



Submitted via www.regulations.gov

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

**RE: RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020,
Public Comment Opposing Proposed Rules on Appellate Procedures and Decisional
Finality in Immigration Proceedings; Administrative Closure**

September 25, 2020

Innovation Law Lab respectfully submits this comment on the proposed amendments to the regulations governing appellate procedures, decisional finality in immigration proceedings and administrative closure, published on August 25, 2020. Innovation Law Lab urges the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The Notice of Proposed Rulemaking (NPRM) claims that the proposed rules will promote “efficiency,” but the proposed changes would strip important due process rights from noncitizens before the immigration court and Board of Immigration Appeals (BIA). Fairness in immigration proceedings is a fundamental requirement under the Due Process Clause of the Constitution and for the majority of noncitizens, having a fair day in court can mean the difference between living in safety in the United States or being returned to a country where they may be killed or tortured. Deportation can also lead to permanent family separation. The U.S. government should ensure that, before it imposes such grave consequences through ordering a person’s removal, every noncitizen has a fair hearing and access to a robust appellate review process. We thus urge you to withdraw these proposed rules in their entirety as these changes will strip noncitizens of a fair appellate review process.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who serve them, providing legal services, direct representation, and tactical support before U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR), which includes the immigration courts and the BIA.



We describe below how the proposed amendments will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from this comment should not be interpreted as tacit approval. We oppose all aspects of the proposed changes.

I. We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

As an initial matter, we object to the DOJ allowing only 30 days to comment on the proposed amendments to the regulations. As discussed in more detail below, these changes would dramatically alter the BIA appellate process, would prevent many noncitizens with immediate relatives or asylum eligibility from seeking to have their cases reopened, and would prevent the BIA and immigration judges from administratively closing cases, thereby foreclosing avenues of relief for noncitizens and adding to the EOIR backlog. The public should be given adequate time to consider these dramatic revisions to existing law in order to provide thoughtful and well-researched comments. Instead, DOJ has given no reason for allowing only 30 days for the public to submit comments to these dense and complicated proposed rules rather than the customary 60-day comment period. The shortened comment period presents particular challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance childcare with work activities.

Innovation Law Lab staff is currently working entirely remotely due to the pandemic. Many of Innovation Law Lab's staff are parents and are managing childcare in addition to their work with Law Lab. Moreover, Law Lab staff have family members, friends and colleagues who have contracted COVID-19, which has not only required staff to take time off but has taken a great emotional toll. Innovation Law Lab's work with our clients and pro bono attorneys has become increasingly difficult because of the strains COVID-19 has placed on our organization, our communities and the communities we serve. We have had to adapt all of our programs to provide our services entirely remotely, which has resulted in time consuming efforts to effectively engage with clients and manage the varying degrees of technological knowledge within our staff as well as within our client base and pro bono network.

In addition to the impediments created by COVID-19, the uptick in natural disasters during the pandemic has created additional challenges to our staff. Law Lab's Oregon and California communities continue to be severely impacted by the recent wildfires. Several of Innovation Law Lab's Oregon clients lost their homes and belongings to the wildfires or evacuated to avoid the smoke and fires. The evacuations and severe smoke have exacerbated the risk that our staff and our clients may contract COVID-19, as those who evacuated were unable to properly socially distance themselves from others and the severe smoke has the potential to increase their vulnerability to contract and suffer complications from COVID-19.

This proposed rule, with its broad changes to EOIR practice, follows closely after DOJ and the Department of Homeland Security's (DHS) proposed rules and new forms, which would bring sweeping changes to long-established asylum rules. See [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review](#) and [Asylum Security Bars and Processing](#). Significant agency revisions to established practice should be well-thought out and allow the public the opportunity to fully comment. Instead, the agencies have used the summer months during a pandemic and during numerous natural disasters to rush through proposed rules that would radically alter procedures that have been in place for decades and leave tens of thousands of noncitizens who could qualify for lawful status with no recourse. For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

II. We Strongly Object to the Substance of the Proposed Rule and Urge the Administration to Rescind It in Its Entirety

Although Innovation Law Lab objects to the agencies' unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations which would greatly reduce the rights of noncitizens appearing before EOIR and would result in increased, permanent family separations and the potential death of asylum seekers who are removed to their home countries to be killed. Importantly, these proposed changes to the regulations would strip noncitizens from the statutory and due process protections to which they are entitled. The proposed changes are at odds with the law and derive not from a desire for efficiency but from a desire to harm immigrants, our communities and organizations like Innovation Law Lab. They are an attempt to further weaponize EOIR as a tool to rapidly deport immigrants.

III. The Proposed Rule Would Prevent the BIA and Immigration Judges from Administratively Closing Cases

Proposed Section 8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10 would explicitly foreclose the BIA and immigration judges' authority to administratively close cases. Rather than promote judicial efficiency, this proposed change would exacerbate the already extensive immigration court backlog and inflict unwarranted harm on noncitizens who are eligible to lawfully adjust their status.

Administrative closure is an important docketing tool that courts routinely use to prioritize cases most in need of immediate resolution and deprioritize cases where there is not an

urgent need for fast resolution. *See Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (explaining how district courts may administratively close cases, such as by removing them from the active docket, as a docket management tool). The elimination of administrative closure means that EOIR adjudicators have no ability to prioritize cases—regardless of the individual circumstances present within the case. Such a regulation conflicts with the Immigration and Nationality Act (INA), which requires case-by-case adjudication. Stripping adjudicators of the ability to prioritize and deprioritize cases in this way is irrational; rather than increasing “efficiency,” the proposed rule will add cases to the backlog and prevent adjudicators from managing their own dockets. It will further result in statutory and due process violations and is at odds with the laws enacted by Congress. The elimination of administrative closure would also further limit the independence of immigration judges and increase pressure on judges to prioritize completion of their performance metrics at the expense of due process.

Additionally, the proposed rule would make it more difficult for immediate relatives of U.S. citizens to obtain provisional waivers and legalize their immigration status. Noncitizens who are in removal proceedings cannot obtain a provisional waiver unless their removal proceedings are administratively closed. By explicitly stripping judges and the BIA of the ability to administratively close cases, DOJ has used a backdoor to end provisional waiver eligibility for many noncitizens who are in removal proceedings. The intent behind this proposed change appears to be motivated by animus towards immigrants- this change will effectively prevent noncitizens from lawfully adjusting their status through mechanisms that are legally available to them.

Eliminating administrative closure would also result in harsh consequences for the most vulnerable noncitizens seeking humanitarian relief over which USCIS has exclusive jurisdiction. Children and Unaccompanied Minors who are pursuing Special Immigrant Juvenile Status (SIJS) and asylum pursuant to the Trafficking Victims Protection and Reauthorization Act (TVPRA), survivors of crime pursuing U visas and survivors of trafficking pursuing T visas, may all face removal before USCIS adjudicates their applications for relief. As USCIS has slowed down processing of almost all types of applications,¹ it is especially unfair for EOIR to speed up its case adjudications while stripping immigration judges of the ability to administratively close cases to allow noncitizens to pursue permanent relief that only USCIS can grant. These proposed changes run counter to the laws established by Congress and Congress’s intent to protect vulnerable immigrants such as Unaccompanied Minors, children, and survivors of violence.

¹ See American Immigration Lawyers Association, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, (Jan. 30, 2019) <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

Many of Innovation Law Lab's clients would be negatively affected by this proposed rule. Innovation Law Lab and its nonprofit partners represent numerous unaccompanied minors - some as young as six-years-old, through the Equity Corps of Oregon, Oregon's universal representation program. Virtually all of these unaccompanied minors are eligible to file their asylum applications with USCIS pursuant to the TVPRA and would benefit from administrative closure while their cases are pending before USCIS. As the DOJ is well aware, the backlog of cases is not limited to EOIR, but extends to USCIS asylum offices across the country. Our unaccompanied minor clients often wait years for their asylum interview to be scheduled and wait even longer for a decision from the asylum office. Moreover, many of these children are eligible for SIJS, a protection granted to immigrant children who have been abused, abandoned, or neglected by one or both parents- yet the waiting list for adjustment of status following a SIJS approval can often be years long. Foreclosing administrative closure in these circumstances circumvents Congress's intent to shield vulnerable migrants from the adversarial nature of the immigration courts and deprives them of immigration relief for which they are lawfully eligible.

IV. The Proposed Rule Would Prevent the BIA from Remanding Cases for Further Fact-Finding in all but the Most Limited Circumstances

The proposed rule at 8 CFR § 1003.1(d)(3)(iv) would make it easier for the BIA to rely on facts that did not constitute part of the immigration judge's decision-making to uphold a denial in a case. Law Lab is especially concerned about the effects of this new proposed rule on *pro se* appellants.² The proposed rule would strip the BIA of the ability to remand a case *sua sponte* for further factfinding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. For noncitizens who are unrepresented, this means that even if an immigration judge (IJ) clearly failed to develop the record adequately and even if the Board Member reviewing the case sees that there is a clear avenue for relief on which the IJ did not ask any questions, the Board Member would have no authority to prevent a manifest injustice and remand the case for further fact-finding. This provision appears designed to quickly, and with finality, deport those without representation who would be least likely to understand that they have the ability to seek remand and would therefore most heavily rely on EOIR to protect their rights.

Even where noncitizens are represented, it would be almost impossible in most cases to successfully argue for remand to the BIA. The proposed rule would impose a long list of

² According to the last available DOJ Statistical Yearbook, roughly 20 percent of all BIA appeals are by *pro se* appellants. DOJ, *Statistical Yearbook Fiscal Year 2018*, at 38, <https://www.justice.gov/eoir/file/1198896/download>. EOIR statistics show that overall, 37 percent of pending cases in immigration court are unrepresented. EOIR, *Current Representation Rates*, (Apr. 15, 2020) <https://www.justice.gov/eoir/page/file/1062991/download>.

requirements which must be met before the BIA could potentially remand a case. Under 8 CFR § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if all of the following conditions are met:

- (1) The party seeking remand preserved the issue by presenting it before the immigration judge;
- (2) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;
- (3) The additional factfinding would alter the outcome or disposition of the case;
- (4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and
- (5) One of the following circumstances is present in the case:
 - (i) The immigration judge's factual findings were clearly erroneous, or
 - (ii) Remand to DHS is warranted following *de novo* review.

Under this vastly circumscribed regulatory system, it would no longer be possible to win remand for some of the most common reasons cases are currently remanded. For example, there is no provision to remand the case based on changes in the law that now require further factfinding,³ nor is there an ability to remand based on the IJ's failure to develop the record, even if the noncitizen appeared *pro se* before the IJ. If the respondent did not know what they needed to present to carry their burden, they would not have "attempted to adduce the additional facts before the immigration judge" as would be required for the BIA to remand a case by the proposed rule. Moreover, proceedings could only be remanded if the IJ's factual findings were "clearly erroneous," again leaving no ability for the BIA to remand if the IJ's fact findings were simply inadequate. We are very concerned that immigration judges, faced with performance metrics that require them to adjudicate 700 cases per year,⁴ would have little incentive to take the time to develop the record in *pro se* cases where there is no possibility that the case could be remanded for failure to do so.

Many of Innovation Law Lab's clients would be negatively impacted by this proposed change. Through Law Lab's Centers of Excellence pro bono program, we have placed numerous

³ For example, in the past three years, decisions by the Attorney General have substantially altered accepted norms in asylum law. As a result of Matter of A-B- and Matter of L-E-A-, every particular social group must be proved through the three prong cognizability test. There are many cases pending at the BIA which predated at least one of these decisions where the IJ may have relied on precedent in effect at the time. The intervening precedent requires remand so that asylum-seekers can present evidence in the first instance that the IJ did not require at the time of the hearing. Under the proposed rule, there is no ability for the BIA to remand for this reason.

⁴ See, CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018) <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>.

BIA cases with pro bono attorneys where the noncitizen was unrepresented before the IJ. In many of these cases, a review of the record indicates the IJ failed to fully develop the record as required by due process. Yet despite the violation of these clients' due process rights, the proposed regulations will have the effect of unfairly foreclosing their appeals simply because they were unable to secure counsel before the immigration court.

V. The Proposed Rule Would Prevent the BIA from Remanding Cases in Most Circumstances and Would Improperly Limit the IJ's Review When the Case Is Remanded

This section of the proposed rule, combined with section 8 CFR § 1003.1(d)(3)(iv) discussed above, would strip the BIA of its ability to remand cases in most circumstances. The BIA would be barred from remanding in “the totality of circumstances” or *sua sponte*, unless there is a jurisdictional issue. Put simply, if a Board Member sees that there was a grave injustice in the adjudication by the immigration judge, but the record was not sufficiently developed to grant relief, the BIA will have no choice but to uphold the denial.

Furthermore, the BIA would be barred under the proposed rule from remanding even if there is a change in the law unless the change affected grounds of removability—under the proposed rule, there would be no ability for the BIA to remand based on new grounds of relief available to the noncitizen. Thus, for example, an asylum seeker could have been denied based on existing law at the time of the immigration hearing, Congress or the circuit court, may have changed the asylum eligibility criteria while the appeal was pending, making the asylum seeker potentially eligible for relief, but the BIA would be foreclosed from remanding the case to the IJ.

⁵ We strongly oppose this provision, which would result in the BIA upholding almost all decisions that come before it. As a result, thousands of noncitizens would be left in permanent limbo, such as individuals with withholding of removal who could never reopen proceedings even if they have an approved immediate relative petition or receive derivative asylum status through an immediate relative.

The proposed rule would further severely limit the issues that an IJ could consider if a case is remanded. Under 8 CFR § 1003.1 (d)(7)(iv), the BIA would be authorized to remand a case to the IJ and the IJ could not consider any other issues beyond the issue(s) specified on remand, even though the BIA would simultaneously divest itself of jurisdiction. Thus, if a new avenue of relief became available in the intervening months or years when the noncitizen is waiting for a new individual hearing, or if the noncitizen identified another error in the prior

⁵ Of course, in such a circumstance, if the record was sufficient to grant, the BIA could do so, but if further factfinding were required, the applicant would be foreclosed from relief.

decision, the IJ would be foreclosed from considering those issues. The result would be to tie the IJ's hands to order removal even when there is an avenue of relief available and to deprive the noncitizen of the opportunity to seek all available opportunities to obtain legal status.

VI. The Proposed Rule Creates a Double-Standard, Allowing the BIA to Remand a Case at Any Time Based on Derogatory Evidence the Government Presents, While Explicitly Preventing Remand for New and Favorable Evidence Presented by Noncitizens

8 CFR § 1003.1 (d)(7)(v) specifies that the BIA cannot remand a case when a noncitizen presents new evidence on appeal; instead the only avenue to potentially present new evidence is through a motion to reopen. We are concerned about the effects of this proposed rule on *pro se* respondents who may incorrectly label their submissions to the BIA and be foreclosed from consideration of their new evidence as a result.

Further, there is no justification for respondents having to formally move to reopen while allowing the government, which will always be represented by counsel, from obtaining a remand without making a formal motion. This double standard gives the appearance of impropriety and favoritism toward one party in the proceedings.

VII. The Proposed Rule Favors Speed over Fairness

Under the proposed rule, initial screening for summary dismissal must be completed within 14 days of filing and a decision must be issued within 30 days. Given the number of cases pending before the BIA, Law Lab is concerned that this mandatory timeframe will lead to erroneous dismissals. The BIA staff conducting initial screening would not know until they have screened the case whether or not it falls within one of the eight categories that could be summarily dismissed. Adding arbitrary, mandatory adjudication timeframes will put pressure on the screeners to review cases quickly rather than accurately and will result in erroneous dismissals.

This aspect of the proposed rule will unnecessarily penalize *pro se* respondents, who lack the understanding of the legal system and face cultural and linguistic barriers to accessing the legal system. A *pro se* respondent cannot be expected to articulate complex legal arguments in their notices of appeal and many of the *pro se* respondents that Innovation Law Lab serves are connected to pro bono attorneys more than fourteen days they have filed their *pro se* Notice of Appeal. This proposed change to the regulations would result in the dismissal of their appeals, despite the fact that many of these clients have legitimate grounds for appeal. Not only does this

proposed change undermine fairness and due process, but it impedes noncitizens' right to assistance of counsel.

Moreover, for cases not subject to summary dismissal, the proposed rule, 8 CFR § 1003.1(e)(8), creates mandatory adjudication deadlines, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single Member or three Member decision. We are concerned that these timeframes are mandatory and that Board Members will make mistakes as they emphasize speed rather than fairness in reviewing case records.

8 CFR § 1003.1(e)(8)(v) requires any case that has been pending for more than 355 days to be referred to the Director for him to render a decision. The proposed rule also specifies that the Director cannot further delegate this authority. Given that at the end of fiscal year 2019 there were over 70,000 cases pending before the BIA,⁶ a body comprised of 23 Members, each Member would have to complete 3,043 cases per year to comply with the 355-day deadline. It would not be possible for Board Members to adequately review this number of cases in this timeframe. Moreover, since it is faster for a single Member to affirm an IJ decision than for that Member to refer a case for three-Member review (which is required to overturn an IJ decision), the Board Members will have an incentive to decide and deny cases themselves rather than determine that the cases require three Member review.⁷ This proposed rule will have the effect of pressuring Board Members to rush through appeals so as to comply with the 355-day deadline. The likelihood that mistakes are made or evidence overlooked increases substantially under this proposed rule and is at odds with due process and the requirement that immigration proceedings be fundamentally fair.

Furthermore, this section of the proposed rule essentially creates a “mini-attorney general” allowing the Director, a political appointee, rather than a career adjudicator, to personally adjudicate hundreds or thousands of cases. This proposed change further politicizes EOIR and will result in increased denials at the expense of due process.

VIII. The Proposed Rule Would Allow IJs Who Disagree with BIA Remands to Certify Those Cases to the EOIR Director, Further Politicizing EOIR

⁶ See DOJ, *EOIR Adjudication Statistics*, <https://www.justice.gov/eoir/page/file/1248501/download>.

⁷ The National Immigration Judges Association has questioned whether performance quotas conflict with the judicial canon of ethics. See 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”* at 8 (Apr. 18, 2018) (“In addition to putting the judges in the position of violating a judicial ethical canon, such quotas pits their personal interest against due process considerations.”)

We strongly oppose the so-called “quality assurance” provision proposed by 8 CFR § 1003.1(k). This provision would allow IJs who disagree with a BIA remand, to certify the case to the EOIR Director, a political appointee. Rather than promoting “quality assurance,” this proposed rule undermines the integrity of the BIA. Any adjudicator who is overturned on appeal or who receives a remand, may disagree with the decision of the appellate body, but it is fundamental to our system of jurisprudence that appellate bodies have authority to review decisions by triers of fact. While the proposed rule states that the process should not be used “as a basis solely to express disapproval of or disagreement with the outcome of a Board decision,” the bases on which an IJ can certify a case to the Director are so broad—including, for example, that the IJ believes that the BIA decision is contrary to law, or is “vague”—that an IJ who simply disagrees could construct an argument that would fall under these rules.⁸ Rather than promoting quality assurance, this proposed rule would undermine the authority and integrity of the BIA and allow IJs who are ideologically aligned with the Director to circumvent the BIA.

Innovation Law Lab attorneys and their clients have appeared before IJs who wholly disregard binding legal precedent and who display a clear animus towards noncitizens throughout the proceedings. Indeed, several of our programs operate in what we have dubbed “asylum-free zones”; jurisdictions where immigration judges deny virtually every asylum application that comes before them. As a federal court recently held, “the high rates of denials in these courts may be evidence of . . . bias or a failure to adhere to the requirements of the INA.” *Las Americas v. Trump*, 2020 WL 4431682, *7 (D. Or. 2020). The proposed regulation would allow these biased IJs to circumvent the appeals process and would remove any accountability to conduct proceedings in a manner that respects due process and fundamental fairness.

IX. The Proposed Rule Would Remove Time and Number Limitations on Motions to Reopen by the Government, but Not by Respondents

Under 8 CFR § 1003.2(c)(3)(vii), DHS would be specifically exempted from time and number bars on motions to reopen before the BIA, while noncitizens would be bound by these strict limitations. EOIR is an adjudication system and as such it should not apply different rules to the two parties that appear before it. While the government may in some instances have good cause to file beyond time and number limitations, noncitizens also have good cause to do so

⁸ It was precisely this type of irregular procedure that led to the attorney general’s decision in *Matter of A-B- 27* I&N Dec. 316 (A.G. 2018). In that case, the BIA had remanded a decision to Judge Couch after he had denied asylum to a woman who had survived domestic violence. See Center for Gender and Refugee Studies, *Background and Briefing on Matter of A-B-*, (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/background-and-briefing-matter-b>.

when, among other reasons, new relief becomes available, when they suffered ineffective assistance of counsel in the past, or when extraordinary circumstances warrant reopening.

By allowing the government to move to reopen with no limitations whatsoever, no litigant who ever appeared in immigration court could ever feel fully secure that the grant of relief they received from the court will not be relitigated in the future. This goes against well-established legal principles that favor finality of judgments. It is unclear why the proposed changes would allow one party to disturb the finality of a decision while prohibiting another party from doing so.

X. The Proposed Rule Would Largely Eliminate the BIA's and the Immigration Judge's *Sua Sponte* Authority to Grant Motions to Reopen

The proposed rule, 8 CFR § 1003.2(a), would remove the existing sentence, “[t]he Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.” In its place, the proposed rule would only allow the BIA to reopen proceedings based on a motion filed by one of the parties. Given the constraints on motions to reopen filed by noncitizens, this provision would greatly reduce respondents’ ability to have motions to reopen granted that are untimely or that are number-barred, even in circumstances where the noncitizen could not have filed the motion earlier. Under the rules, with very limited exceptions, a noncitizen may only file one motion to reopen and must file that motion within 90 days of the final order. As a result, noncitizens who later become eligible for relief, for example, noncitizens who obtain an approved immediate immigrant relative petition, an approved application for SIJS status, or derivative asylum status through a spouse or parent, would be foreclosed from reopening their removal orders.

Furthermore, this proposed rule, like the others in this rulemaking, would eliminate the discretion of Board Members to remedy injustices. Even if a Board Member sees that there is a good reason to reopen a case or that failing to do so would result in a manifest injustice, this rule would strip the BIA of its authority to reopen.

Similarly, proposed 8 CFR § 1003.23(b)(1) would eliminate the sentence, “[a]n Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.” In its place, would be a similar change to that made at the BIA level, only allowing the IJ to reopen on their own motion to correct a typographical or ministerial error. As with the BIA, the IJ would only be permitted to reopen a case if one of the parties moves for reopening; however, such motions are subject to

time and number bars for respondents. Thus, even if a noncitizen becomes eligible for relief, the IJ would be unable to reopen the proceeding in most circumstances without relying on the *sua sponte* authority which the proposed rule would eliminate. On the other hand, DHS is not subject to time and number bars in submitting motions to reopen, thus unfairly allowing one party access to further EOIR review while permanently shutting out the other.

Innovation Law Lab recently filed a motion to reopen for an unaccompanied minor who was ordered removed in absentia following his father's sudden death in a car crash. The IJ granted the motion to reopen under her *sua sponte* authority. Under the proposed change, this child may have been precluded from pursuing his claims for relief. Situations such as these demonstrate the need for immigration judges and the BIA to be able to exercise their discretion to reopen or reconsider a case that due process and fundamental fairness require.

XI. The Proposed Rule Would Upend Ordinary Appellate Practice

As with many of the proposed rules in this NPRM, 8 CFR § 1003.3(c) would promote speed over fairness. In almost every appellate adjudication system in the United States, the appellant files a brief and the appellee is then able to respond to the arguments raised in that brief.⁹ The prejudice in the proposed rule to the appellee, who will not know what argument to focus on in their brief, far outweighs any alleged efficiency that EOIR would gain through this process. In many cases, an appellant may include multiple issues in their Notice of Appeal but only brief one or two of those issues. With simultaneous briefing, the appellee would have to address every issue raised in the Notice of Appeal, even if those issues are never briefed. This is unfair to the appellee, and would result in overburdened counsel for both respondents and DHS having to brief issues that will never be considered by the BIA. Furthermore, if there are many issues raised in the Notice of Appeal, there is a greater likelihood that the appellee will have to submit a motion asking to expand the page limit on their brief so that they can address issues that may never be raised in the appellant's brief, further resulting in wasted resources by the BIA in adjudicating these motions.

The proposed rule would also make it almost impossible to file a reply brief. The rule would allow only 14 days to file a reply brief, with the BIA's permission, but the 14 day period would begin running from the due date of the initial brief. Since there is no requirement that the parties receive the other party's brief on the due date, it is common practice for respondent's counsel and DHS to serve their briefs on opposing counsel via regular mail. Since there is not a

⁹ We acknowledge that the BIA already has simultaneous briefing in cases where the respondent is detained, but understand the greater need for adjudication speed where the respondent's liberty interest is at stake.

universal e-filing system at EOIR, litigants must rely on the U.S. postal service or private courier services to make paper filings. In the best of circumstances, it often takes five days to receive mail from the U.S. postal service, and there are currently historic delays occurring at the U.S. postal service,¹⁰ which would mean that the opposing party may not receive the other party's brief until just before the 14 day timeframe has run out. To file a reply brief, the appellant would need to file a motion seeking leave to file a reply and file the reply brief within a few days from receiving the opposition brief. This timeframe would make it virtually impossible for a practitioner, who would have to drop all other case work to comply, to ever file a reply brief.

Finally, this section of the proposed rule would greatly reduce the amount of time that the BIA is permitted to give for extensions. Under the current rule, the BIA is authorized to give up to 90 days to file a brief or reply brief for good cause shown. Despite this regulatory allowance, it has been longstanding practice of the BIA to generally only give a 21-day extension upon request.

Under the proposed rule, this time frame would be slashed to a maximum extension of 14 days, with only one possible extension permitted. As with the issues discussed above concerning reply briefs, by the time an appellant receives a response as to whether or not the extension is granted, the 14 days would likely be almost expired. Moreover, where a litigant successfully demonstrates "good cause," there may be many issues that prevent filing within 14 days, including serious medical issues or a death in the family. There is no reason to eliminate the BIA's authority to grant any extension beyond 14 days no matter how exigent the circumstances may be.

These restrictions will impede Innovation Law Lab from placing cases on appeal with pro bono attorneys and will impede Innovation Law Lab's ability to provide effective strategic support to its pro bono attorneys. This proposed change will have the effect of stripping pro se respondents of the opportunity to retain pro bono counsel at the BIA level because pro bono attorneys will be unable to meet these new deadline requirements. It is extremely difficult for an attorney who did not appear before the immigration court to decide whether or not to take on an appeal before they can review the transcript. These difficulties are further exacerbated for individuals in detention facilities who likely have to mail copies of the transcript to potential counsel, which adds more delay while the 21-day clock is ticking. If attorneys cannot receive a reasonable extension to review the record and prepare a quality brief, it is unlikely they would

¹⁰ Todd C. Frankel, *Postal Problems Could Continue Despite Suspension of Policies Blamed for Mail Delays*, The Washington Post, Aug. 19, 2020, <https://www.washingtonpost.com/business/2020/08/19/postal-problems-could-continue-despite-suspension-policies-blamed-mail-delays/>.



take on the case, thus leaving more noncitizens without counsel during an appellate process in which they are very unlikely to succeed on their own.

XII. Conclusion

The individuals Innovation Law Lab serves will be heavily impacted by these proposed changes to the regulations. Innovation Law Lab routinely assists people fleeing violence and persecution in their home countries who arrive to the United States' southern border to seek safety. These regulations would result in the erroneous deportation of many of these individuals to the very same region from which they have fled, exposing them to further violence at the hands of their persecutors. The proposed regulation will effectively deprive our clients of their statutory and due process rights, and will impede Innovation Law Lab from finding pro bono representation for our pro se clients, thereby undermining their right to be represented by an attorney and to receive effective assistance of counsel. The agencies should withdraw the proposed regulation in its entirety. Moving forward with these proposed changes will effectively eviscerate the appellate process, in contravention of existing laws and Congressional intent.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us should you have any questions about our comments or require further information.

A handwritten signature in black ink, appearing to read "Stephen Manning".

Stephen Manning
Executive Director
Innovation Law Lab

A handwritten signature in black ink, appearing to read "Tess Hellgren".

Tess Hellgren
Justice Catalyst Legal Fellow & Staff
Attorney
Innovation Law Lab

A handwritten signature in black ink, appearing to read "Jordan Cunnings".

Jordan Cunnings
Director of Equity Corps & Staff Attorney
Innovation Law Lab

A handwritten signature in black ink, appearing to read "Kelsey Provo".

Kelsey Provo
Staff Attorney
Innovation Law Lab

A handwritten signature in blue ink, appearing to read "Nadia Dahab".

Nadia Dahab
Senior Staff Attorney



Innovation Law Lab