Migrant Center for Human Rights
Protecting the Persecuted

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RE: RIN 1125-AB01, EOIR 18-0503; Dir. Order No. 01-2021; 85 FR 75942; Doc. No. 2020-25912; Public Comment Opposing Proposed Rulemaking on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal

The Migrant Center for Human Rights ("Migrant Center") writes in response to the Executive Office for Immigration Review's (EOIR) Notice of Proposed Rulemaking on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, published in the Federal Register on November 27, 2020, which proposes to restrict access to motions to reopen and reconsider, as well as stays of removal, by increasing the burden on the moving party and raising the adjudication standard.

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. Additionally, as a non-profit organization, 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, we write to urge your reconsideration of several provisions of the Proposed Rule that we have good reason to believe will negatively affect the due process rights of people in our community, thereby undermining our American values of justice and the rule of law.

Executive Orders 12866 and 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.

Illogically, "the Department does not believe that, broadly speaking, the proposed rule could be said to burden the parties in EOIR proceedings, as the rule simply changes adjudicatory standards used in those proceedings." However, it is exactly because the Proposed Rule changes adjudicatory standards that the process will become more difficult and time consuming. This is true such that, under the Proposed Rule, fewer people could overturn a deportation order, even if they now have a legal way to remain in the United States. In fact, "the Department notes that the proposed rule may result in fewer motions to reopen being granted" but claims that this is acceptable "because motions to reopen are disfavored already as a matter of law," ignoring that motions should be granted or denied not based on a blanket disfavored approach but on the merits of the individual case.

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 without reference, is taken directly from the Proposed Rule).

The Proposed Rule Denies Access to Justice by Ignoring Reality

The Proposed Rule incorrectly states that a person's "volitional departure" from the U.S. while they have a Motion to Reopen or Reconsider pending "represent[s] a conscious decision by the alien to forgo further presence in the United States and evince[s] an effort to abandon or stop pursuing efforts at remaining." The Migrant Center, to the contrary, has come across multiple cases over the years of immigrants who make brief departures from the U.S. in order to take care of sick relatives or attend the funeral of a loved one. By changing regulation such that a person's volitional departure while a motion to reopen or reconsider is pending constitutes a withdrawal of that motion, the Proposed Rule puts people in an impossible position where they must choose between giving up their legal rights or taking care of important family matters. This cannot be right. The Proposed Rule should refrain from establishing a blanket legal principle without creating an exception such as an advance parole option that would allow for a brief departure to attend to important matters without the necessity of renouncing critical legal rights.

The Proposed Rule also denies access to the judicial system in favor of immigration enforcement by requiring that stay requests be filed first with DHS, and that "DHS must have subsequently denied or failed to respond to the request within five business days" before a stay request can be filed with EOIR. The Proposed Rule claims, without support, that this "is a commonsense procedural mechanism that ensures an alien multiple opportunities to have a stay request considered". Individuals already have the option of seeking two stays in this, or in the reverse, order. Individuals request stays with EOIR for particular strategic reasons, which often relate to the immenancy of their removal. The Proposed Rule will effectively result in the deportation of individuals who may have valid claims. As a non-profit that works with a detained

docket, the Migrant Center frequently sees DHS only notify someone of their deportation flight the night before by cancelling their commissary account. We've had DHS deny stay requests the same morning that someone is loaded onto a plane. This is not an uncommon practice around the country, as we've heard in our conversations with other advocates. The reality is that by the time there is a DHS decision, or the five days are up, the person will already have been deported. The Proposed Rule will effectively deny access to the EOIR stay process for many detained individuals.

It is worth mentioning that the Proposed Rule is completely wrong when it states that: "It also promotes efficiency, as DHS, the agency seeking to remove the alien, is in the best position to evaluate a stay request in the first instance." DHS is NOT in the best position to evaluate a stay request in many situations. ICE Deportation Officers and CBP agents are not attorneys, much less judges, versed in immigration law. How the Proposed Rule thinks they will do a better job of evaluating the merits of an individual's case is mind-baffling. The Proposed Rule offers no evidence for this claim; if anything, the fact that DHS is trying to remove the individual puts them in the role of a partial decision maker and therefore makes them less qualified to make a stay decision. There are certainly circumstances where DHS officers are capable of making well-informed and considered decisions, but it is without-a-doubt that they are not the best placed to do so in many situations. This section of the Proposed Rule should consequently be withdrawn.

The Proposed Rule similarly requires that EOIR adjudicators wait three business days from the filing of a stay request before issuing a decision unless the opposing party joins the motion or consents. The Administration states that: "For genuinely exigent situations, nothing in this proposed rule prevents a party for[sic] moving for expedited treatment of its stay request". However, there is no language in the actual proposed regulatory language that creates this exception. As written, the Proposed Rule would again lead to the inappropriate deportation of individuals without recourse to the court system. A more proper regulation would allow for a temporary stay to be put into place while the so-called opposing party has an opportunity to

respond. This would function similar to a Temporary Restraining Order or Preliminary Injunction in federal court, ensuring that important legal rights are not forsaken, nor irreparable harm caused, due to the time needed for adjudication.

The Proposed Rule Prioritizes Enforcement Over Justice

The Proposed Rule states that: "The alien's failure to comply with a notification to surrender may result in the denial of the alien's motion." While we agree that it is generally desirable for individuals to comply with orders of removal, deportation, or exclusion, it is not true that not doing so is a "deliberate flouting of the immigration laws"[1] in all cases, as demonstrated in the present context where the individual is actively seeking to have the law applied correctly in their case by filing a motion to reopen or reconsider. By stressing that EOIR adjudicators should deny motions where the person has a removal order they are allegedly not complying with, where they are seeking to change that order through the filing of a motion, the Proposed Rule effectively undermines the whole motions process and violates their legal rights to ask EOIR to review their case. Motions should be judged on their merits, in accordance with the laws of the U.S., not on whether the person is an otherwise law abiding individual. Other issues, whether those be DHS enforcement or criminal procedures, have separate legal systems designed to address whatever needs addressing. It is not EOIR's role to get involved in these areas outside of relevant contexts, such as good moral character determinations that are established by statute. Instead of encouraging individuals to assist with the "the enforceability of a court's judgments"[2], through which they may lose important legal rights, not to mention suffer other serious harm to themselves and their families, the Proposed Rule will only encourage them to give up their legal right to seek regulation of their legal status. There is no incentive for them to come out of the shadows if their time and money in seeking legal status will be subject to a strong discretionary preference for rejection. Conflating the roles of our immigration

[1] *Matter of Barocio,* 19 I&N Dec. 255 (BIA 1985).
[2] *Martin* v. *Mukasey,* 517 F.3d 1201, 1204-05 (10th Cir. 2008).

enforcement and justice systems is therefore not only harmful to individuals but is contrary to the public interest. Establishing compliance with removal orders as a discretionary factor only makes sense if adjudicators are given free leeway to determine what weight to give this factor after a cumulative, fact-based analysis. As written, the Proposed Rule does not set out a neutral discretionary framework. This lack of clarity can lead to abuse and disparate results in similar cases, anathema to the fair administration of justice.

The Proposed Rule Unequally Gives Preference to DHS

By deciding that the "time and numerical limitations set forth in this paragraph do not apply to motions by DHS" the Proposed Rule gives DHS the power to continue litigating a case whenever the agency feels like it, all while limiting the ability of immigrant respondents to seek judicial review of their case. DHS is only limited "in exclusion or deportation proceedings" but not in removal proceedings. These limits should apply across the board, with any exceptions such as reopening / reconsidering for alleged fraud or a crime that would support termination of asylum clearly spelled out. Where time or numerical limitations are an issue, DHS could still seek to file a joint motion or request sua sponte reopening / reconsideration where needed, but giving the agency a blanket power incorrectly assumes that DHS' motions are by nature more meritorious and unnecessarily and inappropriately tilts the scales of justice in DHS' favor.

The Proposed Rule Increases Adjudicators' Burden Unnecessarily

The Proposed Rule "would also clarify that immigration judges and the BIA may not automatically grant a motion to reopen or reconsider that is jointly filed, that is unopposed, or that is deemed unopposed because a response was not timely filed." If an adjudicator looks a the case and determines that the motion is prima facie approvable, there is no reason that the adjudicator should be required to conduct an in-depth analysis and prepare a lengthy, detailed written decision when there is no debate on the matter.

The Proposed Rule Raises the Standard to be Granted a Stay of Removal

Under the Proposed Rule a stay of removal request must now put forward evidence and argument on the "likelihood of success on the merits; the likelihood of irreparable injury; harm that the stay may cause to other parties interested in the proceeding; and the public interest". This both makes it more likely that the individual will not have the time to prepare the stay request and/or that the adjudicator will be unable to render a decision before the individual is deported, as well as requires that the adjudicator review the case multiple times: for the stay request, for the motion, and on the actual merits. The Proposed Rule does nothing to delineate how these processes are different. Rather, the Proposed Rule suggest that the "moving party bears a heavy burden"[3] such that stay requests - which are often filed in order to get time for adjudication - will effectively require that adjudication to take place without the requisite time to do so. (This is why it is also problematic to *per se* reject stay requests that are not filed along with a motion, as fully briefed motions take time to prepare. Rather, a *prima facie* standard should apply as there should be some showing that there is merit to the request.)

The Proposed Rule Creates a New Standard for Adjudication that is Unnecessarily Harsh

The Proposed Rule states that: "Allegations of fact contained in a motion to reopen or motion to reconsider are not evidence and *shall* not be treated as evidence... Such allegations made by counsel or an accredited representative *shall* not be accepted as true for purposes of adjudicating the motion" (emphasis added). This language makes little sense. Not taking a State Department Human Rights Report or a sworn affidavit as evidence runs contrary to how EOIR adjudicators determine cases, which is to say that a trier of fact cannot be expected to reach a legal conclusion based on a case where there are zero facts in the record. Instead adjudicators must accept some evidence into the record first, after which they determine what weight to give

[3] *Dieng,* 947 F.3d at 963.

the facts. Requiring adjudicators to not accept any evidence makes it impossible to rule on a motion.[4]

To get around arguing admissibility at the motions stage (which is impractical as the parties are not in open court), EOIR traditionally will decide that, if the evidence presented is determined to be admissible and the appropriate weight given, then a *prima facie* case has been established and the motion can be granted. It is not necessary for the adjudicator to determine that all the facts as presented are true, but it is necessary for the adjudicators to have this option. The Proposed Rule, by foreclosing the possibility that the facts presented could be true, doesn't allow the adjudicator to do their job and undermines the impartiality of the judicial system.

Similarly, for motions to reopen based on ineffective assistance of counsel, the Proposed Rule requires that "the conduct be unreasonable based on the facts of the case, viewed at the time of the conduct at issue"[5] and raises the standard by requiring that the individual "demonstrate prejudice based on that conduct". This means that the adjudicator "shall consider whether a reasonable probability exists that, absent counsel's ineffective assistance, the outcome of the proceedings would have been different". In a case where there has been ineffective assistance of counsel, the fundamental problem is that the person did not have a fair hearing and is simply asking for their right to be restored by granting them the opportunity to have that hearing. The

[4] The Administration claims that the Proposed Rule clarifies that factual assertions that are contradicted, unsupported, conclusory, ambiguous, or otherwise unreliable should not be accepted as true, consistent with current standards. *See, e.g., Dieng,* 947 F.3d at 963-64 (affidavits that are "self-serving and speculative," statements concerning changed country conditions that are not "based on personal knowledge," and letters from petitioners' family members that are "speculative, and not corroborated with objective evidence," may be discredited as "inherently unbelievable"). However, the regulatory language proposed does not talk about the type of evidence, or weight to afford evidence, but rather states that nothing shall be considered evidence or taken as true, regardless of its reliability or relevancy. In this way the language of the Proposed Rule appears to contradict its intended purpose.

[5] *Strickland* v. *Washington,*466 U.S. 668 (1984).[17] For an attorney's representation to constitute ineffective assistance, the representation "must . . . [fall] below an objective standard of reasonableness," *id.* at 688, judged "on the facts of the particular case, [and] viewed as of the time of counsel's conduct," *id.* at 690.

motion is not the procedure through which they are supposed to have the full merits of their case litigated, but rather a preliminary procedure through which they explain why they need a hearing. It is very time consuming to prepare a motion to reopen with the detail and evidence of a full merits hearing and it should not be required. It will make it more difficult and expensive to find and hire counsel, and will result in counsel unable to take on additional cases.

Take the case of an asylum seeker from Somalia represented by undersigned counsel. His attorney copied his CFI results into his asylum application and submitted it without reviewing it with him, never answered his calls about his evidence not arriving (which resulted in DHL storing his evidence for a month and then destroying it), turned in country condition evidence late to the judge because - as stated on the record - he was pro bono (however, he was paying her $500), met with him only one hour before trial, and limited her preparation to telling him to say the truth in court. The ineffective assistance of counsel was so egregious that not only was the case effectively not prepared for trial, but his case was damaged more than if he had proceeded *pro se* as the judge was presented with incorrect, confusing, and incomplete information while thinking that the attorney had done reasonable due diligence in presenting the case appropriately. Tellingly, undersigned counsel won a very similar case with the same judge only about two weeks before this case was denied. The flaws were so severe that he merited being given a chance to restart his case from scratch.[6]

Establishing the requirement to prove prejudice such the moving party must demonstrate a probability that "the outcome of the proceedings would have been different" will be especially difficult for *pro se* respondents who do not have a nuanced understanding of our immigration laws. Rather, the Proposed Rule should establish a standard more similar to a reasonable possibility -- and not probability -- that the outcome would have been different. To do otherwise makes the initial burden to get a fair hearing illegally higher than that established in law through

[6] Incorrectly, he was denied this opportunity by the BIA because he hadn't litigated his case in the first instance in his motion to reopen with the BIA, only providing a multiple-page summary of his claim.

the CFI process, makes it more cumbersome to prepare a motion, and will result in *bona fide* cases being prejudged and denied without a full hearing in line with due process requirements.

On a quick note, the Proposed Rule excuses the submission of a written contract if one does not exist for *pro se* respondents but does not similarly do so for represented respondents. Furthermore, accepting a motion where no written contract exists should not be a matter of adjudicator discretion as this would undermine access to justice by allowing motions to be dismissed simply because the ineffective attorney did not put the contract down in writing. The language of the Proposed Rule should be adjusted accordingly so that there is no confusion on this point.

Ignoring Case Processing at Other Immigration Agencies Will Result in Unnecessary Denial of Benefits and the Harm this Entails

The Proposed Rule prevents adjudicators from granting motions to reopen or reconsider "based on an application for relief from removal over which the immigration judge or Board lacks authority unless that application for relief has been granted by another agency, the granted application provides complete relief from removal". The Proposed Rule explicitly prohibits reopening or reconsidering a removal order where the person has "interim relief, *prima facie* determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the application for relief". Often USCIS cannot grant a petition if there is an outstanding removal order. For example, when USCIS approves an I-130 petition for an immigrant spouse, a spouse who has a prior, unrelated removal order will need to move to reopen and terminate proceedings before the I-485 can be granted. Without the ability to do this, the immigrant will not be able to obtain their green card to live permanently and legally with their U.S. citizen spouse. Without changing case processing procedures at USCIS, the Proposed Rule will create unnecessary harm to U.S. citizens and their families.

The Proposed Rule's Limit on Filings and Issues Will Deny Justice to Eligible Individuals

The Proposed Rule prohibits reopening or reconsidering a case if the "original asylum application was denied based upon a finding that it was frivolous". This makes no legal sense if there are now valid arguments for asylum and/or another form of relief available, either through the judicial process or because the individual has been, or could be, granted legal status through another agency such as USCIS.

The Proposed Rule also limits any reopened proceedings to only those issues "upon which reopening or reconsideration was granted, as well as matters directly related, except as otherwise provided by statute, regulation, or judicial or administrative precedent". This means that if there is any collateral matter that comes up, and which may be a quicker / more efficient form of resolving the case, the EOIR adjudicator is prevented from doing so. Additionally, the party affected is likely prevented from raising the issue in a new motion as they will usually be barred from submitting additional motions to reopen or reconsider. This makes no sense.

Conclusion

The Proposed Rule includes many problematic sections, as discussed above, and should consequently be significantly revised.

Sincerely,

//s// Sara Ramey

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