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IMMIGRATION
LAWYERS
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Submitted via www.regulations.gov

RE: Executive Office for Immigration Review, Department of Justice Notice of Proposed Rulemaking: Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal (RIN 1125-AB01; EOIR Docket No. 18-0503)

Dear Ms. Alder Reid,

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) submit this comment in reference to the proposed rule of the Executive Office for Immigration Review (EOIR), *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75942 (Nov. 27, 2020), EOIR Docket No. 18-0503. We urge EOIR to withdraw the proposed rule.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council's legal department provides technical and strategic assistance to others litigating before the immigration courts and has a direct interest in ensuring that the immigration courts remain accessible to noncitizens.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The proposed rule creates new obstacles to filing motions to reopen pursuant to 8 U.S.C. § 1229a(c)(7) and motions to reconsider pursuant to 8 U.S.C. § 1229a(c)(6). Instead of acknowledging the importance of these motions, throughout the proposed rule, EOIR describes the motion to reopen process as “disfavored” and subject to the agency’s “broad discretion.”¹ Notably, the Supreme Court cases that the agency cites for these propositions were decided prior to the codification of the motion to reopen process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). See IIRIRA § 304; 85 Fed. Reg. at 75949 (citing *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94 (1988)). But subsequently, in reviewing the *statutory* right to seek reopening, the Supreme Court has repeatedly acknowledged the importance of motions to reopen. See, e.g., *Kucana v. Holder*, 558 U.S. 233, 242 (2010); *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). As the Court has explained, a motion to reopen “is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” *Kucana*, 558 U.S. at 242 (quoting *Dada*, 554 U.S. at 18 (2008)). Noncitizens have a statutory right to file one motion to reopen their case. See *Reyes Mata v. Lynch*, 576 U.S. 143, 144 (2015); *Dada*, 554 U.S. at 4–5.

Through the proposed rule, EOIR would undermine noncitizens’ ability to exercise this important statutory right and create far-reaching changes to the long-standing procedures governing motions practice before the immigration courts and the Board of Immigration Appeals (BIA). Therefore, we urge the agency to rescind the proposed rule.

- I. **EOIR Should Rescind the Proposed Rule Because It is Unlawful and Would Harm Noncitizens Seeking Reopening or Reconsideration of Removal Orders**
 - A. **EOIR Should Withdraw the Existing Regulatory Departure Bar and Should Not Replace It with a New Functional Bar to Reopening for Individuals Who Have Departed the United States**

We urge EOIR to withdraw the departure bar regulations currently found at 8 C.F.R. § 1003.2(d) and 1003.23(b)(1), which prohibit filing motions to reopen or reconsider after departing the

¹ See, e.g., 85 Fed. Reg. at 75949 (describing, inter alia, the agency’s alleged “broad discretion” to deny statutory motions even if the moving party demonstrates prima facie eligibility for relief). The plain language of the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), contains no discretionary component and the agency does not have the authority to re-inject that discretion into the reopening process. See *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“[T]he starting point for interpreting a statute is the language of the statute itself.”).

United States and which the courts of appeals have uniformly rejected.²

While EOIR purports to remove those regulations, the proposed rule also would impose new requirements and consequences related to departing the United States that would continue to impede noncitizens' right to seek reopening. See 85 Fed. Reg. at 75945-46. The proposed rule would replace the existing departure bar regulations with a requirement that would "treat[] an already-filed motion as withdrawn upon the [noncitizen's] volitional departure from the United States." 85 Fed. Reg. at 75946. According to EOIR, this variation comports with circuit case law because it does not set a geographic limit on the *filing* of motions. *Id.* However, the new "volitional departure bar" suffers from the same legal flaws as the current departure bar. Therefore, we urge the agency to rescind the proposed regulatory changes related to departure.

The new proposed regulations would be unlawful, just as the existing departure bar regulations are. Courts have struck down the current departure rules for not only setting limits on the filing of motions, but also on the adjudication of motions filed within the United States, where the person subsequently departed. See *Lin*, 681 F.3d at 1238, 1241 (rejecting departure bar regulation as applied to an individual who was deported after filing a motion to reopen). Because the statute forecloses a geographic limitation on the adjudication of motions to reopen and reconsider, it is "immaterial" whether the movant left the United States voluntarily or involuntarily. *Toor*, 789 F.3d at 1064 (finding the departure bar *ultra vires* to the statute even as applied to person who voluntarily departed). With this proposed rule, EOIR would add an impermissible requirement beyond that authorized by Congress. See *Santana*, 731 F.3d at 56 (rejecting the argument that "the government possesses the discretion to impose . . . substantive limitations on a noncitizen's right to file a motion to reopen that lack any foundation in the statutory language").

Even if there were circumstances where a noncitizen's voluntary departure could constitute withdrawal of a motion, the proposed new departure bar does not provide any notice that a "volitional" departure would result in the forfeiture of these statutory rights. See 85 Fed. Reg. at 75946 (assuming knowledge, rather than requiring notice, of "the consequences of departing the

² See 85 Fed. Reg. at 75945-46 (acknowledging court of appeals decisions); see also *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015); *Santana v. Holder*, 731 F.3d 50, 51 (1st Cir. 2013); *Garcia-Carias v. Holder*, 697 F.3d 257, 264 (5th Cir. 2012); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 816 (10th Cir. 2012) (en banc); *Lin v. Att'y Gen.*, 681 F.3d 1236, 1241 (11th Cir. 2012); *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213, 224 (3d Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234, 239-40 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593-94 (7th Cir. 2010); *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007). The regulations setting forth the former departure bar were found invalid because Congress set no physical presence requirement for the adjudication of motions to reopen or reconsider. See, e.g., *Santana*, 731 F.3d at 55-56; *Lin*, 681 F.3d at 1240; *Prestol Espinal*, 653 F.3d at 217.

United States”). Due process requires that noncitizens be advised of the consequences of departure before their statutory rights are deemed waived. See *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 806 (9th Cir. 2004) (holding that a petitioner’s due process rights were violated after the immigration judge failed to inform the petitioner when she reserved her right to appeal that her departure from the United States during her pending appeal to the BIA would constitute a waiver of her right to appeal under 8 C.F.R. § 1003.4).

Finally, the proposed new departure bar includes a definition of volitional departure that sweeps too broadly by including acts that are neither a departure nor evince an intent to abandon statutory rights. The proposed departure definition, while excluding removal at the direction of DHS, includes departure following a grant of advance parole. 85 Fed. Red. at 75947, 75955. This purports to overturn *Matter of Arrabally*, 25 I&N Dec. 771 (BIA 2012), a Board precedent decision, which states that when an individual leaves the United States with advance parole, they do not effect a “departure” for purposes of the departure bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). See 8 C.F.R. § 1003.1(g)(1) (stating that BIA precedent decisions are “binding on all officers and employees of DHS”).³ EOIR does not adequately explain why it believes *Matter of Arrabally* was wrongly decided, nor why the decision’s interpretation of the statute is incorrect. Moreover, the rule offends due process by treating those who leave the United States on advance parole as having withdrawn a properly filed motion, despite having received “assurance” that any pending request for immigration benefits will not be “deemed abandoned,” and without providing any notice to the contrary. *Matter of Arrabally*, 25 I&N Dec. at 778; see also *Martinez-de Bojorquez*, 365 F.3d at 806.

B. EOIR Should Rescind the Proposed Failure to Surrender Provision, Which Misapplies the Fugitive Disentitlement Doctrine

The proposed rule would require individuals to submit with every motion to reopen or reconsider a statement indicating whether they have been notified, at any time and in any form, to surrender to DHS, and whether they complied. 85 Fed. Reg. at 75947, 75956. The agency maintains that any failure to surrender “would generally be treated as an unfavorable factor” by immigration judges and the BIA when adjudicating motions. *Id.* at 75947. By adding this requirement, the agency wrongly expands the fugitive disentitlement doctrine. We urge EOIR to rescind these provisions of the proposed rule.

³ A noncitizen’s “departure under a grant of advance parole is qualitatively different from other departures.” *Matter of Arrabally*, 25 I&N Dec. at 778. “By granting advance parole, the DHS . . . is telling the [noncitizen] that he can leave the United States with assurance that his pending applications for immigration benefits will not be deemed abandoned during his absence” *Id.* For this reason, the Board has interpreted the term “departure” in 8 U.S.C. § 1182(a)(9)(B)(i)(II) to exclude departures on advance parole. *Id.* at 779.

“The fugitive disentitlement doctrine is an extreme sanction that permits a court to waive an appellant’s right to appeal if the appellant fails to appear before a relevant tribunal.” *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007). As such, courts apply it sparingly. See *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (“[T]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court’s authority and dignity.”); *Wu v. Holder*, 646 F.3d 133, 137-38 (2d Cir. 2011) (declining to apply the doctrine to a “simple” case where petitioner did not seek to take unfair advantage of the courts). In the immigration context, courts have only applied the doctrine in narrow circumstances to individuals who have failed to appear in response to a formal notice to report for removal. See, e.g., *Martin v. Mukasey*, 517 F.3d 1201, 1202 (10th Cir. 2008) (applying doctrine where noncitizen and noncitizen’s counsel were served with formal notice to report for removal requiring appearance on a date certain). Moreover, even where potentially applicable, courts have placed the burden on the government to show that it will suffer “actual prejudice” in litigating an appeal as a result of an individual’s failure to report. *Degen v. United States*, 517 U.S. 820, 824–25 (1996); *Wu*, 646 F.3d at 137 (declining to dismiss appeal under fugitive disentitlement doctrine where the government “has presented no evidence indicating that [the noncitizen’s] fugitive status has prejudiced its case”).

By contrast, with this proposed rule, EOIR makes any alleged failure to surrender a potential denial ground in every motion to reopen or reconsider, places no limits on the form of notification the noncitizen must receive before the doctrine is applied, and requires no showing that the government would suffer any prejudice as a result of the noncitizen’s failure to report. See 85 Fed. Reg. at 75947, 75956. The proposed rule is a departure from, and unsupported by, the fugitive disentitlement doctrine.

EOIR also fails to justify the imposition of these extreme sanctions. In parallel regulatory processes, EOIR has insisted that judges should generally not consider the mechanics of deportation because DHS still may grant administrative stays regardless of whether an immigration judge orders a person removed. EOIR, Notice of Proposed Rulemaking, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75925, 75934 (November 27, 2020) (noting that “[t]he potential availability of a stay of removal from DHS further diminishes any need to keep immigration proceedings open in circumstances in which an immigration judge or the Board can take no action on a collateral application”). EOIR should not simultaneously tell judges that they should not consider whether a person actually will be deported because DHS may grant an administrative stay and that the judges must impose an extreme sanction on those that are not actually deported.

C. **EOIR Should Expressly Recognize That Reopening Is Appropriate Following Ineffective Assistance of Counsel but Should Not Create or Reinforce Harsh Barriers to Reopening on That Basis**

Individuals facing removal from the United States must be afforded fundamentally fair hearings, including access to counsel and the right to seek a remedy when counsel does not provide effective assistance, are critical elements of a fair hearing. Therefore, EOIR is correct to expressly recognize that reopening is an appropriate remedy in the face of ineffective assistance. However, the proposed rule tempers that recognition by reinforcing a harsh and unworkable standard for adjudication of such motions. See 85 Fed. Reg. at 75951-53.

For 30 years, the BIA has provided a framework for seeking a remedy when ineffective assistance of counsel deprives individuals of a fair hearing. See *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988). The intervening years have demonstrated that the *Lozada* framework is fundamentally flawed—unworkable in some cases and unnecessary in others. Yet the regulations proposed by EOIR would make the “high standard” for ineffective assistance of counsel claims (IAC claims) imposed by *Lozada*, see 19 I&N Dec. at 639, even harsher. Therefore, EOIR should rescind the proposed rule regarding ineffective assistance of counsel for the following reasons:

1. *EOIR Should Not Bar Colorable IAC Claims Based on Procedural Requirements*

We urge the agency to create a process for adjudicating IAC claims focused on evaluating the merits of claims of real ineffective assistance of counsel, rather than winnowing out such claims through procedural roadblocks. See, e.g., *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (finding that “the record of the proceedings themselves [was] more than adequate” to demonstrate “that an adequate factual basis exists . . . and that the complaint is a legitimate and substantial one”).

At the heart of any IAC claim is the question of whether an individual was able to obtain a fair hearing with a meaningful opportunity to be heard. Cf. *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (“Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”). But the proposed rule—as well as the existing framework set forth in *Matter of Lozada*—deprioritize this key consideration in favor of evaluating whether an individual can follow a complex set of procedural and evidentiary requirements. Instead, the focus should be on claims that an individual who was not removable, was eligible for relief from removal, or was a citizen improperly placed in removal proceedings was denied the opportunity to meaningfully present his or her case.

2. *Even if EOIR Maintains a Lozada-like Framework for IAC Claims, the Agency Should Ensure Flexibility in Applying Procedural Requirements*

We believe that the proposed rule's emphasis on strict compliance with procedural requirements rather than an examination of the fairness of proceedings in which allegedly ineffective assistance occurred is fatally flawed. *See supra*. However, to the extent that EOIR will continue to apply a process that largely relies on procedural requirements, we nonetheless urge EOIR to rescind its proposed rule and modify the requirements to ensure that colorable claims are evaluated on their merits and to minimize burdensome requirements. This includes the following:

- EOIR should remove the requirement that individuals making IAC claims must “file a complaint with the appropriate disciplinary authorities” (hereinafter, bar complaint) from the proposed regulations. The decision to file a bar complaint should be distinct from the decision to file a motion to reopen based on ineffective assistance of counsel and should take into account different considerations. As the Fourth Circuit recognized in *Figeroa v. U.S. INS*, 886 F.2d 76 (4th Cir. 1989), that an aggrieved individual took “no action” against his former counsel did not indicate that the representation was effective. *Id.* at 79 (recognizing that the “energies [of the petitioner and his new counsel] were properly directed at stopping the deportation, rather than pursuing [the former attorney]”). The conduct underlying an IAC claim can fall outside of the scope of conduct governed by a state’s grievance procedure, making the filing of complaints in some cases frivolous and thus unethical. Notably, the Supreme Court does not require a bar complaint for ineffective assistance claims in criminal proceedings. *See, e.g., Strickland*, 466 U.S. 668.
 - At minimum, EOIR should not *expand* the existing bar complaint requirement from *Matter of Lozada*. *See* 85 Fed. Reg. at 75958 (making requirement mandatory and creating additional requirements for filing EOIR disciplinary complaints and complaints against accredited representatives and certain other non-attorneys). EOIR does not adequately justify the expansion of the bar complaint requirements, nor does it adequately explain why the current framework provided in *Matter of Lozada* has proved inadequate.
- EOIR should not impose *heightened* evidentiary requirements as compared to the procedural rules set forth in *Matter of Lozada* regarding evidence of an agreement with counsel. *See* Fed. Reg. at 75957 (requiring, in addition to an affidavit, copies of representation agreements in almost all cases). While EOIR may suggest litigants provide copies of their retainers as evidence if they are available, failure to do so should not be considered a negative factor where, for example, an affidavit and response from former counsel could serve the same purpose. EOIR also does not consider that respondents

who have been the victim of ineffective assistance of counsel may be less likely to be able to produce a retainer than those who are represented by competent counsel. If providing the retainer becomes the default practice, immigration judges may treat failure to provide a retainer as an adverse factor even where no written retainer ever existed or where the ineffective assistance prevents a respondent from being able to obtain a copy of it. Such a practice would negatively impact especially vulnerable litigants.

- EOIR should not seek to end the practice, accepted within the jurisdictions of several courts of appeals, of waiving some or all of the procedural requirements for IAC claims where there has been substantial compliance with the requirements and/or ineffectiveness is clear on the face of the record in the relevant case. See 85 Fed. Reg. at 75951. By narrowly circumscribing the situations in which EOIR can excuse the evidentiary requirements in the proposed regulations, the agency may bar consideration of meritorious motions simply because it did not consider an unforeseen set of circumstances during the rulemaking process. Instead, to the extent that the agency requires noncitizens making IAC claims to comply with procedural requirements, *but see supra*, EOIR should create a broader rule permitting immigration judges and the BIA to consider a motion where there is substantial compliance with the evidentiary rules in the proposed regulations. See, e.g., *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007) (requiring “substantial compliance” with, rather than “slavish adherence” to, procedural requirements for an IAC claim). EOIR should modify the proposed regulation to allow consideration of the merits of an ineffective assistance -based motion to reopen where there are colorable claims but incomplete compliance with the procedural rules set forth in the regulations, where ineffective assistance is clear on the record, where the individual claiming ineffective assistance is pro se and/or detained, or where he or she has otherwise provided good cause for failure to comply with the requirements.⁴
- EOIR should remove any indication that waiver of the procedural requirements is “an exercise of discretion committed exclusively to the agency,” 85 Fed. Reg. at 75957, to the extent that the language indicates that, in the agency’s view, these determinations will not be subject to judicial review. *Cf. Kucana*, 558 U.S. at 252 (declining to provide the agency with “a free hand to shelter its own decisions from abuse-of-discretion appellate court review”). As discussed *supra*, EOIR should not rely on outdated case law to assert that the motion to reopen process in general is “disfavored” and subject to unfettered discretion by the agency.

⁴ See, e.g., *id.*; *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000); *Rranic v. Att’y Gen.*, 540 F.3d 165, 174 (3d Cir. 2008); *cf. Saakian v INS*, 252 F.3d 21, 26 (1st Cir. 2001) (requiring BIA to provide pro se litigant the opportunity to remedy lack of compliance with procedural requirements of an IAC claim).

3. *EOIR Should Not Seek to Impose Stricter Substantive Requirements for Ineffective Assistance of Counsel Claims*

EOIR already requires individuals seeking to establish ineffective assistance of counsel to demonstrate that the relevant counsel was ineffective and the ineffectiveness caused prejudice to their case. See *Matter of Lozada*, 19 I&N Dec. at 638. To the extent that it seeks to impose heightened standards for those requirements, we urge the agency to rescind the proposed rule.

For example, the proposed rule provides that adjudicators will assess “whether there is a reasonable probability that, but for counsel’s ineffective assistance, the result of the proceeding would have been different” to assess prejudice. See 85 Fed. Reg. at 75957. However, the realities of many individuals seeking reopening, such as limited access to the record of proceedings (particularly if the prior lawyer is not cooperative or is unavailable), impending filing deadlines, and the uncertainty created by the very ineffective assistance of counsel that the motion to reopen seeks to overturn, may make demonstrating this difficult or impossible. A reasonable prejudice requirement that assesses whether ineffectiveness may have affected the outcome of proceedings would take into account the limitations of establishing harm at the motions stage. Specifically, the agency should ensure that, where an IAC claim hinges on an attorney forfeiting her client’s opportunity to apply for relief or improperly presenting a claim for relief, a noncitizen will only be required to establish prima facie eligibility for that form of relief. Requiring more than prima facie eligibility often would require an evidentiary hearing, as well as evidence that may not be available to an individual seeking reopening.

4. *EOIR Should Expressly Recognize that the Motion to Reopen Deadline Is Subject to Equitable Tolling in Cases of Ineffective Assistance of Counsel and Other Extraordinary Circumstances*

Although EOIR adopted several elements of the proposed rule on ineffective assistance of counsel from a previous proposed rule, see 85 Fed. Reg. at 75944, the agency declined to include any reference to the need for equitable tolling of the time and number requirements for motions to reopen in certain cases of ineffective assistance of counsel. We urge that any recognition of ineffective assistance of counsel motions to reopen to expressly state that the relevant deadlines are subject to equitable tolling. Cf. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (noting that an individual is “entitled to equitable tolling,” if he or she shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing”).⁵

⁵ The availability of tolling should not be limited to motions to reopen involving ineffective assistance of counsel. See, e.g., *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (equitable tolling permitted in cases of “deception, fraud, or error”); *Kuusk v. Holder*, 732 F.3d 302, 307 (4th

D. EOIR Should Not Adopt Extra-Statutory Standards Regarding the Adjudication of Motions to Reopen that Prevent Noncitizens from Accessing their Statutory Rights

We urge EOIR to rescind the burdensome standards and limitations that the agency would impose on the motion to reopen process through the proposed rule. These limitations could undermine the effectiveness and function of this “important safeguard.” *Kucana*, 558 U.S. at 242.

First, EOIR lacks any statutory authority to limit the scope of reopened proceedings to only the issues that were the basis of a decision granting a motion to reopen. When proceedings are reopened, the respondent no longer has a final removal order and, if he or she was previously in proceedings under 8 U.S.C. § 1229a, is placed back into those proceedings. Congress has not created any separate, more-limited set of proceedings for individuals after reopening. EOIR does not have the authority to contract its own jurisdiction to exclude individuals with reopened proceedings from pursuing forms of relief and procedural steps provided for by statute. *Cf. Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 86 (2009) (rejecting agencies’ authority to contract their own jurisdiction or refuse to adjudicate cases over which they have jurisdiction because “Congress alone controls [an agency’s] jurisdiction”). Furthermore, this will create a complete ban on consideration of forms of relief that an individual becomes eligible for after reopening is granted, an especially problematic rule given that EOIR is also seeking to ban individuals from seeking reopening based on applications for relief pending before other agencies.

In addition, the agency should not adopt elements of the proposed rule that will similarly disrupt the longstanding process of adjudicating motions to reopen:

- The agency should not reject the long-standing rule that adjudicators accept facts as set forth in affidavits as true unless they are inherently unreliable. In addition to being contrary to federal court precedent and the immigration statute, *see, e.g., Trujillo Diaz v. Sessions*, 880 F.3d 244, 252-53 (6th Cir. 2018); 8 U.S.C. § 1158(b)(1)(B)(ii), the convoluted language of the proposed rule suggests that motions to reopen—which necessarily require provision of new evidence that may well be contrary to that presented during underlying proceedings—should be rejected where they are based on affidavits containing this type of new evidence. *See* 85 Fed. Reg. at 75956. EOIR does not explain how respondents could overcome this burden for claims based on evidence that may exist only in testimonial form.

Cir. 2013) (equitable tolling permitted where, *inter alia*, “the government’s wrongful conduct prevented [a noncitizen] from filing a timely motion”).

- The agency should not bar adjudicators from reopening based on applications for relief pending before another immigration agency. This rule, when combined with EOIR’s final rule that limits adjudicators from administratively closing, terminating, or sua sponte reopening proceedings, as well the proposed rule seeking to bar continuances for collateral adjudications, would create a requirement that individuals with pending USCIS applications face physical deportation regardless of the strength of their claims for relief or discretionary factors that might counsel against such an outcome. See 85 Fed. Reg. at 75956-57. EOIR fails to provide any justification for disregarding decades of precedent that harmonize the immigration court system with the immigration benefit system, allowing respondents to avoid the harsh penalty of deportation if they are *prima facie* eligible for relief from another agency, or if they could obtain relief but for the existence of a final order of removal that could be reopened. The proposed rule would reject Congress’s intention to preserve paths to remaining in the country by imposing a harsh bar on individuals who become eligible for relief following the imposition of a final order.

E. EOIR Should Publish the Standard Applied in Adjudicating Requests for Stays of Removal, but Should Not Apply the *Nken* Test or Adopt Procedural Barriers to Seeking a Stay

We urge EOIR to publish the standard under which it adjudicates requests for stays of removal. The agency’s past refusal to do so has left individuals seeking stays in an untenable position: they must provide the BIA with “all relevant facts” and, if those facts are in dispute, “appropriate evidence,” BIA Practice Manual, Ch. 6.3(c)(i), without knowing the standard under which their stay will be assessed. Absent notice of what is required to merit a stay, these individuals have no meaningful opportunity to be heard.

However, the proposed rule would adopt a too-harsh standard and apply procedural barriers to adjudication of stay requests in a timely manner, a process that would not prevent irreparable harm to individuals facing imminent deportation. Therefore, we urge EOIR to rescind the proposed rule addressing administrative stay requests.

The proposed rule adopts the four-factor test for judicial stays set forth by the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009). However, that standard was adopted in the context of *judicial* stays of removal, connected with appellate proceedings in which relevant claims are reviewed following initial adjudication before the agency. Motions to reopen, by definition, present new and previously unavailable evidence and claims that have never been reviewed or adjudicated on the merits. As such, centering the functional equivalent of an expedited merits review when adjudicating a stay filed with a motion to reopen at the administrative level is less feasible than it would be during judicial review, when a record for the claim has already been created. Instead,

EOIR's review should focus on the risk of irreparable harm, especially in adjudicating a stay filed in conjunction with a non-frivolous motion to reopen based on new and previously unavailable evidence of a fear-based claim. In these cases, premature deportation may cause injury, or even death, before the agency can fully evaluate an individual's fear-based claim. Deportation prior to adjudication of the motion to reopen in some cases essentially would defeat an individual's statutory right to pursue a motion. Where the consequence of an erroneous deportation is physical harm, the individual seeking reopening who is prematurely deported may not benefit from later success on the merits. Notably, a generous stay standard is especially necessary where, as the agency proposes, administrative stays would be *barred* absent compliance with the proposed rule's requirements. See 85 Fed. Reg. at 75958.

Any stay standard should not incorporate a diligence requirement for either the stay request or the underlying motion to reopen or reconsider. *Id.* Notably, existing EOIR requirements themselves indicate that the agency has *favored* late-filed stay requests. See, e.g., BIA Practice Manual, Ch. 6.3(c)(ii)(A)-(B) (noting that the BIA only adjudicates stay requests in a time-sensitive manner when they are filed when deportation is imminent). Penalizing respondents for following EOIR's guidance is especially inappropriate in the context of emergency stay requests. Incorporating a diligence requirement into assessment of the underlying motion is equally inappropriate. The Immigration and Nationality Act sets forth the requirements for seeking motions to reconsider and motions to reopen; they do not include a diligence requirement. See 8 U.S.C. § 1229a(c)(6), (7). EOIR is not free to incorporate an additional limitation on the statutory right to seek reopening or reconsideration through its stay regulation.

Furthermore, the proposed rule would erect a series of unworkable procedural barriers that would prevent many from seeking stays from EOIR and thus risks sending them to face irreparable harm without any intervening agency review. See 85 Fed. Reg. at 75958 (requiring, *inter alia*, (1) seeking a stay from DHS and having that request denied or not acted upon for five business days, (2) notice to opposing counsel resulting in counsel joining/non-opposing the motion or failing to act for three business days, (3) a heightened service requirement for stay requests, and (4) evidentiary requirements for stay requests).

Given that individuals seeking stays often have very little advanced warning of their imminent deportations and may be detained and *pro se*, conditioning their access to administrative stays on compliance with a time-consuming, costly, and complex set of procedural requirements functionally denies them access to this key procedural protection. The risk of erroneous deportation in the face of a justified stay is especially heightened given the proposed rule's requirement to wait five *business days* for DHS to respond to a stay. Depending on the day of the week a person files his or her request with DHS, and whether there is a holiday in the following

week, the regulation could require a person to wait over ten calendar days to file a motion for an administrative stay with the BIA.⁶

II. EOIR Should Provide, at a Minimum, a 60-Day Comment Period to Allow for Meaningful Input from the Public

Finally, we urge EOIR to reopen the comment period for the proposed rule. EOIR failed to provide a sufficient period for interested parties to comment on the proposed rule, thereby denying the public and individuals impacted by the rule their statutorily guaranteed right to provide meaningful input.

It is well-established that agencies generally must provide public comment periods of at least 60 days. See, e.g., Exec. Order 12866, 58 Fed. Reg. 51735 §6(a)(1) (1993) (directing agencies to allow “not less than 60 days” for public comment in most circumstances); Exec. Order 13563, 76 Fed. Reg. 3821, 3821-22 (2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”) There is no indication that an exception to the 60-day minimum is warranted in the present case; in fact, the agency provided no justification for deviating from the Executive Orders’ guidance at all.

To the contrary, both current circumstances and the specific content of the proposed rule indicate that a period of 60 days or more is necessary to permit a meaningful opportunity for comment.

First, the proposed rule will have a significant impact on the public and, especially, for people who have a basis to seek reopening or reconsideration. See *supra* Section I. Given the consequences of enacting the proposed rule, ensuring sufficient time to hear from impacted parties should be a priority for the agency.

Second, the timing of the shortened comment period made it especially difficult for the public to submit detailed comments. The 30-day window encompassed two federal holidays, Thanksgiving and Christmas, as well as Christmas Eve, which is a public holiday in 12 states, and the day after Thanksgiving, which is a public holiday observed in more than 20 states. The agency thereby functionally shortened the comment period to 26 days and undercut the purpose of the notice process to invite broad public comment. See *Pangea Legal Services v. DHS*, No. 20-CV-07721-SI, 2020 WL 6802474 at *20-22 (N.D. Cal. 2020) (finding a 30-day comment period

⁶ For example, if a person filed a motion for a stay with DHS on a Friday and the following week contained a federal holiday, the fifth business day would fall two Mondays after the filing date.

“spanning the holidays” likely violated the notice and comment requirements of the Administrative Procedure Act). The comment period also falls in the middle of an ongoing surge in the Covid-19 pandemic, impacting all sectors of the U.S. public, including organizations and individuals who may be harmed by this rule and who would otherwise provide critical comments. See, e.g., Tom Stelloh, *U.S. Tops 14 Million Covid-19 Cases, Sets Daily Record for Deaths, Cases and Hospitalizations*, NBC News (Dec. 2, 2020, 11:21 PM).

For these reasons, we urge EOIR to reopen the comment period for 30 days, extending the deadline for comments at least until January 28, 2020, to allow the public adequate time to provide detailed feedback on the proposed rule.

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For these reasons, as well as others we were unable to articulate due to the shortened comment period, the Council and AILA urge EOIR to rescind the proposed rule.

Sincerely,

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