



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

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### **RE: RIN 1125-AB03, EOIR 19-0410; Dir. Order No. 02-2021; 85 FR 75925; 2020-25931; Public Comment Opposing Proposed Rulemaking on Good Cause for a Continuance in Immigration Proceedings**

The Migrant Center for Human Rights (“Migrant Center”) writes in response to the Department of Homeland Security’s (DHS) [Notice of Proposed Rulemaking on Good Cause for a Continuance in Immigration Proceedings](#), published in the Federal Register on November 19, 2020, which proposes to largely eliminate the ability to get a continuance, adjournment, or postponement in Immigration Court by redefining the meaning of “good cause”.<sup>1</sup>

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<sup>1</sup> 8 CFR 1240.6 (“may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.”); see also 8 CFR 1240.45 (adjournments or postponements in the context of exclusion proceedings). The Proposed Rule states that it does not intend to define good cause as it is used in any other context outside of 8 CFR 1003.29. However, not only does it not make sense to have separate definitions for the same legal term, but it seems possible that if the Proposed Rule’s definition is made into regulation it will bleed over into other areas of the law. “Good cause” is also used as a standard for evaluating the appropriateness of actions elsewhere in EOIR’s regulations. See, e.g., 8 CFR 1003.3 (extension of briefing schedule); 8 CFR 1003.20 (change of venue); 8 CFR 1003.25 (waiver of the presence of the parties).



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The Migrant Center is a 501(c)(3) non-profit organization that provides *pro bono* and *low bono* legal services to immigrants, specializing in detention and removal cases. Our team’s legal expertise includes more than eight years of immigration litigation experience assisting several thousand individuals and representing dozens in removal proceedings, mostly on the detained docket. Additionally, we have extensive expertise in working with low income *pro se* immigrants and therefore are particularly aware of the unique challenges they face in trying to navigate our legal system without counsel.

On behalf of the immigrants we work with, as well as our non-profit organization and the attorneys that work with us, 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 right to a fair hearing in Immigration Court.

While we agree with the Proposed Rule that continuances should be granted for “good cause in a consistent and coherent manner”<sup>2</sup> we have significant reason to believe that the Proposed Rule will force Immigration Judges to deny continuances when good cause exists and that the limitations on the ability to find legal representation is a violation of the Constitution’s Fifth Amendment due process clause. We also agree that “unnecessary continuances undermine the detailed statutory and regulatory scheme” but disagree with the Proposed Rule’s premise that straightjacket *per se* rules will assist in administering justice. To the contrary, we believe it is more appropriate to trust Immigration Judges - who know the facts of the case and can weigh arguments for and against a motion for a continuance - in reaching the correct outcome. To do otherwise undermines the claimed purpose of the Proposed Rule: “By articulating a clearly-defined good cause standard, the Department believes that it will be less likely to be misapplied or misconstrued”. While EOIR quotes itself, aka the Attorney General, in claiming that “the ‘good cause’ standard is often misapplied in immigration proceedings, resulting in the overuse of

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<sup>2</sup> An immigration judge “may grant a motion for continuance for good cause shown.” 8 CFR 1003.29. The “continuance for good cause shown” language was initially added to the regulations in 1987 to codify existing practices and to “restate[ ] in simpler terms the discretionary authority of Immigration Judges to grant continuances for good cause shown found in 8 CFR 242.13.”



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continuances” there has been no study done, ie no data presented, to back up this claim. *Matter of L-A-B-R-*, 27 I&N Dec. at 411.

Continuances are an “important management tool for adjudicators,” intended to promote efficiency by allowing for more time in a case where “it [would] be wasteful and inefficient to plow ahead immediately” due to certain developments in the case, such as illness of a key participant. *Matter of L-A-B-R-*, 27 I&N Dec. at 407; *see also, United States v. Tanner*, 544 F.3d 793, 795 (7th Cir. 2008) (continuances may “promote efficient case management”).

Executive Order 12866 and [Executive Order 13563](#) direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). 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”. [Executive Order 13563](#) emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The negligible benefits of the Proposed Rule certainly do not justify its costs, to our system of justice, respondents, and the U.S. taxpayer.

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).

### **The Proposed Rule Eliminates Important Discretionary Power**

The Proposed Rule states that: “Proper uses of continuances can greatly benefit respondents with [sic] valid claims and it should be up to the parties and the Immigration Judge to determine whether that continuance is proper in the context” yet then proceeds to eliminate judges’ ability to grant continuances in many instances. For example, the Proposed Rule eliminates the ability of judges to grant continuances in order to seek “deferred action, or the exercise of prosecutorial discretion by the Department of



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Homeland Security (“DHS”). In other words, even though DHS may decide that the individual should not be removed for humanitarian or other reasons, the Immigration Judge will be required to issue a removal order. This could apply to Dreamers who would be eligible for DACA, to name one example. Having a removal order can impact an individual’s ability to then obtain immigration relief they may have otherwise been eligible for, such as legal permanent residency and humanitarian visas.

The Proposed Rule does not allow for continuances if applications for collateral forms of relief have not been filed assuming, it appears from the language of the Proposed Rule, that this is the immigrant’s fault. EOIR, here and in other places, uses circular reasoning by quoting itself to justify its decision: “A continuance would also not likely be justifiable where the alien expresses an intention to file for collateral relief at a future date.” *Matter of L-A-B-R-*, 27 I&N Dec. at 416. The Proposed Rule incorrectly compounds the notion of due diligence and filing previous to a court hearing. However, in the Migrant Center’s experience, many immigrants don’t learn about other forms of relief that are available to them until they are in proceedings and consult with an immigration attorney. This is especially true for those in detention.

Furthermore, the Proposed Rule would prohibit continuances for collateral matters - such as adjustment of status - unless the immigrant has both “demonstrated by clear and convincing evidence a likelihood of obtaining relief on the collateral matter” and has a visa available within six months.

### **The Proposed Rule Unnecessarily Limits Access to Counsel**

The Proposed Rule makes it such that Immigration Judges do not need to give continuances for *pro se* respondents to look for counsel,<sup>3</sup> claiming that the 10-days notice of hearing is sufficient time. This claim is woefully divergent from reality. It is almost impossible to find representation in 10 days. Even assuming that the respondent knows how to, and can look for, representation and contact attorneys the day after they receive notice, they will have only typically have 4-6 days to set up consultations (considering that the notice is likely received on average three days after mailing and that there will be

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<sup>3</sup> Currently, judges are [required to grant at least one continuance](#) for respondents to find a lawyer if requested.



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two weekend days during this 10-day period). Now, even assuming that there may be an attorney who has an opening in their schedule for a meeting with only a few days notice, it will be difficult for respondents to engage in best practices by consulting with several attorneys on prices, work style, etc.; make a decision; and gather the money to pay the attorney retention fee. Also, with the more complicated cases especially, respondents will need to gather documents - such as police records and court judgements - for the attorney, and the attorney will need to do legal research, before eligibility can be determined. It is notable that the Proposed Rule simultaneously makes it more difficult to get a continuance for attorney preparation.

Pausing here for a moment, it is crucial to recognize that this 10-day period under INA 239(b)(1) only applies from the time of issuing the NTA, not from the time that a court hearing is set. DHS often issues NTAs without a court hearing date. Attorneys may be able to evaluate a case based on an NTA but they certainly cannot agree to take a case without knowing the date and time of the hearing to verify their availability. Under the Proposed Rule, the Immigration Judge will not be able to change the hearing date to accommodate the attorney's schedule, meaning that this attorney will have to reject the case and the respondent will have to begin with their search again, except this time there may only be a day or two after receiving the hearing notice before they need to show up to court. Only respondents who line up multiple attorneys in preparation for receiving a hearing notice will have a chance at representation in these circumstances. Also, this will require the attorney to prepare to respond to the charges in perhaps under 24 hours. The only other alternative is to ask the potential client to hire them to prepare this part of their case but limited representation agreements can be confusing and deleterious for all parties and should not be encouraged, as this Proposed Rule does.

Importantly, detained respondents who do not have family and friends to help them find an attorney, especially if they are low-income, will often not know how, or have the ability to, look for representation before their first court hearing. It is usually at the first Master Calendar hearing that the Immigration Judge provides them EOIR's List of Pro Bono Legal Service Providers. It makes no sense



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for the agency to do this but also expect that they've already found representation.<sup>4</sup> Data shows that the vast majority of detained respondents do not have counsel at their first hearing.

It is worth noting that any additional time beyond the 10 days that transpire before the first master calendar hearing cannot be counted on as this time will differ in each case and therefore is not a solid foundation on which to base policy. It is also inapposite to set policy based on median timeframes as this effectively means that those who fall below the median are discounted from the policy. Not only is this illogical but it institutionalizes an unequal system, which violates the U.S. Constitution, including the Fifth Amendment's due process clause.

Now, while Immigration Judges may grant one continuance for 30 days - a reasonable time in most if not all cases (the Proposed Rule should add language such as "except where good cause is shown for needing longer") - limiting this continuance to only those cases where less than 30 days have passed since obtaining the Notice to Appear is problematic. As explained above, without having a hearing date, few attorneys will be inclined to take a case, and may refuse to even conduct a consultation until there is a hearing date as facts can change in the interim which would affect eligibility and consequently require the attorney to double their work by needing to do two consultations. Additionally, the Proposed Rule prejudices respondents through no fault of their own, equally applying the law on right to counsel dependent on when their hearing is scheduled. If we make the reasonable assumption that attorneys will not seriously consider a case until a date is set, someone who has a hearing 31 days after being served a Notice to Appear will not be able to request a continuance to find representation even if they only received that hearing notice a few days before the hearing. This problem can, and likely will, affect many respondents, especially as courts take longer to schedule hearings during the COVID-19 pandemic, when there are holidays, week-long judicial trainings, and other pauses in the court's work;

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<sup>4</sup> Some respondents may be given this list by USCIS but without anyone explaining to them what the list is in their language, it has limited relevancy; additionally USCIS has a tendency to not give the most up-to-date list, sometimes being a year or more old. Similarly, these lists are supposed to be posted by the phones in each detention dorm but no one explains where or what these are to detained individuals. The most vulnerable respondents - in terms of language, knowledge, income, etc. - are often the ones who rely most on the court system to uphold their rights, including a meaningful right to seek and obtain counsel.



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and lengthy court backlogs, such that hardly anyone - even detained respondents at present - have their initial master calendar hearing within 30 days of being served. Consequently, the Proposed Rule effectively eliminates the ability to find representation at the beginning of proceedings (at which time important rights and legal arguments may be unknowingly forfeited by *pro se* respondents). Additionally, DHS sometimes serves the respondent and then takes several weeks to file the Notice to Appear with the court, thereby making it next to impossible to get a court hearing within 30 days (we see this especially in detained asylum cases). It cannot be right that DHS, the party opposed to the respondent, can effectively prevent the respondent from obtaining counsel.

Furthermore, often respondents need to ask for time to find counsel at a subsequent hearing, not at the initial hearing. Take for example an asylum case - a large portion of EOIR's docket - the respondent can often easily plead to the charges on their own and get a date for filing their asylum application, and they may even be in a position to file their application *pro se* if they are receiving assistance from an organization like the Migrant Center. The Migrant Center, as well as other organizations and private attorneys, may be holding back on entering an appearance if the respondent is seeking release from custody and likely will be proceeding with their case outside our jurisdiction. While we can file a Motion to Withdraw due to the change in venue, this is extra paperwork and time for us and for the court and there is no guarantee the motion will be granted. Therefore, it is frequently better practice to see how matters shake out first. We are still monitoring deadlines in the case and typically will not need the respondent to ask for a continuance for us to represent them but this is possible depending on when the court has scheduled the hearing (under the Proposed Rule we would also be barred from requesting a continuance due to a scheduling conflict). Having the judicial flexibility to respond to the needs of the case is important and the Proposed Rule eliminates the ability to schedule cases in such a way as to allow for increased representation. This is no small matter, as asylum applicants with representation are almost five times more likely to receive protection than those who proceed *pro se* (47% v. 12%). It is concerning that the drafters of this Proposed Rule state "it is important for the Department to ensure that representation does not undermine the orderly procedure of the immigration courts and is not a hindrance to fair and timely adjudications" suggesting that is a



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problem as opposed to a well-documented solution to increasing fairness and timeliness (for example, EOIR’s Legal Orientation Program has been shown to speed up hearings simply by providing a basic level of information and assistance with forms).

EOIR refers to the fact that approximately two-thirds of respondents in removal proceedings have representation without considering that this means over 330,000 people do not have representation and that the numbers are significantly lower for those in detention, where the Proposed Rule will speed up the process even more.

Additionally, it is problematic that this exception can only be given once. What if the respondent uses their one chance to get an attorney and then that attorney fails to provide effective assistance and needs to be fired (more likely under the Proposed Rule which doesn’t give time to look into the options)? Now the respondent cannot get time to find new counsel, which will likely be even more important as the ineffective attorney may have complicated aspects of the case. Again, the respondent is unfairly prejudiced due to matters outside their control. A prior regulation that governed immigration court proceedings for approximately 30 years allowed for more than one continuance to seek representation if there was “sufficient cause” for more time. See [8 CFR 242.13](#) (1986). The current Proposed Rule is even more strict than this regulation, which was deemed unuseful and discarded in favor of a more flexible approach (likely considering that judges could be trusted to make reasonable decisions on continuances, weighing the facts and considering judicial efficiency, such that additional “sufficient cause” adjudication was unnecessary).

The Proposed Rule states “that good cause will not be found due to a representative’s scheduling conflict in another court if that conflict that[sic] existed at the time the immigration judge scheduled the hearing”. The Proposed Rule bases this prohibition on the fact that “a representative’s assertion that his or her workload or obligations in other cases prevent preparation because professional responsibility obligations require that representatives do not take on no more cases than they can handle” ignoring the fact that the attorney is requesting a continuance exactly so they can comply with their ethical obligations to provide effective representation and if they get the continuance they will be able to handle the workload. Although attorneys cannot assume that a judge will grant a continuance, by not even



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allowing for this possibility, the Proposed Rule dissuades attorneys from providing representation when they would do so otherwise. This further limits access to counsel.

Sincerely,

*//s// Sara Ramey*

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