December 28, 2020

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

Re: RE: "Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal"
RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021,
Submitted via: www.regulations.gov

Dear Ms. Alder 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, "Motions to Reopen and Reconsider;" initially published in the Federal Register on November 27, 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 our extensive experience.

I. DOJ has Failed to Provide a Meaningful Opportunity for Review

DOJ issued this notice of proposed rule-making simultaneously with another EOIR proposed rule regarding good cause for continuances.[2] DOJ has provided the public with a mere 30-day period

[1] Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal" (85 FR 75942) November 27,2020, available at https://www.federalregister.gov/documents/2020/11/27/2020-25912/motions-to-reopen-and-reconsider-effect-of-departure-stay-of-removal (hereinafter "Proposed Rule").

[2] Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Good Cause for a Continuance in Immigration Court Proceedings" (hereinafter "Proposed Rule" (85 FR 75925) November

in which **to review and comment on them both**. This time frame is utterly insufficient. Executive Order 12866 states 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."[3] Instead, DOJ has placed unjustified administrative and personal strains on stakeholders by providing such short comment periods for the rules, especially with a deadline that falls in the middle of the holiday season.

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 and engaging in care-taking responsibilities during the COVID-19 pandemic. DOJ has not provided any rationale why such a short comment period is necessary. Rather, the agency willfully and deliberately derides the proper administrative process by providing such an inadequate timeframe to review and provide comment.

Given the limitations DOJ has needlessly placed on the comment period, this comment reflects only a small fraction of the substantive issues we would have liked to address in our response. Should the comment period be extended, we would provide further details regarding our additional concerns.

II. The Proposed Rule Will Harm Immigrant Crime Survivors

A. Proposed 8 CFR §1003.48

We are deeply concerned about the proposed general standards for motions to reopen or reconsider contained in this rule. The proposed rule indicates that there is no presumption that factual allegations offered in support of a motion to reopen or motion to reconsider are true.[4] It further instructs immigration judges and the Board not to accept accept factual allegations as true in support of a motion to reopen or motion to reconsider if:

> (i) Those allegations are contradicted by other evidence of record;
> (ii) Those allegations are contradicted by evidence described in § 1208.12(a);
> (iii) Those allegations are conclusory, uncorroborated, or unsupported by other evidence in the record or are otherwise based principally on hearsay;
> (iv) Those allegations are made solely by the respondent regarding individuals who are not presently within the United States; or
> (v) Those allegations are otherwise inherently unbelievable or unreliable.[5]

27,2020, available at https://www.federalregister.gov/documents/2020/11/27/2020-25931/good-cause-for-a-continuance-in-immigration-proceedings

[3] 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].

[4] Proposed Rule at 75956.

[5] *Id.*

This provision is completely contradictory to one of the central purposes of motions to reopen, which is to present new facts not already contained in the record.[6] The proposed rule does not discuss how it will evaluate the materiality, weight, and source of contradictory, unreliable or "unbelievable" facts. This is extremely concerning to our organization given our focus on survivor-based relief, as very often abusers and perpetrators of crime will interfere with documentation necessary for a survivor's immigration matter. Furthermore, we are deeply concerned about how this factual analysis will intersect with the Congressionally mandated "any credible evidence standard" commonly used in VAWA, U and T visa relief. When creating the special protections for survivors, Congress recognized the evidentiary challenges that immigrant survivors often face[7] and mandated the special "any credible evidence" standard for these forms of relief.[8] DOJ must not implement a higher standard for motions to reopen than would be necessary for the underlying relief. The proposed rule unjustly stacks the deck against Respondents without any reasonable justification or explanation.

Taken together, these proposed changes make it impossible for a respondent to meet the burden of proof and effectively render motions practice useless. We therefore strongly urge EOIR to completely eliminate the proposed 8 C.F.R. § 1003.48(b) because these proposed changes to the regulations undermine due process, conflict with the statute, and do not account for the inherent difficulties of obtaining certain kinds of corroborating evidence especially for asylum and other humanitarian forms of relief.

B. **Proposed Rule 8 CFR §1003.48 (e)(1)**

We strongly oppose DOJ's proposal to prohibit adjudicators from granting a motion to reopen or reconsider that is premised upon a pending application for relief that the immigration judge or the BIA lacks authority to grant. Congress specifically created numerous forms of relief intended to allow a person to remain in the United States over which only USCIS has jurisdiction, including several forms of survivor-based relief like VAWA self-petitions, T and U visa relief. EOIR should not frustrate Congressional intent by refusing to provide an opportunity for its sister agency to adjudicate an application.

The proposed rule adds insult to this injury for crime survivors. Not only do they face the insecurity and lack of safety waiting years for a decision on their affirmative applications before USCIS, but now DOJ is actively blocking opportunities for relief. By limiting administrative

[6] 8 CFR 1003.23(b)(3)

[7] Memorandum from T. Alexander Aleinikoff , Exec. Assoc. Comm'r, Immigration and Naturalization Service (Apr. 16, 1996) at 5, available at https://asistahelp.org/wp-content/uploads/2019/09/Aleinikoff-Memo-1996.pdf (stating "adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent.)

[8] *See, e.g.,* INA 204(a)(1)(J), INA 214(p)(4)

closure, by limiting motions to reopen, by limiting continuances, by restricting access to status dockets and continuances, by implementing arbitrary scheduling orders (requiring respondents to submit applications in an expedited manner or else waive the right to apply for relief) among other policy measures, DOJ is shutting the door on immigrant crime survivors and others eligible for relief.

USCIS processing times are at crisis levels. A report by the American Immigration Lawyers Association (AILA) shows that average processing times continued to climb, and the average case processing time has now risen by 101 percent from FY14 through FY19.[9] Processing times for survivor-based forms of immigration protections like VAWA self-petitions and U and T visas have skyrocketed, undermining the effectiveness of these critical benefits. VAWA self-petitions now take between 17.5 and 22.5 months to be adjudicated.[10] USCIS' posted processing times for T visa applications for victims of human trafficking are between 18 and 29 months.[11] Current processing times for I-918 U visa applications indicate that adjudications can take between 57 and 57.5 months.[12] This is the posted time for placing cases on the **U visa waitlist**, not the issuance of a full 4-year U visa.

Previously, respondents could move to have their cases reopened *sua sponte* should they be unable to comply with the normally applicable statutory deadline because USCIS had not completed its adjudication of an application, but EOIR has separately finalized regulations that almost entirely do away with *sua sponte* reopening.[13] The proposed regulations would therefore render reopening impossible in the vast majority of cases in which a person has relief available but USCIS has jurisdiction to adjudicate that form of relief.

Another harmful aspect of the rule is that Immigration Judges or Board members will not have the authority to grant a motion to reopen or reconsider for those with prima facie determinations, parole, deferred action, bona fide determinations or any disposition short of a final grant.[14] This directly impacts survivor-based cases as survivors often have dispositions short of a final grant before obtaining a more permanent status. For example, a VAWA self-petitioner will receive deferred action upon approval of the VAWA self-petition as they await adjudication of their application for adjustment of status. A trafficking survivor may obtain continuance presence from ICE before filing for a T visa relief. The U visa regulations provide that all eligible U visa

[9] American Immigration Lawyers Association. "AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow" (February 26, 2020), available at https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow

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

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

[12] *See* USCIS Processing Times at https://egov.uscis.gov/processing-times/ for processing times for I-918 Petition for U Nonimmigrant Status adjudicated at the Vermont or Nebraska Service Centers

[13] *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).

[14] Proposed Rule at 75957

petitioners, who due solely to the cap are not granted U nonimmigrant status, **must** be placed on a waitlist and **granted deferred action** or parole to U-1 petitioners and qualifying family members while the U-1 petitioner is on the waitlist.[15] This regulatory directive signifies that but for the annual visa cap, a waitlisted petitioner would have an approvable application; it is not simply speculative as the proposed rule would frame it. The fact that this is given so little weight under the proposed rule is unconscionable. EOIR should not categorically deny a motion to reopen to those with prima facie determinations, deferred action, and other provisional relief so that the removal case can be closed while the survivors wait for a decision from USCIS. Not doing this is a waste of judicial economy and causes additional barriers for survivors.

C. Proposed Rule 8 CFR § 1003.48 (e)(3)

Furthermore, the proposed rule indicates that neither an unopposed motion nor a joint motion may be automatically granted without further consideration, and that immigration judges or the Board retains discretion to deny a joint motion or unopposed motion "if warranted." Again, the proposed rule provides no explanation or circumstances when such a denial may occur. This provision is arbitrary and overbroad. If both ICE and the Respondent agree to reopen a matter or if a motion is unopposed, then the case should be reopened to allow for further litigation and/or final closure of the matter.

D. Proposed 8 C.F.R. § 1003.48(k)

We deeply oppose the alarming new barriers on obtaining a stay of removal. Despite the high stakes, requests for a stay of removal are frequently submitted urgently because ICE does not provide advance warning regarding when it will effectuate a removal order. The proposed rule creates unnecessary and onerous hoops to jump through by requiring individuals to first file a stay request with DHS before they can file a stay request with EOIR, which can be costly and often ineffective. Furthermore,this provision is in direct violation of the statute at INA 240(c)(7)(C)(iv) for VAWA-based motions to reopen. In these cases, the statute provides that EOIR shall stay the removal of the individual pending final disposition of the motion including exhaustion of all appeals if the motion establishes they are qualified.[16] The proposed rule wholly ignores this critical path for immigrant survivors of crime.

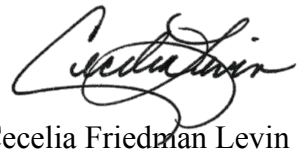
III. Conclusion

For the reasons mentioned above, we hold that the proposed rule will unjustly prejudice immigrants eligible for benefits to help them gain stability and thrive. Administrative actions like the proposed rule actively create a chilling effect on survivors coming forward to access relief

[15] 8 CFR 214.14(d)(2)
[16] INA § 240(c)(7)(C)(iv).

for which they may be eligible. Proceeding with the proposed rule will undermine the situation Congress sought to fix with the creations of survivor-based immigration relief. It will reinforce the growing belief that these benefits are too unreliable, too attenuated, and too much of a risk, which emboldens the threats of abusers and perpetrators of crime, and makes us all less safe. We call on DOJ to promptly withdraw the proposed rule as it makes immigration benefits less accessible and runs counter to bipartisan Congressional intent establishing paths to safety for immigrant survivors.

Respectfully submitted,



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