face a



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language barrier in completing the application, but also have difficulty with about 25% - 50% of the questions due both to vague and confusing questions, lack of sophistication and training in filling out paperwork (much less legal paperwork) and cultural differences. For example, in several African countries people write their family names first, which means that it may appear to the judge that the names on the form and on ID documents do not match (or in the best cases this seeming discrepancy will take the judge unnecessary time to figure out). While one error will likely only take the Immigration Judge a few minutes to sort out, usually there are multiple errors that, compounded, can reasonably take the judge an hour to sort through. In another example, people from Africa are often confused by the terms race and ethnicity until we explain that this can include the tribe they are from or the color of their skin. We have seen all sorts of errors, from writing “America” for the country that issued their last passport, not putting down their nicknames or sports monikers, failing to list half-siblings, not listing their legal status in countries they’ve traveled through (or even not listing the countries), etc. It takes our experienced attorneys a solid hour to go through and fix errors on a draft in the best of cases.

The Migrant Center has reviewed dozens of asylum applications, and our legal team’s overall experience includes reviewing hundreds of applications as well as conversations with other attorneys who state that they have the same experience in preparing applications. Even considering that we require a filled-out draft application and a copy of all other immigration paperwork such as the credible fear interview notes before we will begin work on an application, we find that we still need to spend hours fixing / preparing the application. This is a necessary prerequisite for our assistance as we find this is the most efficient and streamlined way to prepare applications – ensuring that we have the correct spellings of names and places and basic biographic information, that the respondent has obtained some familiarity with the form so that our review with them will go more smoothly, and that they are invested in the process (it also allows us to gage sophistication level, credibility, and other important factors). However, it takes about a week in the best circumstances to get all this information from detained respondents after the first Master Calendar hearing where the immigration judge gives the respondent the application (some respondents get



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it ahead of time from the library but this cannot be expected as there is no regulation requiring this, or official process that advises them of this possibility). It takes several days to prepare, several to photocopy, and several to mail.

Once we receive everything, first we type up the application (which takes about an hour plus whatever supplemental declaration statement they have sent us – if it is in a language that we do not read this alone takes about a week to find a volunteer to translate and get translated, putting us at the 15-day mark before even looking at the application). Next, we schedule a meeting with the respondent and read back the information to them. This is the most basic review we can do. This takes at least two hours for our experienced attorney team members and several days if we have volunteers / interns assisting as they must go back and forth with an attorney to confirm that they are completing the form correctly. There are usually an average of five changes we need to make on each of the 12 pages (excepting page 10 which is the signature page). These are issues such as writing birthdates in the reverse order, not listing children or spouse who currently have asylum cases pending, not putting down immigration arrests, etc. Then it takes 3-5 calendar days for the application to be received back by them in the mail, a day for the respondent to read through and check it, and 1-2 days for the detention center to make photocopies for the government attorney and the respondent. In the very best of circumstances, it is possible to prepare in two weeks if we do not have a high case load the day we receive the paperwork and can work on it immediately. However, for reasons that have nothing to do with our schedule, the application can typically take 3-4 weeks to prepare.

The Proposed Rule claims that asylum applications are frequently filed prior to or at an initial immigration court hearing. There is no data provided to support this and it seems highly unlikely based on our experience. However, we only have a large enough sample size to testify to how cases are processed in a detained court. It is almost never true that asylum applications are filed at the first master calendar hearing in detained cases. And where this is true, it undermines the Proposed Rule's logic as it is simply evidence that a 15-day deadline is not needed in those cases. It is also evidence that applicants are not "simply delay[ing] proceedings" as the Proposed



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Rule suggests. In our experience, asylum seekers complain much more frequently about how slow their court hearings are than how quick they are. The exception is when asylum seekers are waiting for third-parties to send them their evidence from abroad. The Proposed Rule's allegation is pure speculation not supported by the facts. And while of course it's possible that some respondents may seek more time in their case, it is by far not the vast majority. It is inappropriate to punish the majority of applicants for the possible actions of a few people. Additionally, this is something that Immigration Judges are best placed to address on a case by case basis.

The Proposed Rule unnecessarily takes away the judges' authority to set deadlines for the filing of applications and related documents as listed in 8 CFR 1003.31(c). There is a good reason that regulations currently give judges this discretion. The regulations currently do not prescribe a specific deadline for filing an application for asylum beyond the statutory one-year filing deadline, as judges are aware of the due process problems that can result if a case is rushed and the current system acknowledges that each case is different. Even setting a longer deadline, say 45 days, would be too short for some applicants and much more time than others need.

As acknowledge by the Proposed Rule: "It is well established that immigration judges have the authority to set filing deadlines and manage their dockets consistent with applicable law." 8 CFR 1003.10(b) (powers and duties under 8 CFR 1003.10(b) to manage immigration court hearings: "In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."), 8 CFR 1003.14(b), 8 CFR 1003.18, 8 CFR 1003.31(c), 8 CFR 1003.36 ("The Immigration Court shall create and control the Record of Proceeding."). According to the Supreme Court, administrative agencies have the prerogative to determine the proper rules of procedure that will best allow them to carry out their missions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978). However, this does not mean that administrative agencies such as the DOJ can, or should, set rules of procedure that go against due process or efficient case management.



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By forcing judges to require applications within 15 days, they will receive many more applications that are poorly prepared. We have heard repetitively that one of the legal services that judges most appreciate is help preparing the applications. And for good reason. As discussed above, there are many challenges that asylum seekers face in preparing these applications if they do not have U.S. immigration assistance from an experienced individual (this does not necessarily need to be an attorney, it could be a BIA accredited representative, for example). Without a clearly-written, detailed asylum application, it can be incredibly difficult for judges to identify, much less evaluate, legal matters relevant to the claim, such as nexus, grounds for asylum (especially potential particular social groups), internal relocation possibilities, why the police cannot or are unwilling to protect the person, etc. Without a solid application it is both more difficult for the judge – and DHS attorney – to prepare for trial, and results in a much longer merits hearing to elicit the necessary information. Additionally, we have seen that without detailed background information written in the application, judges forget to ask important questions and deny for lack of information. To give just two examples, in one case the judge determined that the police were willing and able to protect the respondent, an opposition politician opposed to President Kabila in the DRC because the police went in the direction of the attackers after being told where they went (which of course they did, since they were at the scene of a crime and had to at least give the appearance that they were doing their job), without inquiring whether the police pursued any investigation or looking at any of the other evidence in the record. In the second example, the judge found that a political activist in Guinea could internally relocate because he moved to another city and did not have problems for about a year, without asking *why* he did not have problems. Once our office spoke with the respondent and found out that he was in hiding inside a house during this time, the judge granted our motion to reopen. It is understandable that even the most experienced judges would fail to elicit all the relevant testimony considering not only that they are human and can't think of everything in one hearing with the respondent, but that without well-written applications they are also working from such a limited start with very little information from which to build their inquiry and understanding of the case. If one agrees with Malcolm Gladwell's



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conclusion that 10,000 hours in a profession makes someone an expert, we can safely testify to the fact that it is often necessary to have several meetings with the respondent with time between them to review and think about the case to come up with additional questions that often prove crucial for fully understanding the facts and possible legal arguments. The 15-day deadline will take away counsel's ability to adequately and competently represent our clients and assist *pro se* respondents in completing their applications.

Reasonable filing deadlines do not violate immigration laws or international treaty obligations. *See, e.g., Hui Zheng v. Holder*, 562 F.3d 647, 655–56 (4th Cir. 2009); *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008); *Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001). However 15-days is by no means a reasonable deadline, for all the reasons discussed here.

Having a good cause exception to the 15-day rule does not cure the unreasonable timeline issue. The good cause exception must be separate and apart from a reasonable deadline. It cannot cancel out the legal requirement of a reasonable deadline as it is meant to be an exception. A good cause exception tied to an unreasonable 15-day deadline does not mitigate the need for a reasonable deadline as it will need to be used to respond to every day predictable difficulties such as language barriers, access to counsel, mailing times, etc. Respondents should not have to prove good cause in almost every case that arises when it is clear that good cause will almost always exist. Were the deadline reasonable there would still need to be a good cause exception to respond to unforeseen or difficult circumstances, but in this case it would truly be used as an exception and not the rule. Additionally, because it is unclear what will be interpreted to qualify as good cause it is foreseeable that some deserving cases will be denied, thus resulting in a denial of due process and the unlawful *refoulement* of *bona fide* refugees. This rule will also result in increasing litigation, at cost to the U.S. government / taxpayer, respondents and their attorneys who could better use their time in litigating more cases and not in arguing the good cause exception unnecessarily. The 15-day deadline accomplishes nothing but to create more work and stress for all parties, and creates an unacceptably high probability of due process and other legal violations.



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The Proposed Rule wants asylum seekers “to be prepared to state his or her claim as quickly as possible” but doesn’t have a good grasp of what is possible, much less realistic. Putting aside the biographical and other claim-related questions as discussed in part above, the narrative section of the I-589 is difficult to complete without assistance. Although asylum seekers know the problems they face, they often have difficulty explaining these problems in chronological order, with sufficient detail to know what is what (such as stating that they are fleeing the gang or tribe but not saying what one), and often leave out key points that while not of particular focus for them are important legal considerations (such as why they didn’t try to relocate internally). To give a few examples, asylum seekers have a tendency to say “they” threatened me without explaining who they is and how they know this, why they were threatened, or what the threat actually was (what was said, what was meant, how the threat was delivered). Asylum seekers often don’t think to explain why they didn’t try living in another part of their country or why they didn’t go to the police, in many cases because they view these things as obvious and not important to their need for protection in the U.S. By having an opportunity to work with counsel who can ask these questions to elicit this important testimony and include it in the asylum application, the Immigration Judge has important information before trial to help evaluate the claim and can better focus judicial time on particular issues that may be contested or complex, instead of starting to explore the case from scratch.

We do understand that supplemental declarations can be submitted at a later date up to and including the evidence filing deadline. However, a number of questions are asked on the asylum application and short of providing only cursory incomplete information, the asylum seeker will need time to prepare, hopefully with an interpreter and an attorney. Turning in an incomplete, summary-type application risks leading the judge to believe that all the relevant information has been included and when the respondent attempts to supplement this information the judge may feel this is a credibility issue. While it is fair for the judge to inquire as to why additional information was not provided earlier, creating a process through which this information can only be provided with great difficulty in the first instance, sets the majority of cases up for confusion,



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additional litigation time, and anxiety (we've seen some respondents, out of fear that saying new things will make the judge not believe them, hesitate to fully explain their case, resulting in a higher chance of denial and a miscarriage of justice).

The Proposed Rule cites concern that “delaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time”. As a general matter, we are concerned about this issue as well. But the Proposed Rule does not assist in mitigating this concern. These are negligible concerns when the difference in filing is only 30 days later. Creating a strict deadline that does not allow for the judge to consider the circumstances of the case, including the effects of a continuance, undermines the very concern the Proposed Rule claims to address. *Per se* rules are inherently problematic for this reason. Additionally, the ability to gain protection when the case is so rushed that the claim is not clearly laid out is significantly less, not more. In one nationwide [study](#) conducted in 2016 (in other words, using a large sample size to eliminate the effect of variance in case facts), represented asylum seekers were five times more likely to receive grants of protection than *pro se* respondents (~52% v. ~10%). This is not equal administration of justice. There are many reasons for this difference but one of the main reasons is the inability of *pro se* respondents to clearly articulate the problem and the difficulty of judges to ferret out the relevant information without the assistance of legal counsel, as discussed above. The first crucial piece of testimony is that written in the asylum application. In many ways the asylum application is the foundational document on which the entire case is based.

While we agree with 8 CFR 1208.5(a) that asylum applications filed by detained aliens should be given expedited consideration, this does not mean that the preparation of the application should be rushed. Regardless of whether or not a 10 day time period is sufficient for detained crewmembers (and we doubt that it is – and no evidence has been presented to suggest otherwise) 15 days is certainly insufficient time to prepare an application in a typical detained case. Detained asylum cases are already being given expeditious consideration, and non-detained cases move slowly because of the low number of Immigration Judges compared to the total number of cases –



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turning in the asylum application 15 days after the first master calendar hearing will not significantly alter case processing times as merits dates often are set out more than a year simply due to the judges' availability. As mentioned above, detained asylum seekers are usually anxious to get their application submitted on as soon as possible because they know that this will speed up their case, hopefully allowing them to receive a grant of protection and be released from detention. In fact, by setting an arbitrary 15-day deadline, considering that asylum seekers in detention face higher barriers to accessing legal assistance, the Proposed Rule unfairly prejudices asylum seekers in detention.

The Proposed Rule is simply begging for incomplete, poorly prepared, and inaccurate applications to be submitted. The number of errors that we see is commonly so high – and the problems so potentially confusing – that any initial application prepared this way is arguably unreliable. It serves no one to have a poorly prepared asylum application. It does not help the judge who must spend more time struggling to piece the case together. It does not help DHS who must do the same. And it certainly doesn't help the asylum seeker, who now has to try to fix mistakes that may appear to be inconsistencies, and who likely won't even realize there are mistakes without obtaining counsel until potentially the day of their merits hearing after testimony has already started (and they've already signed the asylum application). We have seen over and over again where mistakes, or simply unclear answers such as putting down a "wife" when the person is not legally married, lead to apparently conflicting information in court and adverse credibility determinations (as these determinations can be based on anything, even if it doesn't go to the heart of the matter). For example, when someone puts down that they left their country on the 6th but they really left on the 8th. If they had been afforded an opportunity to speak with an attorney they would have been informed that they don't need to guess just because there is a question and that if they don't recall a date exactly they should indicate that the information is approximate. This discrepancy led to over 20 minutes of back and forth in court between the DHS attorney and the respondent before the irrelevant confusion was resolved and the individual was able to prove their credibility.



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It is especially true that there will be issues with asylum applications where respondents rely on a fellow detainee who only speaks a smattering of English – or their language – to complete the form. We have seen situations where this has resulted in the preparer misunderstanding the respondent’s history and writing completely incorrect information. By instituting a 15-day deadline more respondents will be pushed to obtain whatever form of assistance they can get, many more of them working with non-legal individuals such as fellow detainees and notaries. Asking respondents to sign applications under oath that they have had to prepare without an interpreter is basically forcing people to commit perjury. DHS can, and has, federally prosecuted asylum seekers for information contained or not contained in their asylum application. This is problematic if the individual has not been given an opportunity to prepare and review the form in a language they understand but are still forced to sign and submit it or face being deported into an environment of persecution and torture. DHS and the public does not benefit either as their prosecution team would not have reliable information to go off of.

The Administration states that asylum seekers could later amend or supplement their application but, as this is subject to an immigration judge’s discretion it is not a sufficient due process protection. The reality is that even when an application is reviewed multiple times by both the applicant and an attorney there are still typically a few changes that need to be made at the final hearing. No one wants the respondent to need to make 50 changes at the beginning of a merits hearing because the case wasn’t well-prepared up front. This is time consuming, and as previously stated, means that the judge and DHS attorney were not able to prepare well for the hearing as the correct and complete information was not on file. While amendments and supplements can sometimes be submitted before the merits hearing, again what then is the point of filing a poorly-executed application in the first place (except to set a merits date)? It doesn’t help anyone and it potentially creates more work and confusion, in the worst cases resulting in an unjustified denial of protection.

If the concern is how quickly judges can schedule merits hearings, arguably this could be done before filing the asylum application. We have had judges set filing deadlines for asylum



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applications at the same time as evidence filing deadlines and the merits date. However, for *pro se* respondents, not submitting applications in person at a master calendar hearing could create some confusion (although this doesn't foreclose scheduling a merits hearing at the second or third master calendar hearing and then setting a pre-merits hearing date to submit the I-589 in person as is often done with evidence to ensure that there are no issues that need to be addressed). While some individuals may ultimately choose not to file an application, this is likely to be the exception and not the norm, and the number of merits hearings that would consequently need to be canceled is certainly significantly less than the courts are already used to canceling due to respondents being released from detention. Regardless, rushing the preparation of asylum applications has no significant benefit to judicial efficiency and other measures may better result in the expeditious processing of cases – such as hiring more judges for the non-detained docket – which the Administration could propose and submit for public comment or otherwise dedicate agency resources towards. As things stand, the detained docket moves fairly quickly already, considering the time needed to gather evidence and present a case for trial and the Proposed Rule is simultaneously unnecessary to achieve its stated objective, burdensome on all parties, and a significant risk to respondents' due process rights.

Requiring Exceptional Circumstances to Continue a Case Beyond 180 Days Even When there is a Showing of Good Cause Inappropriately Limits Necessary Judicial Flexibility

The Proposed Rule requires judges to complete adjudication of asylum applications with 180 days of filing absent exceptional circumstances, only allowing continuances for good cause and for filing documents if these continuances will not exceed 180 days. This changes current regulation and case law, which allows for continuances upon a showing of good cause without any mandatory time limitation. 8 CFR 1003.29, 1240.6; *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

Good cause is generally treated as a lower standard than “exceptional circumstances” such that a finding of good cause does not necessarily mean that an exceptional circumstance has also



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been established. *Hall v. Sec’y of Health, Educ. & Welfare*, 602 F.2d 1372, 1377 (9th Cir. 1979) (“Good cause is . . . not a difficult standard to meet.”). The Proposed Rule defines “exceptional circumstances” as, for example, “battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the parties”. INA 240(e)(1); 8 U.S.C. 1229a(e)(1); *see also, United States v. Larue*, 478 F.3d 924, 926 (8th Cir. 2007) (“exceptional reasons” are circumstances that are “clearly out of the ordinary, uncommon, or rare”); *United States v. Lea*, 360 F.3d 401, 403 (2d Cir. 2004) (“Exceptional circumstances [under a criminal detention statute] exist where there is a unique combination of circumstances giving rise to situations that are out of the ordinary.” (internal quotation marks omitted)).

As of August 14, 2020, the median processing time for a non-detained asylum case is 807 days. How the Administration believes it is realistic or reasonable to decrease this processing time down by over 400% overnight is unclear (and this doesn’t account for the 49% of cases that take over 807 days). The Administration also doesn’t support its claim that a 180-day deadline is necessary. Immigration judges are not sitting back lazy, they are actively working on cases. If cases take more than 180 days it is because they need to or because there are other matters that the judge is actively working on. The Migrant Center’s cases that have dragged on for years is due to the Administration pulling our judges off our cases to work on MPP cases and released family cases. We have also had unavoidable delays due to judges getting sick, the government shutdown, and COVID-19. None of these circumstances are considered in creating this arbitrary 180-day rule. All this rule will serve to do is pressure judges needlessly, at the risk of violating the parties’ due process rights to a fair hearing, including a careful review of the evidence and a well-thought out and reasoned decision. If the Administration wants to insist on a 180-day deadline, then the good cause exception is a more appropriate legal standard to apply for an exception.

The Proposed Rule Does Not Give the Parties a Sufficient Opportunity to Review or Respond to Evidence



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The Proposed Rule changes § 1208.12 such that an immigration judge may rely on foreign government and non-governmental sources if those sources are determined by the judge to be credible and probative but inexplicably does not require that the judge make a finding of credibility and probative power where the source is the Department of State, other Department of Justice offices, the Department of Homeland Security, or other U.S. government agencies. This is despite the fact that the Proposed Rule acknowledges that government agencies do not necessarily have relevant information but that they “*may* possess relevant information for an immigration judge in adjudicating a claim” (emphasis added). Additionally, without explanation, the Proposed Rule eliminates the judges’ ability to consider on the judge’s initiative information from private voluntary agencies, news organizations, or academic institutions. If the judge is going to be employed as a presenter of facts (a role normally reserved to, and typically best reserved to, the litigants in our adversarial system), we call for these sources to be re-incorporated into the rule such that the immigration judge can move to introduce any evidence if it is considered credible and probative and both parties have had a sufficient opportunity to review and respond to the evidence.

Our only concern with this fact-finding role is how immigration judges will use this authority. In establishing our American adversarial system, it is easiest to preserve both the appearance of and preserve the actual impartiality and independence of judges if judges are not put in charge of looking for facts. We believe that this Proposed Rule must be accompanied by a written, publicly available training manual on how to search for evidence in an impartial manner, determine if a source is credible, corroborate facts with similar evidence if available, or ensure that there is no contradictory evidence, and that this manual, accompanying training, and continuing legal education on this topic be prepared in consultation with stakeholders, including non-profit organizations, LOP providers, the private bar as represented by AILA, the ABA, and others, and the ICE Office of Chief Counsel. This quality assurance measure should be taken even if the regulation is limited to judge’s introducing government documents into the record. Even though it



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is possible that the reliability of government documents is stronger than that of the average document, it is still important to due process how judges access and review these documents.

“[B]etter enable[ing] immigration judges to ensure full consideration of all relevant evidence and full[y] develop... the record for cases involving a pro se respondent” is an admirable goal. However, this must be done with the proper due process safeguards considering their unrepresented status. If the immigration judge seeks to introduce evidence into the record, the purpose for which that evidence is being presented should be explained to the *pro se* respondent in a language that he or she understands and then an opportunity to review that evidence with an attorney should be offered to the respondent. While DHS evidence is not translated for respondents (although a separate issue, it is important to know that we view this as a violation of due process), court documents are typically explained to *pro se* respondents. The Proposed Rule, however, does not include an explicit requirement that evidence produced by judges be explained to respondents – this is especially important if the respondent does not have access to counsel – or that an opportunity to respond include time to consult with counsel (*pro se* respondents may be able to obtain a legal consultation on the matter even if unable to obtain full representation).

We agree that the Proposed Rule is consistent with the immigration judge’s duty to develop the record. *See, e.g., Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) (“[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.”); *see also Richardson v. Perales*, 402 U.S. 389, 410 (1971) (finding that an administrative law judge “acts as an examiner charged with developing the facts”); Charles H. Koch, Jr., *Administrative Law and Practice* § 5.25 (2d ed. 1997) (noting that “[t]he presiding official is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike the trial judge, an administrative judge has a well-established affirmative duty to develop the record”); *Matter of S–M–J–*, 21 I&N Dec. 722, 729 (BIA 1997) (en banc) (noting that “various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator”).



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While we have no issue with immigration judges seeking to submit relevant evidence into the record, if it is credible and probative and not one-sided (in other words that it was not cherry picked from among the evidence to show a certain point of view), this can only be done if proper due process safeguards are put into place. While the Proposed Rule requires that judges provided that a copy of the evidence to both parties and both parties have had an “opportunity to comment on or object to the evidence prior to the issuance of the immigration judge’s decision” this is insufficient for two reasons. First, the Proposed Rule does not require that immigration judges give the parties a meaningful opportunity to review the evidence. An opportunity to review the evidence is meaningful and in compliance with due process if there are, where necessary, several days or weeks to seek out and consult with an attorney, and/or for attorneys to do research in their office, determine if they need to get expert affidavits etc. According to the Proposed Rule, judges can introduce evidence and expect a response within minutes.

Second, the Proposed Rule states that this evidence only needs to be given before the decision – not that the parties will be able to call and/or question witnesses. Respondents may often want to provide testimony about the contents of the evidence or DHS may have questions for the respondents based on the evidence. An opportunity to comment on – which can be interpreted to simply mean that a respondent or attorney says that they don’t think the source is reliable etc. and object does not replace the due process right to review and respond in a meaningful way. The Migrant Center has had immigration judges in both represented and *pro se* cases admit evidence on their own volition at the merits hearing without the full opportunity to examine and respond to the evidence. Guidelines and trainings – with stakeholder input – on what is considered a meaningful opportunity to examine and respond to evidence in order to comply with due process must be given under our Constitution.

Immigration judges should be encouraged to file this evidence on both parties by the court’s filing deadline just like any other evidence so that the parties have sufficient time to review the evidence. In reality, we expect this to not happen often. Typically immigration judges do not begin to review the file until *after* the parties have submitted the evidence (as this is the most



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efficient use of their time) and sometimes not until a day or two before the merits hearing (this is also efficient as it allows for the judge's familiarity with the evidence to be fresh). It makes little sense for a judge to research evidence if the judge hasn't reviewed the file yet to know if there is a matter where evidentiary support might be missing. This means that where immigration judges seek to introduce evidence, it will often be the case, especially with *pro se* respondents, that the merits hearing will need to be continued. This will likely delay adjudication by a month in detained cases and longer in non-detained cases. Our concern is that, feeling pressured to proceed, immigration judges will not give the parties sufficient time to review the documents and prepare a response. Therefore, it is especially important that the Proposed Rule is clear on this requirement so that the parties can appropriately prepare for trial in a time-sensitive way that simultaneously respects their due process rights. For example, where a judge may anticipate at a master calendar hearing that certain matters will need to be addressed in the evidentiary record the judge can ask the parties what they will be submitting (the judge should not identify the issue in all cases because some issues are legally left to the prosecutor to raise), briefly review the contents of the evidence when submitted in court to determine if further documents are needed to develop the record, or set a call-up pre-trial conference hearing for after the evidence is filed but before the merits to discuss any missing evidence.

Procedurally, it can become complicated for immigration judges to research and submit evidence into the record in compliance with due process requirements and further study of how this can constitutionally be done should be undertaken. We also suggest that the Administration include in the Proposed Rule, before submitting it for public comment in compliance with the law, the estimated cost of immigration judges conducting additional research outside of their file review and adjudication duties and to what extent this may slow down the adjudication of the case, as well as other cases. This will require a more in-depth analysis of when, and how much, judges will find the need to use this authority. The data of any such survey or analysis should be presented to the public as part of the data and comment process. The Proposed Rule in this regard is immature.



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As it stands, the Proposed Rule falsely believes that by providing a copy of the evidence to both parties “the parties [will have] an opportunity to respond to or address the information appropriately”. This is not true as written, and will likely lead to unnecessary litigation and the consequent cost to the respondents and U.S. government / taxpayer (which is additionally higher if in detention). We propose that the language be changed to read “opportunity to *review*, comment on, object to, *and/or call witnesses and conduct questioning on* the evidence prior to the issuance of the immigration judge’s decision”.

Asylum Seekers Should Not be Penalized for the Court’s Delays and Should Not be Required to Submit Applications Within 30-Days Without Clear Advisals on the Consequent of Abandonment

Eliminating the Immigration Court’s ability to accept an asylum application as complete for purposes of starting the EAD clock, if the application has not been reviewed and rejected within 30 days as incomplete, will merely result in more asylum seekers living in poverty with no legitimate benefit to anyone, and with the likely added cost to the judicial system, the public, and the respondents of making it more difficult for them to obtain counsel to help them move forward with their cases. While the Administration claims that, while the Immigration Court can take as long as they want to review the applications, it will do so in a “timely fashion” there is nothing in the proposed regulatory change requiring this, much less an indication of what is considered “timely”. However, by eliminating the requirement to mark an application as complete if not rejected within 30 days indicates that the Proposed Rule foresees applications being returned as incomplete often after 30 days have passed. This delays the ability of asylum seekers to work and support their children from a minimum of seven months post-submission to an undefined longer amount of time.

Additionally, the Proposed Rule require the re-submission of an incomplete application within 30 days absent exceptional circumstances with little explanation why – there is already a statutory one year filing deadline. This proposed change arguably runs contrary to the one year



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filing deadline 1997 statute as it decreases the time period to submit an application to less than a year in direct contradiction to the clear statutory language. (This rule is also problematic where a respondent submits their application within one year and then gets notice it was deemed incomplete and rejected after the year has passed.)

Setting aside the legal issues, in most cases 30 days should be a sufficient amount of time to remedy any errors in the application if certain precautions are taken for unrepresented respondents (even considering that by the time the rejection is received there will likely be only 25 days to make the correction although the Proposed Rule does not state if the application must be postmarked or received within 30 days, so potentially the respondent will only have 20 days to make changes). Rejection of applications for unrepresented respondents must be accompanied by an advisal that their application will be abandoned if not resubmitted with this timeline in a language that the individual understands (and an exception should be made for applicants who are not literate). Normally such important matters would be explained in court with an interpreter so that the judge can ensure that the legal advisals are understood. Sending a rejected application back without explaining that it must be resubmitted in 30 days in a manner in which the respondent can understand the legal process will make the execution of the rule unconstitutional. Without the Proposed Rule including these due process protections, we cannot support it.

Conclusion

The Proposed Rule will make it more difficult for both represented and unrepresented asylum seekers to obtain counsel and competently prepare their asylum applications and present their case, and more difficult for counsel to competently represent their clients, increasing the cost and stress for all parties (which causes experienced practitioners to leave the profession). The Proposed Rule will additionally create unnecessary deadlines that will create more problems than they will ostensibly solve. If published in its current form, the Proposed Rule will further erode due process in immigration court. We urge you to rescind and amend the Proposed Rule as outlined above.



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Sincerely,

//s// Sara Ramey

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