



September 25, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

**RE: “Appellate Procedures and Decisional Finality in Immigration Proceedings;
Administrative Closure”**
RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020,
Submitted via: www.regulations.gov

On behalf of ASISTA, I am submitting this comment in opposition to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) proposed rule, “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure” initially published in the Federal Register on August 26, 2020 (hereinafter “proposed rule”).¹

ASISTA’s mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors of violence. We submit this comment based on these guiding principles and our extensive experience.

I. EOIR should extend the deadline for comment

DOJ provided the public with a mere 30 day period in which to comment on the proposed rule; a time frame which is utterly insufficient given the enormous challenges organizations like ours are facing during the COVID-19 pandemic. Executive Order 12866 states that agencies “should

¹ Executive Office for Immigration Review, Department of Justice. “Notice of Proposed Rulemaking: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure” (hereinafter “Proposed Rule” (85 FR 52491) August 26 2020, available at <https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure>

afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period of *not less than* 60 days.”² Instead, DOJ has placed unjustified administrative and personal strains on stakeholders by providing such a short comment window. Stakeholders, including our own organization, must balance the demands of responding to constant and complex changes to immigration policy, while at the same adapting to irregular work conditions, engaging in care-taking responsibilities, including in some instances, helping children navigate the extraordinary challenges of remote or hybrid learning.

Immigrant survivors already face myriad barriers accessing services and assistance, and these barriers have been exacerbated during the COVID-19 pandemic. Abusers and perpetrators of crime often threaten survivors that reaching out for help will result in separation from their children or in deportation. At this moment of crisis, such threats take on new force and survivors face increased uncertainty and confusion. The pandemic has caused an increased rate of domestic violence and augmented the complexity and challenges of serving survivors.³ Agencies that serve survivors are either at capacity or must now navigate additional and novel barriers in their service provision.

EOIR’s purported mission is to “to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration law”⁴; however, providing such a short period for comment violates that mission by not providing a fair and sufficient period for response. Immigrant survivors of domestic violence, sexual assault and human trafficking are uniquely impacted by this proposed rule. DOJ does a disservice to these survivors and to service providers that serve them by providing such a limited time frame to respond to such substantive challenges.

For these procedural deficiencies alone, the DOJ should withdraw the proposed rule. In the alternative, DOJ should give the public at least 60 continuous days to have sufficient time to provide more comprehensive comments. Given the extreme limitations DOJ has placed on the comment period, this comment reflects only a fraction of the substantive issues we would have liked to address in our response.

II. Administrative Closure

In the proposed rule, DOJ “proposes to amend 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240— provide no freestanding authority for immigration judges or BIA members to administratively close immigration cases absent an express regulatory or settlement basis to do so.”⁵

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

³ National Taskforce to End Sexual and Domestic Violence. “Fast Facts: Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis” available at <https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842/687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>

⁴ Executive Office for Immigration Review “About Us” (last updated: August 14, 2018), available at <https://www.justice.gov/eoir/about-office#>

⁵ Proposed Rule at 52492.

DOJ misconstrues the history of administrative closure which has been used in the federal court system, including immigration matters, for decades.⁶ The ability to apply for relief, especially for matters in immigration court and before the BIA is often impacted by the fact that the U.S. Citizenship and Immigration Service (USCIS) has exclusive jurisdiction over certain forms of relief, including survivor-based protections created under VAWA and the TVPA. For example, VAWA self-petitions were created by a bipartisan majority in Congress because it recognized:

a battered spouse may be deterred from taking action to protect him or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation. Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.⁷

Later Congress established, also in a bipartisan fashion, two additional remedies for immigrant survivors: the T visa to assist victims of human trafficking, and the U visa to assist noncitizen victims of certain eligible crimes (including domestic violence, sexual assault, and trafficking) who are willing to assist in the investigation or prosecution of those crimes. These forms of relief play a critical role in helping immigrant survivors find independence, safety and stability for themselves and their children, and USCIS has exclusive jurisdiction over the adjudication of all three of these protections.⁸

Together with our partners, we have already presented to EOIR that the use of administrative closure is essential in survivor-based cases as it “can be used to pause proceedings when a removal proceedings could be affected by a decision on a visa application by another agency.”⁹ This is critically important given that USCIS is now facing unprecedented backlogs in the adjudication of cases, including for survivor-based relief.

⁶ See *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012) “Administrative closure is not limited to the immigration context. It is utilized throughout the Federal court system, under a variety of names, as a tool for managing a court’s docket.”

⁷ See H.R. REP. NO. 103-395, at 26-27 (1993); See also Section 1513(a)(2)(A), Public Law No: 106-386, 114 Stat. 1464 (2000) (indicating that Congress created the U and T visa program to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking...and other crimes...committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”)

⁸ 8 C.F.R. § 204.2(c)(6)(iii); 8 C.F.R. § 214.11(b), (d); 8 C.F.R. § 214.14(c)(l)

⁹ See Amicus Brief on behalf of the Tahirih Justice Center, ASISTA, American Immigration Lawyers Association (AILA), the Center for Gender and Refugee Studies, and the Asian-Pacific Institute on Gender-Based Violence filed in response to the *Matter of Castro-Tum* (February 2018) available at <https://www.tahirih.org/wp-content/uploads/2018/04/Matter-of-Castro-Tum-Brief-by-Amici-Curiae-Tahirih-Justice-Center-et-al.pdf>

Over a decade ago, a CIS Ombudsman report stated the “Ombudsman is concerned that USCIS has not allocated the resources needed to timely process T and U non-immigrant, as well as eligible adjustment cases.”¹⁰ Again, in May of 2016, advocates nationwide expressed their deep concern over case delays in the U visa program, as processing times were then over two years.¹¹ In September 2020, U visa processing times are now posted at 57 to 57.5 months, more than double where they were four years earlier.¹² According to USCIS data, the average processing time for U visa applications was 11.4 months in FY2015.¹³ In FY2020, the average processing time was 47.3 months, a 317% increase.¹⁴ VAWA self-petitions now take between 17 and 22.5 months to be adjudicated.¹⁵ USCIS’ posted processing times for T visa applications for victims of human trafficking are between 18 and 27 months,¹⁶ which at the higher limit represents a 321% increase from FY2015 when these applications took 6.4 months to adjudicate.¹⁷

The reality is that these shocking backlogs undermine the effectiveness of these critical benefits. Such long waits for the adjudication of their cases, coupled with other barriers (like a lack of access to work authorization or other financial support) can be devastating to survivors, and cause them possibly to either face homelessness or have to return to violent homes.

Now, under the proposed rule, survivors who are facing these incredible backlogs are more at risk of potential deportation before their applications are adjudicated, which will exacerbate the trauma they have already endured and put them further in harm’s way. There have already been reports of survivors being deported before they have an opportunity to present their case before USCIS, including this very month where a survivor in Texas was deported after alleging sexual assault and harassment in a detention center in El Paso.¹⁸ And there are numerous other

¹⁰ Department of Homeland Security. CIS Ombudsman. “Improving the Process for Victims of Human Trafficking and Certain Criminal Activity: The T and U Visa January 29, 2009”, available at https://www.dhs.gov/xlibrary/assets/cisomb_tandu_visarecommendation_2009-01-26.pdf

¹¹ See Sign-On Letter to Director Rodríguez on Significant Delays in Adjudicating Petitions for U Nonimmigrant Status And USCIS Response (2016), available at <https://asistahelp.org/wp-content/uploads/2019/07/2016-ASISTA-Sign-on-letter-on-U-processing-delays-and-response-1.pdf>; See also USCIS. “Historic National Average Processing Times for All USCIS Offices”, available at <https://egov.uscis.gov/processing-times/historic-pt>

¹² See USCIS Processing Times at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> for processing times for I-918 Application for U Nonimmigrant Status adjudicated at the Vermont Service Center

¹³ USCIS. “Historic National Average Processing Times for All USCIS Offices” (captured Dec. 4, 2019), available at <https://web.archive.org/web/20191204043557/https://egov.uscis.gov/processing-times/historic-pt>

¹⁴ USCIS. “Historic National Average Processing Times for All USCIS Offices”, available at <https://egov.uscis.gov/processing-times/historic-pt>

¹⁵ See Note 12, *supra*. for processing times for I-360 VAWA self petitions adjudicated at the Vermont Service Center

¹⁶ *Id.* for processing times for I-914 Application for T Nonimmigrant Status processed at Vermont Service Center ¹⁷ See note 13, *supra*.

¹⁸ Lomi Kriel. “ICE deported a key witness in investigation of sexual assault and harassment at El Paso detention center” Texas Tribute (Sept. 15, 2020), available at:

instances of crime survivors who have been deported before their applications have been adjudicated by USCIS.¹⁹

The elimination of administrative closure will make it exceedingly difficult for survivors to obtain legal status given these egregious USCIS processing delays. These administrative backlogs are in no way attributable to survivors applying for relief and are wholly outside of their control. In matters like T visas, deporting survivors will eliminate their ability to apply for relief given that physical presence in the United States on account of trafficking is a required element.²⁰ Thus, eliminating administrative closure as a docket management tool undermines the Congressional goals in establishing these survivor-based forms of relief and undermines due process.²¹

The proposed rule's elimination of administrative closure will only increase procedural inefficiencies within EOIR, needlessly contributing to court backlogs instead of reducing them. A survivor's access to immigration relief specifically designed for their protection must not be compromised based on the pretext of administrative efficiency.

III. Limits on Remand

We are deeply concerned about the limits on remand in the proposed rule, in particular the proposed changes to 8 CFR §1003.1(d)(3)(iv) and to 8 CFR §1003.1 (d)(7)(iii), (iv).

The changes to 8 CFR §1003.1(d)(3)(iv) limit the Board's ability to remand for additional fact finding in the course of deciding appeals, with limit exception that it may take "administrative notice of facts not subject not in the record."²² Further, it says that the BIA shall not *sua sponte* remand a case for further fact finding unless it is necessary to determine jurisdiction over the case.²³ We are deeply concerned about this provision as it limits the BIA's authority to engage in fact finding where immigration judges did not adequately make the record, including inquiries regarding forms of relief. We feel these changes are particularly significant for *pro se* respondents. Current data shows that 44% of individuals who have never been detained with matters in immigration court are unrepresented and for detained individuals, only 18% are

["https://www.texastribune.org/2020/09/15/ice-deport-witness-sexual-assault/?utm_campaign=trib-social&utm_content=1600194817&utm_medium=social&utm_source=twitter&fbclid=IwAR1tRBW3ZHLXYrsrXh5PziqJpopU0zCKUdlcOUo51iE7qcStKvZHHJBgxU"](https://www.texastribune.org/2020/09/15/ice-deport-witness-sexual-assault/?utm_campaign=trib-social&utm_content=1600194817&utm_medium=social&utm_source=twitter&fbclid=IwAR1tRBW3ZHLXYrsrXh5PziqJpopU0zCKUdlcOUo51iE7qcStKvZHHJBgxU)

¹⁹ See e.g. Elly Yu. "A Northern Virginia Mother was a Victim of Domestic Violence. She was Deported." WAMU (Sept. 11, 2019), available at <https://wamu.org/story/19/09/11/a-northern-virginia-mother-was-a-victim-of-domestic-violence-she-was-deported/>

²⁰ INA § 101 (a)(15)(T)

²¹ 27 I&N Dec. 187 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1022366/download>

²² Proposed rule at 52510.

²³ *Id.*

currently represented.²⁴ According to DOJ data from 2018, about 20 percent of all BIA appeals are by *pro se* appellants.²⁵

The proposed rule would further severely limit the issues that an IJ could consider if a case is remanded. Under the proposed 8 CFR § 1003.1 (d)(7)(iii), if the BIA were to remand a case, the immigration judge “shall not consider any issues outside the scope or purpose of that order” unless there is an issue of continuing jurisdiction.²⁶ Thus, if an individual later becomes eligible for additional forms of relief (like later becomes a victim of a crime eligible for U visa relief) or if there are subsequent errors in law in fact identified in the underlying decision, immigration judges would be precluded from addressing those issues. As our partners at the Asian Pacific Institute on Gender-based Violence note, the proposed rule would disproportionately impact immigrant survivors of gender-based violence, who often are traumatized by the abuse they have endured which makes it difficult to relate their experiences to strangers in an adversarial legal setting.²⁷ These limitations contained in the proposed rule unjustly binds immigration judges and limits the ability of survivors to avail themselves of remedies for which they may be eligible, contravening Congressional intent in establishing survivor-based immigration relief.

IV. Limits on Motions to Reopen

The proposed rule, 8 CFR § 1003.2(a) takes away the first sentence of the current rule which states “The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.” Instead, DOJ now proposes the following language:

“The Board may at any time reopen a case in which it has rendered a decision on its own motions solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. In all other cases, the Board may only reopen or reconsider any case in which has rendered a decision solely pursuant to a motion filed by one or both parties”²⁸

The criteria in which individuals may submit motions to reopen before the BIA are limited in time and in number.²⁹ With limited exceptions, a non citizen may only file one motion to reopen which must be filed within ninety days of the final order. This has significant consequences for individuals who may have available relief despite a prior final order (including certain

²⁴ Trac Immigration (last accessed Sept. 25, 2020), available at <https://trac.syr.edu/phptools/immigration/nta/> (The data shows that of the individuals never detained (2,549,416) that approximately 1,141,255 are not represented. Similarly, of those individuals with matters in removal proceedings who are detained,(1,603,108) that only 300,033 individuals have representation).

²⁵ DOJ, *Statistical Yearbook Fiscal Year 2018*, at 38, <https://www.justice.gov/eoir/file/1198896/download>.

²⁶ Proposed Rule at 52511.

²⁷ Comment to EOIR Docket No. 19-0022 from the Asian Pacific Institute on Gender-based Violence

²⁸ Proposed rule at 53512; Similarly, DOJ uses similar language in proposed changes to 8 CFR 1003.23(b)(1).

²⁹ 8 CFR 1003.2(c)

survivor-based relief) may be foreclosed from reopening these proceedings unless able to fit into one of the exceptions.

Under the proposed regulation at 8 CFR § 1003.2(c)(3)(vii), DHS appears to be specifically exempted from time and number bars on motions to reopen before the BIA, while Respondents would be bound by these strict limitations. By allowing DHS to move to reopen without any limitation, individuals who were granted relief from the court may question whether their case may be reopened for some unknown reason in some unknown future. DOJ creates significant disadvantage to respondents by unfairly permitting DHS unfettered access to administrative review.

V. Prioritizing Speed over Due Process

The proposed rule reduces briefing schedules and provides for simultaneous briefings for individuals not in detention, with the goal of enabling “the BIA to more expeditiously review and adjudicate non-detained appeals.”³⁰

This shortened period makes it more complex for Respondents, including survivors, to prepare their own briefs as well as anticipate and reply to DHS’s position. Neither party will have an opportunity to respond to the merits of the opposing argument until it is time to submit a reply brief. DOJ incorrectly claims that these changes would have “relatively little impact on the preparation of cases by the parties on appeal.”³¹ For survivors who are not represented, this reduced time frame will make it harder to obtain counsel given the amount of preparation often involved in appellate practice which often necessitates briefing extensions under the current rule (including reviewing the case history, prior evidence submitted and examining the transcript). Respondents forced to file simultaneous briefs will likely need more time to prepare briefs as they will be required to brief *all* potential claims rather than just ones briefed by opposing counsel. As mentioned above, cases based on victimization and persecution due to gender-based violence often involve highly sensitive and traumatic facts as well as complex and detailed legal arguments. Reducing the briefing schedules will unduly prejudice these applicants and cause greater administrative inefficiencies.

VI. Increased Politicalization of EOIR

The proposed rule would impermissibly politicize the immigration court system by giving the EOIR Director unprecedented authority to issue decisions in two scenarios: when an appeal has

³⁰ Proposed rule at 52499. We note that simultaneous briefs are currently used for individuals in detention 8 CFR 1003.3(c) given that there is an increased need for timeliness when an individual’s liberty interests are involved.

³¹ Proposed rule at 52498.

been pending for more than 335 days and when an immigration judge believes a BIA decision warrants review for “quality assurance.”

The proposed rule justifies the first criteria to “ensure management oversight consistent with the Director’s authority to ‘set priorities or time frames for the resolution of cases’ and the Director’s responsibility’ to ensure the efficient disposition of all pending cases.”³² The proposed rule suggests that the EOIR Director will use this authority sparingly, stating “most appeals are already decided within these parameters, unless there is a regulatory or policy basis for delay, the Department expects few, if any, appeals to need to be referred to the Director.”³³ However, this is incredibly disingenuous given that the rule itself admits **the median** case appeal takes 323 days.³⁴ The proposed rule is silent about whether the EOIR Director will actually have the relevant background, resources and capacity to ensure this high level of “management oversight.” Even more concerning, the EOIR Director position is a non-adjudicatory position that is principally administrative and does not necessarily suggest the Director will have the requisite expertise, training, or impartiality necessary to decide cases.

The second criteria is based on a disturbing “quality assurance” provision contained in the proposed 8 CFR § 1003.1(k). This would allow immigration judges to forward cases to the EOIR Director, a political appointee, for review. The proposed rule indicates that “the quality assurance certification process shall not be used as a basis solely to express disapproval of or disagreement with the outcome of a Board decision *unless that decision is alleged to reflect an error described in paragraph (k)(1) of this section.*”³⁵ However, the bases on which an immigration judge can forward a case to the EOIR director are so overbroad—including whether the immigration judge believes the BIA decision is “vague, ambiguous, internally inconsistent or otherwise did not resolve the basis for appeal”³⁶--that immigration judges who merely disagree with a decision can use these broad bases as pretext to challenge them. Rather than promoting quality assurance, this proposed rule would undermine the authority and integrity of the BIA.³⁷

Conclusion

There are myriad issues of concern to our organization that we simply do not have the time nor capacity to address in this comment. We deeply oppose the proposed rule; it is a significant

³² Proposed rule at 52508.

³³ *Id.*

³⁴ *Id.* See Footnote 39 (stating the median time to completion for case appeals in FY 2019 was 323 days.) [Emphasis added.]

³⁵ Proposed rule at 52512. Emphasis added.

³⁶ *Id.*

³⁷ See Center for Gender and Refugee Studies, *Backgrounder and Briefing on Matter of A-B-*, (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> outlining that this was precisely the irregular procedure that led to the Attorney General’s decision in *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018).

departure from prior practice and represents an unlawful and unjustified attack on due process and fundamental fairness within the EOIR, with a significant and unique impact on survivors of gender-based violence. We call on DOJ to promptly withdraw the proposed rule in its entirety, given its substantial procedural and substantive deficiencies.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Cecelia Levin', with a stylized, cursive script.

Cecelia Levin
Policy Director
ASISTA