RE: RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020,

Public Comment Opposing the Proposed Rule on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure


The Migrant Center for Human Rights (“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 asylum seekers and other detained immigrants since July 2017. Our team’s legal expertise includes more than eight years of immigration removal defense litigation experience. As a non-profit organization, we also 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.

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. Sections of the Proposed Rule not discussed below should by no means 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).

While the Proposed Rule’s stated aim is “consistency, efficiency, and quality of its adjudications” our experience shows that these goals will not be met by the proposed changes. Rather, 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.

Decreasing Briefing Time Will Result in Denial of Access to Counsel and Deny Individuals their Due Process Right to Provide a Meaningful Response to the Immigration Judge’s Decision, Undermining the Board of Immigration Appeals’ Ability to Reach a Fair and Just Outcome; Requiring Simultaneous Briefing Is Similarly Problematic

The Proposed Rule would “reduce the maximum allowable time for an extension of the briefing schedule to 14 days,” decreasing it from the current practice of granting 21-day extensions based on good cause shown, with the current regulatory maximum of 90 days where needed. The Proposed Rule erroneously states that 14 days is sufficient time to prepare a brief before the Board of Immigration Appeals (BIA) because the extension is usually requested to finalize a brief, not write it from the beginning. The suggestion that most of the brief will be written before the transcript is issued is never true in practice. Even in cases where we represent respondents before the Immigration Court and can outline the issue and do the necessary legal research before receiving the transcript, until we have received the transcript we cannot cite to the record, a fundamental necessity in the vast majority of appeals as many deal with issues of credibility, sufficiency of evidence / testimony, and burden of proof, among other issues like whether a matter was sufficiently address on the record below. Furthermore, reviewing the transcript may additionally raise other legal issues that need to be researched and briefed.
Transcripts are not usually received for at least three to five business days after the start of the briefing schedule and so under the Proposed Rule an attorney would have an initial two weeks to review the transcript and prepare the brief and, with an extension, a maximum of two additional weeks to prepare the brief. Briefs can be written in under four weeks to be sure, but only if the attorney is not working on any other matters. This is never the reality. Importantly, because no one knows when the briefing schedule will be set ahead of time attorneys often have a host of other commitments including court hearings and filing deadlines that cannot just be dropped when the transcript arrives, as this would represent a serious ethical violation of duty to the client and be a breach of court orders, subjecting clients to deportation, family separation and possibly death, and subjecting attorneys to censorship, loss of profession, and court penalties. On the other hand, not giving BIA litigants the ability to request extensions in line with the time needed to adequately complete briefing forces attorneys to provide them less than competent representation and more importantly deprives the parties of their due process rights to present their case completely and deprives the BIA of the ability to have access to all the information it needs to reach a fair and just decision.

These problems are compounded 100-fold for pro se respondents. Our office often cannot evaluate a case for representation until the transcript arrives as we were not present at the merits hearing and it is next to impossible for pro se respondents to explain what happened, much less the judge’s decision, in legal terms such that we can understand what issues exist. In the best of cases it takes about 10 calendar days for the pro se detained respondent to receive, photocopy, and mail us the transcript before we can even begin to evaluate the case. It takes us a minimum of one week to review the transcript and documents, discuss the case with the respondent, and do the preliminary legal research necessary to determine eligibility and consider making a case placement. This means that, even requesting a 14-day extension, our office would only have about three weeks to find pro bono counsel and for them to review the file and prepare the brief. We have already been told by CLINIC’s BIA Pro Bono Project, as recently as in a case one week ago,
that the 21-day extension is likely not sufficient time to review the case file and make a placement and also prepare a brief.

It is therefore of utmost importance that the Proposed Rule not take away the BIA’s ability to grant a longer extension or grant a second extension, for example where a pro se respondent might have just obtained counsel a week before the briefing deadlines. In fact, when an attorney considers taking an appeal the attorney considers these deadlines and we find it much easier to place cases if pro bono attorneys know they will be able to competently prepare legal argument for their client and without undue stress. Denying pro se respondents the time they need to find legal representation not only represents a constitutional due process violation but also prejudices indigent immigrants who cannot easily hire private counsel and must rely on the limited number of organizations like ours, who are often over capacity with requests for assistance, and pro bono attorneys who are few and far between. According to the Executive Office for Immigration Review (EOIR) 22% of respondents are unrepresented on appeal, and this number is likely higher if considering the representation rate at the time the transcript is issued. Making a rule that would discount these individuals, and make it harder to obtain counsel, is impermissibly discriminatory and will lead to lower rates of representation.

Leaving it to the BIA to determine if supplemental briefing is need is insufficient. This takes away the right of the parties to research, raise, and thoroughly present issues they have identified as important and undermines the American adversarial system whereby we trust the parties with preparing cases, not the courts.

The Proposed Rule erroneously states that all the issues will be presented in the Notice of Appeal, which requires specific details about the case and arguments to be considered. While a summary of the issues is provided it is impossible to fully cite the case law or all the relevant facts, especially for pro se respondents. This is what the legal brief is intended to do.

There is no harm to the BIA in continuing to allow it the flexibility to adequately respond to judicial necessities of individual cases. Rather than restricting fairness and the efficient use of administrative resources the ability to grant extensions as needed based on the circumstances of a
particular case is crucial to ensuring that the BIA receives all the information it needs to quickly and easily review the case in a legally thorough manner, ensuring due process and that a just outcome is achieved. This is more efficient and more fair, not less so.

In FY2019 BIA briefs were filed in approximately 14,069 cases. Cases where briefs were not filed – about 3000 – are irrelevant to the consideration of the time needed for briefing except as possible evidence that the litigant had insufficient time to do so. To give a couple of recent examples that support this possibility: this summer the Migrant Center worked with one refugee where the 21-day extension time was insufficient for him to obtain counsel and so was unable to write a full legal brief; in another case the individual was unable to obtain counsel and write a brief.

The Proposed Rule’s unsupported allegation that the changes will have “relatively little impact” is just that, an allegation not based on fact that we know from experience is false. To meet the needs of proper case processing the BIA should grant more and not less time to file briefs. In fact, between 1996 to 2002 litigants were given 30 days to briefs. At a minimum, the Administration should not place the BIA in a judicial straight-jacket but instead allow it the flexibility to respond to the circumstances of the case in question.

Additionally, while we believe in equal treatment of individuals in equal situations, the situation of detained and non-detained individuals is not equal and cannot be “harmonized” simply out of a desire to do so. Non-detained individuals are not costing the U.S. tax-payer money and so there is no reason that consecutive briefing cannot be allowed. In fact, to be fair, consecutive briefing should be allowed in detained cases if either of the parties request it. Simultaneous briefing leaves the parties guessing what the legal issues are that will be raised by the other party as they prepare their brief, inevitably resulting in important issues not being addressed, and is neither helpful to the BIA nor allows for the due process zealous advocacy required by attorney ethnics rules which mandate that the attorney present all legally valid arguments. All parties must have the ability to respond to the arguments against them.
If the Administration insists on simultaneous briefing then the Proposed Rule must state that reply briefs are always allowed, not just with BIA permission in certain cases. To do otherwise denies the responding party – either the immigrant or the government – the ability to respond to allegations against them and brief the BIA on crucial issues. No one is saying that cases should not be resolved expeditiously, but this should never be at the cost of a fair judicial proceeding in line with the U.S. Constitution.

Litigants must also be allowed 21 days to file a reply brief, with the possibility of an extension, just like with initial briefs. Requiring that reply briefs be filed within 14 days is grossly unrealistic. By the time that the other party’s brief is received, there will usually only be a week left to reply. This is also assuming that the current delay issues with the U.S. postal service are resolved (parties are not required to use a private courier service and to do so would present additional legal issues). This one-week timeframe would make it virtually impossible for attorneys, who would have to drop all other case work to comply, to ever file a reply brief. This puts attorneys in an impossible situation where they must decide which clients they will not be able to competently represent, possibly giving rise to state bar complaints and other problems as summarized above. This proposed change is therefore likely to give rise to additional litigation, not less, in the courts of appeals and elsewhere.

The importance of fairness in immigration proceedings cannot be overstated: for many noncitizens having a fair day in court can mean the difference between living in safety in the United States or being returned to a country where they may be persecuted, tortured, or killed. Deportation can also lead to permanent family separation, tears communities apart, and negatively affects the U.S. economy. The U.S. government should ensure that, before it imposes such grave consequences, every immigrant has access to a fair and just appellate review process.

**Administrative Closure is an Important Legal Tool for Ensuring Efficient Use of Judicial Resources in a Humane Manner and Should Not Be Eliminated**
The Proposed Rule codifies the Attorney General’s June 2018 decision in *Matter of Castro-Tum* such that Immigration Judges will no longer be able to administratively close or suspend adjudication of a case unless a regulation or a judicial settlement expressly authorizes this (while simultaneously reserving the power to defer adjudication of a case to the Director or Chief Immigration Judge). From FY 1986 to 2020, **6.1% (or 376,439) cases** had been administratively closed (each year, between 1% and 30% of cases are administratively closed, with high percentages of administrative closures during the Reagan and Bush Administrations in the late 1980s and early 1990s and during the Obama Administration between 2012 and 2016).

Administrative closure is an important docketing tool used to prioritize cases most in need of immediate resolution and deprioritize cases where there is not an urgent need for fast resolution. *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). Taking away the power of EOIR adjudicators to prioritize cases is both illogical and harmful to immigrants, their families, and our communities.

Administrative closure has been routinely used by Immigration Judges to manage the resolution of cases where there is overlapping jurisdiction between EOIR and other immigration agencies such as USCIS. (The Migrant Center has argued that jurisdiction should be shared between agencies to eliminate the inefficiencies and injustices created by the current system but, until this happens, administrative closure is an important case management tool needed to achieve these objectives.) The Proposed Rule will negatively impact victims of crime pursuing U visas, trafficking victims pursuing T visas, youth pursuing Special Immigrant Juvenile Status (SIJS), and others as they face removal while waiting for USCIS to review their applications. As USCIS has slowed down processing of almost all types of applications, it is especially problematic for EOIR to strip Immigration Judges of the ability to administratively close cases to allow noncitizens to pursue legal status that only USCIS can grant.

Since the Attorney General’s decision in *Matter of Castro-Tum*, the Migrant Center is aware of several cases where crime victims who have assisted U.S. law enforcement in making
our communities safer have been deported while their U-visa applications were pending. This undermines Congress’ purpose in creating the U-visa, which is to encourage undocumented immigrants from cooperating with law enforcement.

The Migrant Center is also currently representing a father of five U.S. citizen minor children who has been detained and unable to support them for close to two years waiting on USCIS adjudication because the Immigration Court will not administratively close his case due to *Matter of Castro-Tum*. This represents not only extreme hardship to our client and his American children, as well as to his legal permanent resident wife, but is a huge cost to the U.S. taxpayer in unnecessary detention and EOIR adjudication costs, and has required a significant investment in extraneous legal work.

Additionally, the Proposed Rule will negatively impact immediate relatives of U.S. citizens applying for provisional waivers to legalize their immigration status as they cannot obtain this waiver unless their removal proceedings are administratively closed. The Proposed Rule thus undermines family unity as well as our country’s humanitarian programs. These case examples give us an idea of the impact the Proposed Rule will have on immigrants, their families, and our communities.

Furthermore, administrative closure has helped reduce the court’s backlog. By clearing away non-priority cases those immigrants who want to have their cases heard as soon as possible don’t need to wait years to do so. For example, as we saw in the case of a former client, where a refugee needs to get a grant of asylum so that he can petition for his wife who is in danger to join him in the United States, delaying his hearing for months is potentially life-threatening. If the 292,042 cases that are currently administratively closed are recalendared onto the Immigration Court's active docket, this would suddenly increase the court’s backlog of 1,233,307 cases to 1,525,349 cases, increasing Immigration Judges’ caseload by 24%. Importantly, these are cases that judges have already deemed to not be priorities.

Several federal courts of appeal have looked at this issue and determined that administrative closure is authorized by regulation -- 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) which
states that adjudicators can take action “appropriate and necessary for the disposition” of cases – despite the Attorney General’s interpretation of the regulation in *Matter of Castro-Tum*. These cases include:

**Forth Circuit:** *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)
**Seventh Circuit:** *Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020)

The Administration proposes no justification for taking away this regulatory adjudicatory power, beyond stating that by administratively closing cases adjudicators are assuming the role of the prosecutor to determine which cases should be adjudicated and which ones should not. However, this ignores adjudicators’ authority to manage their dockets by holding cases in abeyance until one or both of the parties put forward a request for the case to be recalendared. Because they have both the ability to oppose administrative closure and the ability to request recalendaring, DHS prosecutors do not lose prosecutorial power as a result of the administrative closure mechanism. This demonstrates that administrative closure is more closely akin to adjudicators’ decision-making authority and not DHS’ prosecutorial authority. Additionally, far from being a problem for DHS, administrative closure is an additional tool DHS can use to manage its own case load to prioritize the most urgent cases. It does not make sense, for example, for the American people – via their DHS attorney – to be forced to litigate the removal case of a father with five U.S. citizen children over the case of a convicted drug dealer.

Administrative closure is an important litigation tool, as evidenced by the number of appeal since the Attorney General’s decision in Matter of Castro Tum. Currently there are pending challenges in at least five federal circuit courts to the elimination of administrative closure:

**Second Circuit:** No. 18-3460, Benitez Marquez v. Barr
**Third Circuit:** No. 19-2681, Ramos-Padilla v. Att'y Gen.
**Sixth Circuit:** No. 20-3175, Hernandez-Serrano v. Barr
**Ninth Circuit:** No. 19-70964, Umana Escobar v. Barr
**Tenth Circuit:** No. 20-9559, Acuna-Prieto v. Barr
Administrative closure has existed in one form or another since at least 1984, when the Chief Immigration Judge instructed judges to consider administrative closure as one means of managing case dockets. More recently, in 2012 the BIA held that judges may use administrative closure, after weighing the arguments of both parties. Matter of Avetisyan, 25 I&N Dec. 688, 697 (BIA 2012). This is at its very core decision-making power.

The Proposed Rule incorrectly states that administrative closure increases the court’s backlog and time in adjudicating cases. This is not only incorrect – the opposite is true. The Administration claims that judges were less productive in closing cases between Matter of Avetisyan and Matter of Castro-Tum then after Matter of Castro-Tum but the data shows the reverse. Per judge, annual case completions were 737 during the period of administrative closure and 657 after administrative closure was limited. While we do not believe increases or decreases in average case completions can be correlated to administrative closure without any evidence showing this correlation (and the Administration fails to provide any to back up its claim), the higher case completion rate during the time of administrative closure only makes sense. Administrative closure allows the judges to decided which cases are ready to resolve and which may need more time to prepare. (Continuances, which have also become limited under this Administration, are not a substitute, especially for those in detention like the Migrant Center’s U-visa pending client who has remained locked up away from his U.S. citizen children for two years at tax-payer’s expense as the case cannot be administratively closed under Matter of Castro-Tum. Also, continuances often do afford the necessary time to resolve pending collateral legal matters, such as DHS applications for humanitarian or family-based relief from removal. Rehearing and removing for continuances is an inefficient use of resources for both the court and the parties.) Contrary to what the Administration claims, administrative closure allows adjudicators to not waste time litigating unnecessary matters – such as lengthy asylum cases – and allows them the opportunity to let other branches of the government weigh in before reaching a decision (usually to terminate once the legal matter is resolved). Not only is this fair, such as for our client who put himself in the line of fire to protect a coworker and testified against the armed assailant, resulting
in a 6-year prison sentence and making everyone in our community safer, waiting for the matter to become ripe for adjudication allows for efficient use of judicial resources. For example, instead of litigating a full asylum case – let’s say 8 hours of the judge’s time, 12 hours for the DHS attorney (both paid by the U.S. taxpayer), and 50 hours for respondent’s counsel (average time according to the American Bar Association) – the court can resolve the matter in less than 30 minutes, freeing up substantial time to adjudicate other cases in the backlog. Data shows that 44% of cases being recalendared after administrative closure result in termination orders as no grounds for removal remained, with another 16% being granted relief.

It is worth quickly noting that any inconsistent application of administrative closure is a general concern related to training and consistent application of law and is not a reason to change regulation. Administrative closure is not the reason for the alleged, but unsupported contention of inconsistent application. Adjudicators’ decision-making power is often exercised differently by different judges. This is a general concern that must be addressed by proper training and is one of the reasons that our system has an appellate process. It is also worth noting that there are different facts that will lead to different decision-making in different cases. This judicial flexibility to respond to the real-world circumstances of a given case is crucial to the ability of our justice system to reach correct decisions.

In sum, the judicial flexibility that administrative closure allows makes it easier to address both new and pending cases.

Eliminating Judges’ Sua Sponte Reopening / Reconsideration Authority Prevents Legal and Factual Errors from Being Remedied

Amending the regulations to take away adjudicators’ ability to fix any mistakes that are not “ministerial mistake or typographical error” will result in the miscarriage of justice. There is no reason that adjudicators – Immigration Judges and BIA Panel Members – should be prohibiting from fixing errors that they identify, especially when these are legal errors, or fact-determination errors, made by them that may have inappropriately resulted in a grant or denial of relief from
removal. Adjudicators may be aware of or notice issues that the parties do not and, when they notice errors, they should have the ability to fix them to ensure that the correct outcome is reached.

Requiring that a motion be filed by one or both parties will additionally highly prejudice pro se respondents, who often have no knowledge of legal changes, or way of obtaining that knowledge, much less knowing about the motions process. While judges are required to inform respondents of their appeal rights, they are not required to explain the legal right and circumstances under which a respondent can and should file a motion to reopen or reconsider.

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 ensure the correct legal outcome. Eliminating access to this key safety net will lead to unacceptable miscarriages of justice.

This proposal is additionally problematic given the time and number constraints on motions. By statute, with very limited exceptions for in absentia orders, asylum claims based on changed country conditions, or certain claims involving battered spouses, children, or parents, a noncitizen may only file one motion to reopen and must file that motion within 90 days of the final order (or 30 days for a motion to reconsider). INA 240(c)(6) and (7), 8 U.S.C. 1229a(c)(6) and (7). 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.

Respondents – who are better aware of individual cases as EOIR adjudicators cannot be expected to recall all matters before them – may make an adjudicator aware of the benefits of reconsidering or reopening a case where they do not have the ability to file a motion but believe justice would be served by such action. DHS attorneys do not need to do this as, in conflict with constitutional due process norms of party parity, DHS is not subject to time and number bars in submitting motions. 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 good cause warrants reopening. Furthermore, the Administration’s
desire to achieve finality in decision-making is not achieved by allowing DHS to move to reopen
with no limitations whatsoever, and no litigant who ever appeared in immigration court could ever
feel fully secure that the grant of relief they received from the court will not be relitigated in the
future.

Unfairly allowing one party access to EOIR judicial review while permanently shutting out
the other is problematic on its own and becomes even more so when adjudicators do not have the
sua sponte authority to correct matters. This also puts much more pressure on DHS to identify
and/or work with respondents to address matters. If the respondent is lucky enough to have counsel
that can identify the issue and reach out to DHS about joining in a motion, the proposed change
would basically make all the authority of processing the case rest with DHS, striping not only
respondents but adjudicators of the ability to remedy issues. DHS prosecutors are government
employees subject to the political whims and shifting priorities of the times. They are not, nor are
they intended to be, neutral impartial adjudicators. This is why these issues must be able to reach
the adjudicators’ desk. DHS cannot assume the role of gatekeeper to our justice system.

Requiring equitable tolling arguments in all cases is unnecessary and will increase the
burden on respondents, DHS, and EOIR to prepare and review these additional arguments. It is
also an insufficient substitute because equitable tolling can require exceptional circumstances and
diligence in pursuing the claim. See, e.g., Avila-Santoyo v. U.S. Att'y Gen., 713 F.3d 1357, 1363-
64 & n.2 (11th Cir. 2013). Exceptional circumstances is a high threshold and will result in cases
not being considered where good cause for reconsidering or reopening has been established.

We agree with the Administration that finality in immigration proceedings is a worthwhile
goal. Doherty, 502 U.S. at 323 (“Motions for reopening of immigration proceedings are disfavored
for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly
discovered evidence.”) (citation omitted)); INS v. Abudu, 485 U.S. 94, 107 (1988) (“There is a
strong public interest in bringing litigation to a close as promptly as is consistent with the interest
in giving the adversaries a fair opportunity to develop and present their respective cases.” (footnotes omitted); Matter of Beckford, 22 I&N Dec. 1216, 1221 (BIA 2000) (en banc). However, finality in proceedings cannot come at the cost of justice.

Congress directed the Attorney General to promulgate regulations such that if an intervening change in law or fact renders the respondent no longer removable, and the respondent has exercised diligence in pursuing his or her motion, there will not be a miscarriage of justice. Requiring that a “material” legal or factual change vacates the removability in toto will mean that important legal matters still cannot be addressed. Additionally, requiring review by a three-member panel will place an unnecessary burden on the BIA. Also, the Proposed Rule still limits this option to one motion by the respondent. Lastly, and perhaps most importantly, limiting this option to removability, and not to changes in the law related to relief from removal such as asylum, withholding, and Convention Against Torture protection, will continue to lead to perverse results in contravention of the law, as well as the foreseeable refoulement of refugees. To give one current example, in June 2020 the D.C. District Court vacated the Administration’s July 16, 2019 “transit ban” under which multiple asylum seekers were denied protection completely or granted withholding of removal under the higher standard, which prevents them from obtaining legal permanent residency and petitioning for their spouse and children to be with them in safety. Under the Proposed Rule, adjudicators would not be able to award asylum to this class of individuals even though the law currently says that they are eligible and should never have been denied.

On a final note, the Administration expresses concern that the federal courts do not have the authority to review the BIA’s discretionary decisions regarding sua sponte motions. See Tamenu, 521 F.3d at 1004-05 (collecting cases). We see no reason why this concern cannot be remedied by adding to regulation a jurisdictional grant.

Allowing Judges to Bypass the BIA When They Disagree with a Decision Undermines the Judicial Process
We take no issue with creating checks-and-balances within the BIA adjudication process. However, allowing judges to forward that case by certification to the Director undermines our justice system by ultimately placing decision-making power within the hands of one political appointee who often does not have the depth of knowledge and experience with immigration law as the judiciary. The Director is a hand-picked bureaucrat – not elected or chosen through a nomination-confirmation process – who is not, nor is required to have been, a judge (and may not even need to be an attorney licensed to practice law). The Director is meant to run EOIR operations as an administrator and is not required to have expertise, training, or impartiality necessary to decide cases. Putting this much power in the hands of a political appointee will undermine the impartiality of our justice system.

The Proposed Rule turns the appellate process on its head. Any judge who is overturned on appeal or who receives a remand can now disagree with the decision of the appellate body and make their own appeal to the Director, despite it being fundamental to our system of jurisprudence that appellate bodies have authority to review decisions by triers of fact. The Administration appears to misunderstand the nature of appellate procedure as evidenced by the statement that the Director is intended to be a “neutral arbiter between the immigration judge and the Board”. There is not supposed to be parity between BIA Panel Members and Immigration Judges. The Panel Members represent a higher authority. Instead of promoting quality assurance, this proposed rule would undermine the authority and integrity of the BIA.

Rather, a better option for “quality assurance” would be for the Administration to create a rule whereby the judges can refer these decisions to a three-member panel of the BIA, or an *en banc* panel if already decided by a three-member panel (although having any certification process is odd and problematic because it gives judges more authority to decide what is correct legal interpretation then their BIA supervisors, pending agreement by different supervisors). We understand that judges’ performance evaluations are affected by the reversal and remand rate but this is no justification for letting them override the decision of the appellate body whose function it is to correct their errors. We also strongly disagree with the contention that the “immigration
judge is in the best position to identify an error made by the BIA” – the parties are at least as well placed, if not better, than the judge to identify errors. The Proposed Rule additionally incorrectly assumes without explanation that this new process will be expeditious and that requiring the parties to use the current adjudicatory process to remedy errors “needlessly places[sic] [an] additional burden” on them. Allowing the judge to appeal BIA decisions to the Director will not make the parties jobs easier, rather it allows an additional layer of complexity to the current litigation process.

While we acknowledge that the Director currently has been given authority by the Attorney General to review BIA cases, this does not mean that it is a wise course of action to take. The Administration’s suggestion that the process of referring a case to the Director that has already been decided by an appellate body (BIA) will make adjudication quicker is unsupported. There is no reason given in the Proposed Rule for how the Director’s review will be quicker than the motion to appeal process that currently exists. The rule does not address how the Director will have the time to personally write decisions, or alternatively, who will write them under the Director's name and what kind of training and oversight they will receive.

Additionally, this proposed rule makes the judges more like prosecutors, allowing them to decide that a case should continue to be litigated when neither party has decided that is necessary. It should remain with the parties to determine if they want to take an appeal to the federal courts, file a motion to reconsider or reopen, or otherwise petition for rehearing en banc (assuming a request for a three-member panel has not already been made).

The proposed Rule requires notice to the parties but creates no mechanism for them to respond. This fundamentally undermines our adversarial due process system. Prohibiting the Director from issuing an order of removal, granting a request for voluntary departure (but not denying), or granting or denying an application for relief or protection from removal does not remedy this problem. In fact, somewhat ironically, the Administration takes issue with the fact that the BIA “may certify a case without notice if it concludes that the parties have been given a fair opportunity to make representations before the Board regarding the case” but does little to remedy
this concern by failing to incorporate an opportunity for the parties to have a say in the judge’s decision to appeal to the Director. The Administration also could have proposed a rule allowing notice and an opportunity to comment on BIA referrals, but it did not do so.

Creating a whole other appellate process only accessible to a judge, and outside of and parallel to the congressionally-established structure is hugely problematic. Placing this process more firmly in the political sphere is also a huge risk to impartial and independent decision-making and certainly undermines the appearance of fairness in our American judicial system.

Referring Cases to the Director after 335 Days is Unnecessary, Burdensome, and Legally Problematic

Despite the Proposed Rule claiming to make changes to increase “timely dispositions”, referring cases to an additional person to review is creating more work both for the BIA in the referral process (and the Administration does not list the cost of this as required by law) and in increasing the Director’s workload. As the Director is the chief administrator for EOIR, it is unclear how he or she will have time to become a single-person appeal body (and one without the legal and judicial knowledge of an attorney or judge). The median case appeal takes 323 days. This does not mean that most of the cases are decided within 335 days as the Proposed Rule claims; it does mean that about half of the cases are decided in more than 335 days. In FY 2019 the BIA completed 19,449 cases. This means that the Director would be referred approximately 9,725 cases per year. The Proposed Rule makes this referral mandatory (“the Chairman shall refer that case to the Director for decision”) and states that the Director “may not further delegate this authority”. It is illogical that the Administration thinks this change will not have a significant impact on the Director’s workload. Among other preparatory work before putting forward a regulatory change, the Administration should look at the average case processing times for detained v. non-detained cases (and then give the public the necessary time to comment). While it is generally 4-6 months to resolve a detained appeal in our experience, non-detained appeals typically take 1-2 years, significantly beyond 335 days.
This proposed change would effectively make the Director into a secondary BIA. Setting up the Director to mandatorily review these cases is unnecessary (not to mention problematic from a due process perspective as discussed elsewhere due to the political nature of the position and the lack of appropriate expertise). Before taking such drastic measures, the Administration should run a study of exactly how many cases would be referred and the cost involved in every step of the process. As it stands, the proposed change will only accomplish moving “any bottlenecks” or “unwarranted delays” from the BIA to the Director.

Preventing the BIA from Remanding Cases for Further Fact-Finding and Limiting the IJ’s Review When the Case Is Remanded Will Result in the Miscarriage of Justice

As a preliminary matter, 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 without giving notice and an opportunity to respond to the parties. This constitutes fact-finding and must be reserved to the Immigration Judge. It is not permissible for the BIA to cherry-pick facts from the record and then make a new legal determination based on those facts unless they are truly not in dispute. While the Proposed Rule allows the BIA to “take administrative notice of facts that are not reasonably subject to dispute such as current events, the contents of official documents outside the record”, the problem is that there is little indication of what constitutes a fact not in dispute except for where the parties affirmatively agree or the judge has “found” the facts and they are not “meaningfully challenged on appeal”. Matter of Diaz & Lopez, 25 I&N Dec. 188, 189 (BIA 2010). This can lead to problematic discretionary application because, while facts may not be in dispute, usually there are contrary facts that must also be weighed before a just outcome can be reached.

Perhaps this proposal came about as the convoluted result of limiting the BIA’s authority to remand for additional fact-finding by the Immigration Judge. The Proposed Rule divests the BIA from receiving or reviewing new evidence submitted on appeal, even for purposes of determining if a remand is warranted, “shall not remand a case for consideration of new evidence
received on appeal [unless for jurisdiction, identity, law enforcement, or security investigations, or removability], and shall not consider a motion to remand based on new evidence”. The Proposed Rule states that a party can file a motion to reopen for consideration of new evidence but there is nothing to reopen if the BIA is still adjudicating the case (as motions cannot be filed with the Immigration Court while the case is pending at the BIA) and reopening with the BIA would accomplish little as the new facts must be reviewed by the trier of fact, ie the Immigration Judge, and so a motion to reopen would still need to be accompanied by a remand. (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.)

We are especially concerned about the effects of this new proposed rule on pro se appellants, who in FY 2018 constituted roughly 20% of appellees. At the end of FY 2019, there were 65,201 appeals pending with the BIA. This means that there were approximately 13,040 pro se appeals. The proposed rule would strip the BIA of the ability to remand a case sua sponte for further factfinding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. For pro se respondents, this means that even if the judge clearly failed to develop the record adequately and even if the BIA Panel Member reviewing the case sees that there was a grave injustice, but the record was not sufficiently developed to grant relief independent of a remand for fact development, the Panel Member would have no choice but to affirm the unjust decision. This is an unacceptable restructuring of our justice system.

We are very concerned that immigration judges, faced with performance metrics that require that they adjudicate 700 cases per year, who already are pressured to develop the record quickly would have little incentive to take the time to thoroughly develop the record in pro se cases where there is no possibility that the case could be remanded for failure to do so. To give an example of how this can result in a miscarriage of justice, the Migrant Center was contacted by a pro se respondent after his asylum was denied based on a finding that internal relocation was possible as he lived in another city for about a year after being persecuted without any problems. When we asked him why he did not have problems, he stated that he remained locked in the house
in hiding. Our asylum law does not require that respondents live their whole lives this way and the judge agreed with us when we filed a motion to reconsider/reopen. However, if the respondent had already filed an E-26 the judge would have been divested of jurisdiction and, under the Proposed Rule, we would not have been able to request a remand with the BIA to develop the record on this important factual line of inquiry. The BIA would have been forced to make a ruling on the merits of the case without all the necessary information. This cannot be right.

The BIA would also have no authority remand *sua sponte* or upon a motion by either or both parties where there is a change in law or facts that now provides a clear avenue for relief or denial that needs to be examined by the fact-finder, ie Immigration Judge. We expect that this will especially prejudice *pro se* respondents.

The proposed rule also divests attorneys who may take a case upon appeal that was previously *pro se* below from putting forth the factual and related legal arguments necessary to competently represent their clients. The Migrant Center has successfully referred several *pro se* detained cases to the CLINIC BIA Pro Bono Project for representation on appeal. These referrals may become more difficult, and the representation certainly will be, if attorneys are not allowed to do their job.

Even with representation, it would be almost impossible in most cases to successfully argue for remand. The proposed rule would impose a long list of requirements which must be met before the BIA could potentially remand a case, even if requested by one or both of the parties. Under 8 CFR § § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if the party seeking remand “attempted to adduce the additional facts” and “preserved the issue by presenting it before the immigration judge” (unlikely in most *pro se* cases).

Similarly, the Proposed Rule is problematic because it limits remands based on “legal arguments not presented below” regardless of any new legal developments, unless the argument relates to jurisdiction, removability, or “substantial evidence indicates that change has vitiated all grounds of removability” meaning that no additional fact-finding is necessary. The BIA would be barred under the proposed rule from remanding even on a motion of one or both of the parties if
there is a change in the law unless the change affects removability — under the proposed rule, there would be no ability for the BIA to remand based on new grounds of relief available. Thus, for example, an asylum seeker could have been denied based on existing law at the time of the immigration hearing, the law may change while the case is on appeal making the asylum seeker eligible for relief, but the BIA would be foreclosed from remanding the case if the record requires any additional fact-finding before determining eligibility.

Prohibiting the BIA from considering new evidence on appeal as a ground for remand is incredibly problematic and will result in the deportation of bona fide refugees. Take the case of a Nicaraguan political opponent of the Ortega regime who this year had his case remanded by the BIA for additional factfinding after presenting evidence to the BIA that his attorney failed to submit to the court. The ineffective assistance of counsel claim included an I-589 listing him as being from Guatemala, a misidentified particular social group claiming he was fleeing from the political party he was a member of, and objecting to the admission of the State Department’s Human Rights Report that held critical information to the case due to unfamiliarity with the report. On remand, the Nicaraguan refugee was granted asylum. If remand for additional fact-finding had not been possible, he would have been deported in violation of our laws.

Additionally, motions to remand under the Proposed Rule must prove that the additional factfinding “would alter the outcome or disposition of the case” (emphasis added). This is even a higher standard than “the `heavy burden' of showing that the new evidence presented `would likely change the result in the case.'” Matter of L-O-G-, 21 I&N Dec. 413, 420 (BIA 1996) (quoting Matter of Coelho, 20 I&N Dec. at 473) (emphasis added). Requiring that attorneys, much less pro se respondents, prove their case to the BIA when it is the Immigration Judge who should remain the trier of fact is problematic, especially where motions to remand must be submitted quickly to avoid having the BIA reach a decision on the merits before the material facts are considered. Making a bona fide case should be sufficient to necessitate a remand.

This limitation on fact-finding is unnecessary as the regulations already require that any new evidence presented was material, previously unavailable. The Administration appears not to
trust its adjudicators because it claims that respondents “might” seek additional evidence to present on appeal in order to procure a second attempt at establishing eligibility, and that adjudicators are somehow unable to conduct the basic inquiry to determine whether this is “new, previously unavailable” evidence, Matter of W-Y-C- & H-O-B-, 27 I&N Dec. 189, 192 (BIA 2018). The Administration claims respondents are frequently engaging in gamesmanship to seek remands based on evidence that could have been submitted to the immigration judge in the first instance, but fails to provide any evidence of this. In the Migrant Center’s experience, where evidence existed at the time of the individual hearing but was not presented to the judge this was for one of two reasons: 1) the individual was not told they needed that specific piece of evidence ahead of time, and 2) the individual’s contacts in home country did not seek out and send the evidence on time. We have never seen an individual try to half-ass their case just so they can go through the process all over again. The suggestion that they wouldn’t try to avoid deportation the first time around make no logical sense and certainly is not born out in practice.

The Proposed Rule also limits judges’ authority on remand to consider any issues “outside the scope or purpose” of the remand, unless it is a jurisdictional question. Therefore, 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 to deprive the noncitizen of the opportunity to seek all available opportunities to obtain legal status and to potentially tie the IJ’s hands into ordering removal even when there is an avenue of relief available. This perverse result serves no one.

Conclusion

We oppose the Proposed Rule because it would deny most respondents, especially pro se asylum seekers, a meaningful ability to present their case and pursue alternative forms of immigration status. The consequences of the Proposed Rule are literally life and death for refugees
the U.S. has a responsibility to protect. Additionally, the Proposed Rule will further politicize the judicial process, increase the backlog, unnecessarily complicate procedure, institutional disparity between the litigating parties, and overall undermine judicial independence and impartiality. Accordingly, we urge you to withdraw the Proposed Rule in its entirety and instead dedicate your efforts – and our taxpayer dollars – to advancing policies that respect individuals’ legal right to a fair and just legal process. We urge you to stand up for due process and rescind the Proposed Rule.

Sincerely,

//s// Sara Ramey

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