**APPELLATE PROCEDURES AND DECISIONAL FINALITY IN IMMIGRATION PROCEEDINGS; ADMINISTRATIVE CLOSURE RULE**

**TEMPLATE COMMENT - INSTRUCTIONS**

Attached is a template to help immigration services organizations draft a public comment in response to the administration’s proposed rule that would greatly restrict noncitizens’ rights in immigration court and before the Board of Immigration Appeals, or BIA. (The Notice of Proposed Rulemaking is available [here](https://www.regulations.gov/document?D=EOIR-2020-0004-0001).)

**Why submit a public comment?** When the government proposes a new rule, it is required (by the Administrative Procedure Act) to give the public an opportunity to read the rule and submit comments. The comment you submit will be public record and available for anyone to read. After the comment period closes, the government agency that proposed the rule must read all of the comments submitted, and take them into consideration when drafting the final version of the rule. If a very large number of people submit comments, and/or the comments identify significant problems with the regulation, then it will take longer for the final rule to be published and take effect, or the agency may make amendments to the rule after considering the comments. Furthermore, if the agency disregards substantive comments, the comments can be helpful to later litigation about the process followed in publishing the rule.

**How do I submit a comment?** You can submit comments online at regulations.gov [click [here](https://www.regulations.gov/document?D=EOIR-2020-0004-0001) to go directly to the proposed rule]. Click on the “comment now” button and either enter your comment in the text box (must be fewer than 5,000 characters) or upload your comment as a PDF. CLINIC has published step-by-step commenting instructions that are available [here](https://cliniclegal.org/resources/step-step-instructions-how-submit-public-comment). Below are some important tips to keep in mind as you are drafting your comment.

**Write comments in your own words.** The template on the following pages is intended to help guide you and give you an example and ideas, but ***the comment should be edited with your original words***. Feel free to delete whole sections or paragraphs and replace them with your organization’s perspective on the issue. It is extremely important to use your own words as much as possible because the agency will bundle any comments that are too similar to each other, and they will consider this bundle as one comment, rather than as individual submissions.

To find your own words in drafting your comment, it may be helpful, to do some research on your own program and practice, the demographics of your clients, and the local community. Consider what aspects of the rule would be particularly troublesome to your organization and your clients. Gather some numbers and statistics that you can use to demonstrate how many of your clients or people in your community will be affected, how and to what extent, and at what financial cost.

**Attach research and supporting documents.** If you cite to statistics or supporting documents in your comments, we recommend including them as an attachment so that they are clearly part of the administrative record. Another option is to include a live link to cited sources.

**If you have experience in an issue area, say so.** If you are a subject matter expert and want to offer comments on your area of expertise, explain why you are qualified to offer this perspective. Feel free to explain your educational and professional background, or attach a copy of your CV to your comment. If you are called to work with immigrants by your faith, feel free to talk about your faith in your comment.

**Provide contact information for a representative of the organization.** Organizational comments should be signed by a representative of the organization, and provide the business contact information of the representative for any follow-up questions or concerns. However, keep in mind that this comment will be publicly available, so do not include personal addresses or cell phone numbers.

Submitted via [www.regulations.gov](http://www.regulations.gov)

DATE

Lauren Alder Reid, Assistant Director

Office of Policy

Executive Office for Immigration Review

5107 Leesburg Pike, Suite 2616

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**

Our organization, NAME, submits this comment urging 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 or Board). The importance of fairness in immigration court proceedings cannot be overstated: for many 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. 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.

ORGANIZATION NAME’s mission is . . . [DESCRIBE ORGANIZATION’S WORK WITH IMMIGRATION. IF ORGANIZATION IS FAITH-BASED, DESCRIBE RELATIONSHIP BETWEEN THE ORGANIZATION’S FAITH-BASED ROOTS AND ITS WORK WITH IMMIGRANTS.

IF POSSIBLE INCLUDE DATA ABOUT THE POPULATION YOU SERVE.

IF POSSIBLE, INCLUDE ANECDOTES ABOUT THE IMPORTANCE OF ADMINISTRATIVE CLOSURE IN IMMIGRATION COURT TO YOUR ORGANIZATION AND/OR THE IMPORTANCE OF MOTIONS TO REOPEN.]

Because these regulations cover so many topics, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time, as explained below, to respond to every proposed change.

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

As discussed below, the proposed regulations 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 Executive Office for Immigration Review’s (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.

[FILL IN ANY SPECIFIC COVID RELATED CHALLENGES HERE. ARE YOU STILL PHYSICALLY NOT IN YOUR OFFICE? HAVE STAFF, FAMILY, OR CLIENTS BEEN AFFECTED DIRECTLY BY COVID? IS STAFF FINDING IT DIFFICULT TO WORK BECAUSE OF CHILDCARE DUTIES OR COVID-RELATED NEEDS TO CARE FOR A FAMILY MEMBER?]

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](https://www.regulations.gov/document?D=EOIR-2020-0003-0001) and [Asylum Security Bars and Processing](https://www.regulations.gov/document?D=USCIS-2020-0013-0001). 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 to rush through proposed rules which 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.

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

Although we object 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.

**8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10—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.

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—whether a known terrorist is placed in removal proceedings or a grandmother who has a pending application for relief with United States Citizenship and Immigration Services (USCIS), and is supporting her family but has overstayed her visa is placed in removal proceedings, all are treated as equal priorities. 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.

Further, 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.

Eliminating administrative closure would also result in harsh consequences for the most vulnerable noncitizens seeking humanitarian relief over which USCIS has exclusive jurisdiction. Children who are pursuing Special Immigrant Juvenile Status (SIJ), crime victims pursuing U visas and trafficking victims 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]](#footnote-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.

ADD ANY ANECDOTE WHERE A CLIENT RECEIVED A PROVISIONAL WAIVER AFTER A CASE WAS ADMINISTRATIVELY CLOSED AND LATER RECEIVED LPR STATUS OR ANY CASE THAT WAS ADMINISTRATIVELY CLOSED, ALLOWING AN APPLICANT FOR SIJS, U, OR OTHER RELIEF TO SUCCEED

**8 CFR § 1003.1(d)(3)(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. We are especially concerned about the effects of this new proposed rule on *pro se* appellants.[[2]](#footnote-2) The proposed rule would specifically 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, remove 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 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]](#footnote-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]](#footnote-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.

 ADD ANECDOTES ABOUT CASES THAT HAVE BEEN REMANDED BY THE BIA AND THE RESPONDENT HAS WON RELIEF AS A RESULT OF THE REMAND, ESPECIALLY RESPONDENTS WHO WERE PREVIOUSLY UNREPRESENTED

**8 CFR § 1003.1 (d)(7)(iii), (iv)—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 section8 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]](#footnote-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 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.

ADD ANECDOTES ABOUT CASES THAT HAVE BEEN REMANDED AND SUCCEEDED AFTER REMAND

 8 CFR § 1003.1 (d)(7)(v)—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.

8 CFR § 1003.1 (e)(1), (8)—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, we are 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 may result in erroneous dismissals.

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]](#footnote-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]](#footnote-7)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.

**8 CFR § 1003.1(k)—The Proposed Rule Would Allow IJs Who Disagree with BIA Remands to Certify Those Cases to the EOIR Director, Further Politicizing EOIR**

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]](#footnote-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.

**8 CFR §** **1003.2(c)(3)(vii)—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 when, among other reasons, new relief becomes available, when they suffered ineffective assistance of counsel in the past, or when extraordinary circumstances warrant reopening. Moreover, the reason for the time and number limitations is that courts generally favor finality of judgments. 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.

**8 CFR §** **1003.2(a) and § 1003.23(b)(1)—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, “The 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, “An 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 the BIA rule change, 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.

ADD ANECDOTES ABOUT CLIENTS WHOSE CASES HAVE BENEFITED FROM SUA SPONTE REOPENING

## 8 CFR § 1003.3(c)—The Proposed Rule Would Upend Ordinary Appellate Practice

As with many of the proposed rules in this NPRM, 8 CFR § 1003.3(c) would privilege 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]](#footnote-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 enlarge 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 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]](#footnote-10) which 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.

We are very concerned that these time restrictions will lead to fewer noncitizens who appeared *pro se* in immigration court finding counsel for their appeals. 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 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.

**Conclusion**

These proposed rules rewrite many aspects of long-established immigration court and appellate practice. The agency should have given the public at least 60 days to respond to these far-reaching changes, and should therefore rescind the rulemaking on this basis alone. Substantively, the proposed rules would prize speed over fairness. The proposed rules will make it more difficult for unrepresented noncitizens to obtain counsel, and more difficult for unrepresented noncitizens to prevail on appeal. They will further make it more difficult for noncitizens to successfully reopen proceedings, even when they have relief available, unfairly establishing finality when there are removal orders, but allowing DHS to reopen cases with no limitations. The proposed rules would strip the BIA of authority, especially its discretionary authority, while vesting further power in the EOIR Director. If published in their current form, the proposed rules will further erode due process in immigration court and BIA proceedings. We urge you to rescind them.

 [Name, position and signature]

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>. [↑](#footnote-ref-1)
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>. [↑](#footnote-ref-2)
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. [↑](#footnote-ref-3)
4. *See*, CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018) <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>. [↑](#footnote-ref-4)
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. [↑](#footnote-ref-5)
6. *See* DOJ, *EOIR Adjudication Statistics*, <https://www.justice.gov/eoir/page/file/1248501/download>. [↑](#footnote-ref-6)
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.”) [↑](#footnote-ref-7)
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, *Backgrounder and Briefing on Matter of A-B-*, (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b>. [↑](#footnote-ref-8)
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. [↑](#footnote-ref-9)
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/>. [↑](#footnote-ref-10)