



Submitted via www.regulations.gov

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**RE: RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021,
Public Comment Opposing Proposed Rule on Motions to Reopen and Reconsider; Effect of
Departure; Stay of Removal**

Innovation Law Lab respectfully submits this comment urging the Department of Justice (DOJ) to withdraw the majority of its proposed rule that seeks to significantly change motions practice with regard to motions to reopen and reconsider and stays of removal. Motions to reopen and reconsider are an important procedural protection for immigrants with removal orders, and the proposed changes would limit due process by unnecessarily making it more difficult to reopen a proceeding. The proposed rule also improperly raises the standard for obtaining a stay of removal, which would lead to the improper deportation of many people with meritorious claims for relief.

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 the United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR).

Innovation Law Lab Objects to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

Innovation Law Lab objects to the agency's decision to provide only a 30-day comment period instead of the customary 60-day period.¹ The proposed regulations would make significant changes to immigration court practice that dramatically affect both respondents and practitioners, including our organization and its clients. There is no reason to provide such an abbreviated comment period over several major holidays (including Thanksgiving, Hanukkah, Kwanzaa, and Christmas), during a global pandemic, and simultaneous to the proposing and publishing of several other rules² that would dramatically affect immigrants in removal proceedings and immigration attorneys and nonprofits (including our own). The public deserves adequate time to fully consider and thoughtfully respond to these proposed changes.

The Agency Wrongly Asserts that This Rule Would Not Have a Significant Economic Impact on a Substantial Number of Small Entities

Innovation Law Lab objects to the agency's assertion that this rule would not have a significant economic impact on a substantial number of small entities, including nonprofit organizations like Innovation Law Lab. If implemented, the proposed changes would have a financial impact on Innovation Law Lab, its representation programs, and other small entities who represent immigrants in removal proceedings and those with final orders of removal. The heightened standards for motions to reopen and stays of removal, and the inevitable denials, will require a significant amount of extra work for legal service providers, limiting the number of cases that organizations can take on and possibly necessitating the creation of new programs and hiring of new staff. Because of the significant economic impact to organizations like ours, this regulation must be closely scrutinized by the Office of Information and Regulatory Affairs.³

¹ See Exec. Order No. 13563, Improving Regulation and Regulatory Review § 2(b) (Jan. 18, 2011)

² See, e.g., EOIR NPRM, Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942 (proposed Nov. 27, 2020); Department of Homeland Security (DHS) NPRM, Employment Authorization for Certain Classes of Aliens with Final Orders of Removal, 85 Fed. Reg. 74196 (proposed Nov. 19, 2020); DHS NPRM, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (proposed Sept. 11, 2020); EOIR NPRM, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020).

³ See Regulatory Flexibility Act, 5 U.S.C. § 603.

Innovation Law Lab Strongly Objects to the Substance of the Majority of the Proposed Rule and Urges the Administration to Rescind Most of It

Innovation Law Lab strongly objects to the majority of the proposed rule and urges that it be rescinded. The proposed regulations would severely hinder the right to due process in immigration proceedings and will lead to increased deportations, family separation, and death and serious harm to persons who are wrongfully removed without a chance to vindicate their rights before the immigration court.

1. Innovation Law Lab objects to proposed 8 C.F.R. § 1001.1(cc), which fails to account for involuntary exits from the United States and improperly overrules *Matter of Arrabally and Yerrabelly*

The NPRM claims that the proposed definition of departure would encompass only voluntary departures, but the text of the proposed regulation does not state this. The proposed regulation reads as follows:

The terms depart or departure, unless otherwise specified, refer to the physical departure of an alien from the United States to a foreign location. A departure shall not include the physical removal, deportation, or exclusion of an alien from the United States under the auspices or direction of DHS or a return to contiguous foreign territory by DHS in accordance with section 235(b)(2)(C) of the Act, but shall include any other departure from the United States....⁴

As the NPRM acknowledges, it is important that the rule only apply to voluntary departures. The regulatory language should be expressly amended to state as such. Otherwise, as explained in *Matter of Arrabally and Yerrabelly*, “departure” would include “departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnaped outright and spirited across the border against their will.”⁵ This would unfairly punish noncitizens who leave the United States by force or through no fault of their own.

Moreover, the agency should not abandon the rule announced in *Matter of Arrabally and Yerrabelly* that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA § 212(a)(9)(B)(i)(II). Rather than overruling *Matter of Arrabally and Yerrabelly* through regulation, the agency should codify by regulation that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA

⁴ 85 Fed. Reg. at 75955.

⁵ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 775 (BIA 2012).

§ 212(a)(9)(B)(i)(II). At the very least the agency should not retroactively apply this rule to people who have traveled on advance parole in reliance on the prior rule.⁶

2. Innovation Law Lab agrees that EOIR should rescind the departure bar, as proposed in 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1), but the agency should do so in its entirety

Innovation Law Lab supports the removal of the departure bar from 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1). However, we oppose the agency’s proposal to continue to apply the withdrawal provision when a noncitizen leaves the United States while a motion is pending. Instead, the departure bar—including the withdrawal provision—should be rescinded in its entirety and should not be replaced.

As the NPRM points out, every circuit court to examine the issue has found the departure bar to “clearly conflict[]” with the Immigration and Nationality Act or to “impermissibly restrict[]” the BIA’s jurisdiction.⁷ The agency cannot avoid these decisions, and those of the Supreme Court, by keeping a narrower “volitional” departure bar. EOIR is required by statute to exercise its jurisdiction and cannot refuse to do so for a subset of motions based on the location of the filer.⁸ The plain language of the statute creates no barriers to adjudication based on departure, and the agency may not add such a limitation by regulation.

For these reasons, we urge the agency to withdraw the departure bar in its entirety.

⁶ See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 at 9 (AAO Aug. 20, 2020) (“We acknowledge the Applicant’s reasonable reliance on the agencies’ erroneous past practice, and conclude that the statutory construction announced in this decision should not apply to her application based on such reliance.”).

⁷ *Toor v. Lynch*, 789 F.3d 1055, 1057 n.1 (9th Cir. 2015) (enumerating the decisions of other circuit courts on this issue).

⁸ See *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009) (prohibiting an agency from narrowing its own jurisdiction); *Luna v. Holder*, 637 F.3d 85, 101-02 (2d Cir. 2011) (“Nor has Congress indicated since it enacted IIRIRA that an alien’s departure after filing a motion to reopen should be a jurisdictional bar . . . The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed or otherwise departs the United States before or after filing the motion.” (emphasis added) (internal citations omitted)).

3. Innovation Law Lab opposes proposed 8 C.F.R. § 1003.48(b), which would unnecessarily heighten the evidentiary standard for motions to reopen

Innovation Law Lab strongly opposes the inclusion of regulatory language purporting to do away with the rule that facts stated in an affidavit must be accepted as true unless they are inherently unbelievable. As many federal courts have explained, this rule ensures that the moving party has the opportunity to get into court to prove that those facts are true.⁹

The proposed changes are rife with violations of the INA and of due process. The rule proposes that the adjudicator should not accept as true anything that is contradicted by evidence in the existing record. But, because motions to reopen seek to show a need for a new hearing, many motions will be necessarily accompanied by evidence that contradicts the existing record – for example, new evidence showing a likelihood of success on an asylum claim may contradict previously-submitted country conditions evidence. Any factual disputes that arise due to assertions in a motion should be resolved in an evidentiary hearing by the appropriate factfinder (the immigration judge), not in a motion.

The proposed rule also attempts to unlawfully rewrite the statute by preventing an adjudicator from accepting as true statements deemed conclusory, uncorroborated, or unsupported by other record evidence. The agency may not make this change, as INA § 208(b)(1)(B)(ii) clearly states that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” Moreover, corroboration may not always be immediately available at the time a motion to reopen must be filed, especially in the case of detained or unrepresented movants.

The move away from accepting as true affidavits principally based on hearsay is similarly problematic, as hearsay evidence is admissible in immigration proceedings unless its use is fundamentally unfair.¹⁰ And in many cases, hearsay statements will be the only option for someone to prove their case – for example, a persecutor’s statements, necessary to prove nexus, will almost always be hearsay because a persecutor would never be available to provide an affidavit or testimony.

Finally, the rule would prevent an adjudicator from accepting as true statements made about individuals who are not presently in the United States. This change is ludicrous in light of the fact that many forms of relief from removal, including asylum, withholding of removal, and protection under the Convention Against Torture, are premised completely on what has or will occur in a foreign country. Given the difficulty of obtaining testimony and affidavits from people in a country in which the movant fears persecution – especially within the tight deadlines

⁹ See *Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) (noting that this rule is appropriate because “motions to reopen are decided without a factual hearing”); see also *Trujillo Diaz v. Sessions*, 880 F.3d 244, 252-53 (6th Cir. 2018).

¹⁰ *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); 8 C.F.R. § 1240.7(a).

of the motion to reopen context – the movant’s own statements will often be the only available persuasive evidence. The appropriate place to evaluate the credibility of those statements, and to weigh them against the presence or absence of corroborating evidence, is in an evidentiary hearing in reopened proceedings.

The proposed changes would functionally eliminate motions to reopen based on changed country conditions for asylum seekers and would severely limit the feasibility of motions to reopen in other contexts. Consequently, many more people will be wrongfully removed to countries in which they face severe harm and death. We urge the agency to withdraw this portion of the proposed rule.

4. Innovation Law Lab opposes proposed 8 C.F.R. § 1003.48(c), which attempts to improperly apply the fugitive disentitlement doctrine to motions to reopen

Innovation Law Lab strongly urges EOIR to eliminate the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that says that a noncitizen’s failure to comply may result in denial of the motion. The fugitive disentitlement doctrine should not be incorporated into the motion to reopen context.

The fugitive disentitlement doctrine is an “extreme sanction” that should not be applied in the context of civil immigration proceedings.¹¹ First, in the context of motions to reopen, many movants will not have received proper notice of their obligation to surrender, especially when moving to reopen a removal order that was entered *in absentia*. It is not uncommon for DHS to send notice to the incorrect address, or to notify only the bond obligor and not the respondent.¹² It is patently unjust to consider failure to surrender as a negative discretionary factor in the case of a respondent who has not properly received notice of their surrender obligations. Moreover, it will be extremely challenging for movants to prove that they did not receive notice given the proposed evidentiary requirements of 8 C.F.R. § 1003.48(b)(i), which states that allegations made in a motion are not, and cannot be treated as, evidence. In light of this requirement, movants must devote significant resources to developing a factual record regarding the absence of notice – and, as noted above, the adjudicator will no longer presume that any evidence submitted in the form of affidavits is true. This requirement will create unnecessary additional work for movants and their representative, and inserts an unnecessary consideration into the evaluation of the merits of motions to reopen. Finally, allowing the agency to consider failure to surrender as a negative discretionary factor will lead to the denial of otherwise-meritorious

¹¹ See *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007).

¹² See, e.g., *Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005) (refusing to apply the fugitive disentitlement doctrine where, “on more than one occasion, critical documents were sent to the wrong address by the agency”).

motions to reopen, meaning that many people will be deported away from their families and into places of danger.

The agency should not bring the fugitive entitlement doctrine into this context and should withdraw this proposed change in its entirety.

5. Innovation Law Lab opposes proposed 8 C.F.R. § 1003.48(e)(1),(2), which would disallow reopening and reconsideration based on a pending USCIS application

The agency should also withdraw its proposal to prohibit motions to reopen or reconsider based on applications for relief pending before USCIS. These applications include many that Congress created specifically for the benefit of vulnerable populations, including victims of violent crime, human trafficking, and unaccompanied children. This proposed change is especially outrageous when considered with recent changes that functionally eliminate administrative closure and continuances;¹³ many people will now be ordered removed simply because their applications submitted to USCIS are not adjudicated quickly enough, and they will now lack a mechanism to reopen their cases. Moreover, the agency has separately done away with sua sponte reopening,¹⁴ which is often the only mechanism available to people whose applications are adjudicated by USCIS outside of the normally applicable 90-day deadline for motions to reopen.

Taken as a whole, it is clear that the agency is attempting to improperly foreclose the availability of these forms of relief altogether. The agency should not be permitted to re-write the INA by regulation. The proposed changes should be withdrawn.

6. Innovation Law Lab objects to proposed 8 C.F.R. § 1003.48(e)(3), which would limit the scope of reopened proceedings to the issues upon which reopening or reconsideration was granted

Innovation Law Lab opposes the proposed change to limit the scope of reopened proceedings to the issues upon which reopening or reconsideration was granted. As the NPRM acknowledges, this change is a stark departure from past practices governing remand, and the change is both unnecessary and impractical. Movants often will have multiple avenues available for relief from removal and may make strategic decisions to go forward with only one avenue for relief on remand, even if not the grounds upon which their motion was granted. This may be the most efficient way for the court to resolve the case, and taking such an option off the table would not benefit either respondents or the efficiency of the court system. Additionally, this change would prevent adjudicators from considering claims for relief that may have become viable during the

¹³ See, e.g., *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

¹⁴ See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).

pendency of proceedings. This change would thus both be unfair to respondents and potentially lead to the need for repeated motions to reopen, undermining the efficiency of the court system.

7. Innovation Law Lab supports the clarification to proposed 8 C.F.R. § 1003.48(i)(2), which permits respondents to file motions to reopen where they received ineffective assistance from a notario or other individual committing unauthorized practice of law, but we oppose proposed 8 C.F.R. § 1003.48(i)(5), which adds significant and unnecessary barriers to filing motions based on ineffective assistance of counsel

Innovation Law Lab supports the proposed rule's clarification that an individual may bring an ineffective assistance of counsel claim against a person who they reasonably but incorrectly believed to be an attorney. This change would be an important step in combatting notario fraud and in assisting persons who are taken advantage of by unscrupulous parties.

However, we oppose the addition of unnecessary and burdensome requirements to properly file a motion based on ineffective assistance of counsel. These requirements would do little to protect respondents, accredited representatives and attorneys, and the court system itself, and would merely create additional barriers for movants seeking relief from ineffective assistance of counsel.

Currently, motions to reopen based on ineffective assistance must include (1) an affidavit explaining the agreement with former counsel and what prior counsel represented to the respondent; (2) that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) whether the respondent filed a complaint with the appropriate disciplinary authority regarding counsel's conduct, or, if a complaint was not filed, an explanation for not filing one.¹⁵ As the NPRM notes, many circuits only require substantial compliance with these requirements. The NPRM would seek to require strict compliance with its heightened procedural requirements, including the strict requirement to file a bar complaint against the prior attorney, unless the attorney is deceased. These changes create unnecessary procedural hurdles when substantial compliance has been, and remains, sufficient for EOIR to achieve its goal of "provid[ing] a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance."¹⁶

¹⁵ *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

¹⁶ *See Matter of Lozada*, 19 I&N Dec. at 639. When these goals are met, EOIR should not insist upon strict compliance with arbitrary procedural rules. *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003).

The additional requirements the changes would propose on affidavits are also unnecessary and in tension with the normal process of client representation. The regulation would require affidavits to identify the drafter, but it is extremely common, and entirely permissible, for attorneys to draft legal documents on behalf of clients. The other requirements are superfluous, as attorneys are already ethically bound to communicate effectively with their clients and to ensure that clients only sign something that is truthful.

The additional requirements of the proposed rule will be especially burdensome for movants who are unrepresented by counsel and proceeding pro se. The agency's proposed changes would merely create unnecessary procedural hurdles that would allow the denial of otherwise meritorious claims for reopening.

8. Innovation Law Lab strongly objects to proposed 8 C.F.R. § 1003.48(k), which would create almost insurmountable barriers to obtaining a stay of removal

Innovation Law Lab vehemently opposes the addition of significant new barriers to obtaining a stay of removal and urges the agency to completely eliminate the proposed language regarding stays of removal. While a stay is an extraordinary remedy, it is often extremely necessary, and indeed may be the only protection available for someone who would otherwise face significant harm, including death, or permanent family separation upon removal. These added procedural requirements are particularly objectionable given the extremely short time frame under which many stays of removal must be filed.

First, noncitizens should not be required to first file a stay request with DHS before filing with EOIR. There is no need to add an additional layer of agency review and involvement to these requests, especially considering that DHS stay requests require significant time and effort (including a \$155 fee, that not all clients can afford, and fees for obtaining a passport) and are very often denied. Requiring an initial stay request to be filed with DHS would effectively impose a fee for stay requests before EOIR, when no fee is required.

Even more troublingly, the proposed regulation would give DHS veto power over stay requests, stating that a stay cannot be granted unless DHS (1) joins or affirmatively consents, or (2) does not respond after 3 business days. It is fundamentally unfair to allow an agency whose mission is focused on obtaining deportations to have the final say on whether a stay of removal should be granted, especially when the statutory and regulator power to grant a stay lies with *EOIR*.

Additionally, it is wholly unrealistic to require that a stay motion include a complete case history, all relevant facts, a copy of the stay motion filed with DHS, and a copy of the order of removal or description of the order. As noted above, stay motions are often filed, by necessity, on an emergency basis and before counsel has been able to obtain a copy of the record of proceedings. This has been especially true in recent months due to the closure of many courts during the COVID-19 pandemic, the slow adjudication times for EOIR FOIAs, and mail delays due to U.S. Postal Service slowdowns and limited personnel presence in-office. It is often impossible to provide a complete case history under such circumstances, especially when the stay of removal must be promptly filed to avoid imminent deportation.

The agency should not add a requirement that movants prove reasonable diligence in seeking a stay and filing a motion to reopen, as it contravenes the statute for movants who have filed within the statutory deadlines. For example, there is no statutory deadline for filing a motion to reopen based on changed country conditions or based on lack of notice,¹⁷ which would make it exceedingly unfair to impose a diligence requirement to movants in these categories. Attempting to make this change exceeds the agency's regulatory authority because it violates the INA.

Additionally, Innovation Law Lab opposes the unnecessary and burdensome requirements regarding methods of service. Requiring movants to serve the opposing party simultaneously and by the same method by which the stay motion is filed is costly, difficult, and wholly unnecessary. DHS is equipped for electronic service, which is nearly instant, feasible, and free. There is no benefit to the agency from a more burdensome and less efficient method of service.

Finally, we oppose the agency's attempt to codify the *Nken* factors. At the stay of removal consideration stage, the agency would more appropriately consider the irreparable harm to the movant if the stay is denied.

¹⁷ INA §§ 240(c)(7)(C)(ii), 240(b)(5)(C)(ii).

Conclusion

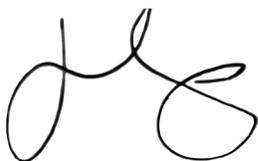
The proposed rule should be rejected almost in its entirety. The agency proposes to entirely revise motions practice and create unnecessary hurdles to reopening proceedings and obtaining stays of removal, regardless of the underlying merits. These changes will cause the unjust deportation of many people, often to countries where they face severe harm and separation from their families and communities. We therefore urge rejection of the proposed changes, as detailed above.



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