October 23, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
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RE: "Proposed Rules on Procedures for Asylum and Withholding of Removal"
RIN 1125–AA93; EOIR Docket No. 19–0010; A.G. Order No. 4843–2020,
Submitted via www.regulations.gov

Dear Ms. Reid:

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 entitled, "Procedures for Asylum and Withholding of Removal" initially published in the Federal Register on September 23, 2020 (hereinafter "proposed rule").[1]

I. The Proposed Rule's Comment Period Is Inadequate

DOJ provided the public with a mere 30-day period in which to comment on the proposed rule. In normal times, 30 days would be wholly inadequate to provide meaningful review.[2] The proposed rule contains numerous shifts in policy and practice that would cause enormous harm to asylum applicants. If implemented, the proposed rule would unjustly speed up asylum hearings, diminish due process protections and the ability of applicants to effectively prepare and present their cases. Furthermore, it would allow immigration judges to reject asylum applications for technical errors as well as permit them to introduce their own evidence in asylum hearings.

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[1] Executive Office for Immigration Review, Department of Justice. "Proposed Rules on Procedures for Asylum and Withholding of Removal" (hereinafter "Proposed Rule" (85 FR 59692) September 23, 2020, available at https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal

[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 (stating that agencies "should 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.") [Emphasis added].

However, these are not normal times. A 30-day comment period is even more egregious given the significant challenges organizations like ours are experiencing during the COVID-19 pandemic. Stakeholders, including our own organization, must balance the demands of responding to constant and complex changes to immigration policy,[3] while at the same adapting to irregular work conditions, engaging in care-taking responsibilities, including in some instances, helping children navigate the novel challenges of remote or hybrid learning.

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 this mission by not providing a meaningful opportunity to respond to such a far-reaching rule. Immigrant survivors of gender-based violence are uniquely impacted by this proposed rule. DOJ does a disservice to these survivors and other asylum seekers by providing such a limited time frame to respond to such substantive changes. For these procedure deficiencies alone, we call on EOIR to withdraw the proposed rule.

II. The Proposed Rule Unjustly Burdens Asylum Seekers

Over the last several years, DOJ has created significant barriers to immigration relief, and no more so than in the context of asylum. Some of these barriers have been in the form of Attorney General certifications, seismic regulatory overhauls, or else a constant series of discrete and calculated procedural shifts--all seemingly designed to decrease access to available protection.[5] While the growing backlog of asylum applications is problematic, any solution offered must protect due process and the rights of asylum applicants to a fair hearing. [6] The proposed rule offers no such protection.

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[3] Both DHS and DOJ continue to publish substantive policy changes at a rapid-fire pace, completely overwhelming interested stakeholders. For example, ASISTA recently provided comments in response to the Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" (85 FR 52491) August 26 2020, available at https://asistahelp.org/wp-content/uploads/2020/10/ASISTA-BIA-regulation-comment-FINAL.pdf ; In addition, on October 13, 2020, we provided comment to U.S. Citizenship and Immigration Service, Department of Homeland Security. Notice of Proposed Rulemaking "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services " September 11 2020, available at https://asistahelp.org/wp-content/uploads/2020/10/ASISTA-Comment-Collection-and-Use-of-Biometrics-Final.pdf ; Upcoming DHS matters seeking comments include Changes to Affidavit of Support Requirements, with comments due November 2, 2020. https://www.federalregister.gov/documents/2020/10/02/2020-21504/affidavit-of-support-on-behalf-of-immigrants

[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 59698.

[6] Our comment will use the term "asylum seekers" or "asylum applicants" to be inclusive of other forms of relevant relief including withholding of removal and/or protection under the Convention Against Torture.

A. **Prioritizing Speed over Fairness**

Like other recent EOIR actions,[7] the proposed rule prioritizes the quick resolution of cases over the integrity of asylum adjudications by 1) making all asylum applications filed by those in asylum- and withholding-only proceedings due within 15 days after an individual's first hearing;[8] and 2) requiring judges to complete asylum cases within 180 days after the application is filed unless the respondent can demonstrate exceptional circumstances.[9]

1. Filing Deadlines for Asylum and Withholding Only Proceedings

The proposed rule revises the regulations at 8 CFR 1208.4 to add a 15-day deadline from the date of a Respondent's first hearing to file an application for asylum and withholding in asylum and withholding only proceedings. Read in conjunction with the proposed EOIR asylum rule from June 15, 2020, this would mean that asylum seekers who have gone through the credible fear process may now have an extremely time-limited ability to submit their asylum application.[10] The proposed rule is silent with regard to the number of asylum seekers that would be affected and does not discuss the burdens to asylum applicants and their ability to find counsel and effectively prepare their case.

For asylum seekers, including those fleeing gender-based violence, the result of an asylum adjudication can make the difference between life and death should they be required to return to their home country. Survivors of gender-based violence overwhelmingly suffer Post-Traumatic-Stress-Disorder (PTSD) and trauma which can manifest itself through anxiety, depression, and trouble sleeping.[11] Without access to mental health and other resources, survivors may not be able to fully tell their story. Without access to legal assistance, asylum seekers may not be able to meaningfully access or understand the legal framework of asylum and withholding. And yet, the proposed rule claims "there is no reason not to expect the [individual]

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[7] In particular, the EOIR's. "Notice of Proposed Rulemaking: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" (85 FR 52491, 52499) August 26 2020, also proposed reducing 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." However, this shortened period would make it more complex for Respondents, including survivors, to prepare their own briefs as well as anticipate and reply to DHS's position. *See* note 3 *supra*.

[8] Proposed Rule at 59693.

[9] E.g. Proposed Rule at 59697.

[10] RIN 1125–AA94, EOIR Docket No. 18–0002 "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review 85 FR 36264, 36266 (June 15, 2020), available at https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

[11] *See e.g*. Nicole Yuan et al. *The Psychological Consequences of Sexual Trauma* (March 2006), available at https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PsychConsequences.pdf

to be prepared to state his or her claim as quickly as possible."[12] USCIS's willful dismissal of the complexity of asylum and withholding cases, especially for *pro se* applicants and/or applicants with Limited English proficiency is astonishing.

Furthermore, USCIS blatantly ignores the unique burdens and intricacies of framing gender-based asylum claims. The Migration Policy Institute confirms that the burdens placed on asylum seekers fleeing gender-based violence is "relatively high, and many face obstacles to having their claims approved. From 2014 to 2015, the Center for Gender and Refugee Studies tracked 67 cases in which women sought asylum based on intimate partner violence. The study found that some women had difficulty establishing credibility, similar to criminal cases involving rape, and judges did not always take cultural practices and norms into account."[13] Thus, the accelerated timeline contained in the proposed rule does not take into account the enormous burdens on survivors to tell their story, clearly present their case, collect the necessary evidence and/ or secure relevant witnesses. As UNHCR guidelines illustrate, survivors of sexual assault and other forms of trauma may need "second and subsequent interviews…in order to establish trust and to obtain all necessary information."[14] The proposed rule will only exacerbate the inconsistent treatment of gender-based claims by immigration judges.

Given DOJ's piecemeal approach to rule making on asylum, it is extremely difficult to fully understand the full impact of these provisions. Furthermore, the timeframe in which to file an application for asylum is determined by statute at INA 208(a)(2)(B) and (D). Thus, the proposed rule directly contradicts these long-established provisions of the INA.

The proposed rule does permit immigration judges to extend this filing deadline "for good cause" and permit applicants to supplement the record at a later time subject to the judge's discretion.[15] However, if the asylum seeker misses the newly set deadline, the proposed rule does not authorize the immigration judge to further extend it; instead the proposed rule states that if the extended deadline is missed, the immigration judge "shall deem the ability to file waived and the case shall be returned to the Department of Homeland Security for execution of an order of removal."[16]

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[12] Proposed Rule at 59694.

[13] Anja Parish. "Gender-Based Violence against Women: Both Cause for Migration and Risk along the Journey" Migration Policy Institute (Sept. 7, 2017), available at https://www.migrationpolicy.org/article/gender-based-violence-against-women-both-cause-migration-and-risk-along-journey

[14] UNHCR. "Guidelines on International Protections: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (May 7, 2002), available at https://www.unhcr.org/3d58ddef4.pdf

[15] Proposed Rule at 59694.

[16] *Id.* at 59699; New Proposed 8 CFR 1208.4(d)

2. The Asylum Adjudication Clock

The proposed rule would require immigration judges to complete asylum cases within 180 days after the application is filed unless the respondent can demonstrate exceptional circumstances.[17] Even though this language is derived from the Immigration and Nationality Act, it does not take into consideration the immense backlog of pending cases. Currently there are over 1.2 million immigration court matters pending before EOIR,[18] In FY 2018, EOIR received approximately 434,158 cases, an increase of over 60% from 1996 when the provisions at INA 208(d)(5)(ii) were passed by Congress.[19] During this period, it is critical to note that DHS dramatically increased enforcement and utilized prosecutorial discretion in immigration court matters less often. Moreover, EOIR reduced its used of docket administration tools like administrative closure which only exacerbates these growing backlogs.[20]

Asylum cases are often deeply complex, requiring extensive preparation and evidence gathering, and are especially complicated for those applicants who have low English proficiency and/or do not have access to counsel. A recent national study found only 37 % of immigrants facing removal were represented by an attorney in cases in immigration court.[21] Additionally, about 86% of immigrants in detention went unrepresented.[22] It is exceedingly difficult for asylum seekers without counsel to navigate the enormous complexity of the U.S. asylum system. The proposed rule plans to implement the 180-day filing requirement, but fails to take into consideration the numerous challenges that applicants may face as a result.

Furthermore, the proposed rule does not specify whether EOIR will apply the 180-day rule to all cases or whether the agency would apply it prospectively to cases filed after the implementation date. This is critical information for stakeholders; however, EOIR fails to specify the scope of the

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[17] Proposed Rule at 59697.

[18] Trac Immigration, Immigration Court Backlog Tool, available at https://trac.syr.edu/phptools/immigration/court_backlog (last accessed October 23, 2020)

[19] DOJ, EOIR, Statistical Yearbook 2000, page B2, available at https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf (showing the number of pending immigration matters to be around 230,000 (exact number 231,

[20] DOJ, EOIR, FY 2019 Congressional Budget Submission February 2018, available at https://www.justice.gov/doj/page/file/1135086/download (stating "DHS has made several changes to immigration enforcement, including increased enforcement and decreased use of prosecutorial discretion. With almost 300,000 new NTAs filed with EOIR during FY 2017, the already large pending caseload has increased dramatically in this new enforcement environment, nearly reaching 650,000 cases. In addition to filing more NTAs, DHS used prosecutorial discretion less frequently and EOIR administratively closed fewer cases."

[21] Ingrid Eagly, Esq. and Steven Shafer, Esq. "Access to Counsel in Immigration Court "American Immigration Council. (Sept. 28, 2016), available at: https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court

[22] *Id.* "Only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of non-detained immigrants."

proposed rule. Either option presents serious administrative and due process challenges. Many asylum claims have been pending for years, with recent statistics showing the national average an immigration court matters remain pending is 811 days.[23] Should EOIR determine that the proposed rule applies to ***all*** cases, then not only would this action be subject to legal challenges but also would cause enormous upheaval for the courts, for immigration practitioners, and for asylum seekers. If EOIR applies the rule to cases filed after the implementation of the rule, then EOIR further delays the immense backlog of asylum matters. Asylum seekers face serious due process concerns if their cases are scheduled too quickly for them to adequately prepare, and equally serious concerns if their cases are pending so long that evidence becomes stale.[24] Moreover, this undermines the authority and autonomy of individual immigration judges to manage their own dockets.

3. Limitations on Continuances

The new provisions at 8 CFR 1003.29 state that "the immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances."[25]

While neither the INA nor the regulations specifically define exceptional circumstances in this context, the proposed rule borrows from language at INA 240(e)(1) which refers to "exceptional circumstances include ''battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances''). We do not dispute that battery and extreme cruelty faced by a Respondent or one of their family members warrant a continuance. However, the limitations on continuances contained in the proposed rule is excessively and unjustly narrow. There are many reasons that an asylum seeker might not be able to proceed within 180 days of filing their asylum application. For example, the asylum seeker may need mental health counseling to be able to articulate their asylum claim or they may be waiting on critical documentation from abroad. Moreover, Congress explicitly applied the definition of "exceptional circumstances" to only INA 240 and 240A. INA 240(e) (defining exceptional circumstances "[i]n this section and section 1229b of this title"). Had Congress intended for this definition to apply

[23] *See* note 18 *supra*.
[24] *See* Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 20 (June 2019), www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf, ("'arbitrary prioritizations wreak havoc on case management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.'")
[25] Proposed Rule at 59699.

to INA 208, it would have so specified. EOIR's cutting-and-pasting of this provision that Congress intended to apply solely to general removal proceedings exceeds its authority.

Coupled with recent BIA decisions further limiting the criteria for continuances,[26] this proposed rule will penalize asylum seekers for circumstances wholly outside of their control. For instance, ASISTA commonly provides technical assistance to attorneys and representatives assisting crime victims in immigration court, including those survivors who may also have asylum applications pending. Thus, these applicants may often seek continuances in order for the U.S. Citizenship and Immigration Service (USCIS) to adjudicate other forms of relief for which they may also be eligible, including U and T visa petitions.

USCIS is currently working its way through a massive, historic backlog. For survivor-based cases in particular, these processing delays are staggering. In October 2020, U visa processing times are now posted at 57 to 57.5 months, more than double where they were four years earlier.[27] According to USCIS data, the average processing time for U visa applications was 5 months in FY2014.[28] In FY2020, the average processing time was 47.3 months, an 846 % increase.[29] VAWA self-petitions now take between 17 and 22.5 months to be adjudicated.[30] USCIS' posted processing times for T visa applications for victims of human trafficking are between 18 and 27 months,[31] which at the higher limit represents a 321% increase from FY2014 when these applications took 5.8 months to adjudicate.[32]

This provision of the proposed rule increases the risk that survivors may be removed from the country prior to the adjudication of their matter before USCIS, if their asylum matter is denied.

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[26] The attorney general has already substantially limited the definition of "good cause" for continuing cases in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). See also Matter of L-N-Y-, 27 I&N Dec. 755 (BIA 2020). In addition, DOJ has imposed performance metrics that give immigration judges a financial incentive to complete cases quickly. *See,* Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* (Apr. 18, 2018), www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf ("production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.")

[27] *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

[28] USCIS. "Historic National Average Processing Times for All USCIS Offices" (captured June 22, 2018), available at https://web.archive.org/web/20180622001323/https://egov.uscis.gov/processing-times/historic-pt

[29] USCIS. "Historic National Average Processing Times for All USCIS Offices", available at https://egov.uscis.gov/processing-times/historic-pt

[30] *See* USCIS Case Processing Times: https://egov.uscis.gov/processing-times/for processing times for I-360 VAWA self-petitions adjudicated at the Vermont Service Center

[31] *Id*. for processing times for I-914 Application for T Nonimmigrant Status processed at Vermont Service Center

[32] *See* note 28 *supra.*

This is not a hypothetical situation, as there have been several documented cases of survivors being deported before their applications with USCIS have been decided.[33] This causes significant and needless harm to survivors of crime and their families, potentially putting them at even greater risk of harm and revictimization. In the case of human trafficking survivors, the consequences of removal would be particularly egregious, as removal would render them ineligible for T nonimmigrant status. Deporting survivors while they have applications pending with USCIS undermines the bipartisan goals of establishing survivor-based immigration provisions in the Violence Against Women Act and the Trafficking Victims Protection Act.

B. Unjust Criteria for Asylum Application Denials

The proposed rule at 8 CFR § 1208.3(c)(3) would prevent bona fide asylum seekers from pursuing protection if they do not include a response to each required question contained in the form or if their filing does not contain the relevant filing fee.[34] Starting in October 2019, USCIS implemented a new processing policy of rejecting asylum applications that contain blank spaces, even when those fields are optional or not applicable to the applicant, and even when the information sought is immaterial.[35]

Like in the USCIS context,[36] EOIR has over prescribed solutions while failing to adequately diagnose any problem. The agency has not made any attempt to explain what is a "required" field nor explained how blank spaces on forms have caused demonstrable problems for EOIR and its evaluation of the merits of the claim. Indeed, the proposed rule is a drastic and significant change, which counters years of prior practice for no real reason. Furthermore, under the proposed rule, EOIR staff (potentially including immigration judges) would have to scrutinize the 12-page application form to see whether any box is not completed. This is a tremendous waste of resources for the applicants, their representatives, and for EOIR itself. The impact of this provision would have a significant and devastating impact on asylum applicants, including those who are unrepresented, in detention facilities or subject to the Migrant Protection Protocols (MPP).

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[33] Adolfo Flores, An Asylum-Seeking Mom Who Applied for a Special Visa For Victims of Violence Is About to be Deported Anyway." Buzzfeed (August 28, 2019); Alexandra Villareal. "US deporting crime victims while they wait for special visa" Associated Press (July 18, 2018), available at: https://www.apnews.com/81e9280f78bb4f899d7ad2f64a0240a8

[34] Proposed Rule at 59699.

[35] USCIS. "I-589: Application for Asylum and for Withholding of Removal", available at https://www.uscis.gov/i-589 The instructions regarding blank spaces are hidden at the very bottom of the "Where to File" drop down menu, and not at all on the main page itself.

[36] *See* Letter to USCIS on behalf of 146 national, state, and local organizations in opposition to the blank space processing policy (August 13, 2020), available at: https://asistahelp.org/wp-content/uploads/2020/08/Letter-to-USCIS-Blank-Space-Rejection-Policy-8.13.2020.pdf

The proposed rule also would require the court to reject the asylum application of any asylum seeker who cannot pay the filing fee. Refusing asylum applicants for their inability to pay this new fee undermines U.S. obligations under international and domestic law, and is significantly challenging for asylum applicants in detention or subject to MPP. Furthermore, as there is not yet a final rule on the proposed EOIR fees,[37] stakeholders are not fully able to ascertain the full impact of this provision.[38]

C. Undermining Judicial Impartiality

The proposed rule allows immigration judges to introduce their own evidence into the record under the guise of their "obligation to establish the record."[39] The proposed rule speculates that this will "better enable immigration judges to ensure full consideration of all relevant evidence and full development of the record for cases involving a *pro se* respondent."[40] While the duty of the immigration judge to take testimony from unrepresented respondents is within their role of a fact-finding adjudicator, this unprecedented provision will fundamentally change the role and function of an immigration judge, and puts immigration judges in the position as another party in the case instead of a neutral adjudicator. This provision unequivocally undermines due process and fundamental fairness, and would have especially harsh consequences for pro se asylum applicants.

III. 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. Overall, we deeply oppose the proposed rule; it represents an unlawful and unjustified departure from prior practice and policy, and with a significant and unique impact on asylum seekers fleeing gender-based violence. We call on EOIR to promptly withdraw the proposed rule in its entirety, given its substantial procedural and substantive deficiencies.

[37] *See* 85 Fed. Reg. 11866 (Feb. 28, 2020),
[38] *See Id*. While there is not currently a filing fee for defensive asylum applications, EOIR proposed a fee for asylum applications through a prior proposed rulemaking measure. Without knowing which proposed rules will ultimately be promulgated, and how they might be altered in their final form, we have no other choice but to provide comment without a complete comprehension of the aggregate effect of all of the proposed rules.
[39] Proposed Rule at 59695.
[40] *Id*.

Respectfully submitted:

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ASISTA