September 25, 2020

Lauren Alder Reid, Assistant Director Office of Policy
U.S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

RE: EOIR Docket No. 19-0022, A.G. Order No. 4800-2020
RIN: 1125-AA96; Document Number: 2020-18676

Comment in Opposition to Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

Dear Assistant Director Alder Reid,

The Advocates for Human Rights writes to oppose the Proposed Rule and demand that the Department withdraw the rule as it violates due process rights of migrants, Congressional intent, and reliance interests of those applying for immigration benefits. The Proposed Rule would dramatically reshape the immigration court system by restricting the ability of immigrants to mount an effective appeal, stripping them of second chances and putting unprecedented power in the hands of a single employee. The Proposed Rule violates international treaty and jus cogens obligations which absolutely prohibit, without exception, the return of people to countries where they face persecution or torture, in favor of bureaucratic maneuvers designed to facilitate the expulsion of people from the United States.

The Government’s attempts to justify these rules targeting individuals who come before the agency as a bureaucratic necessity is unsupportable. The Government bemoans the growing number of appeals facing the Board of Immigration Appeals. The Government’s failure to prioritize adjudicative resources over the billions of dollars it dedicates to apprehension, detention, and expulsion of immigrants annually and its failure to seek and provide adequate funding to the Executive Office for Immigration Review since the Office’s inception has done a disservice to all who come before it. But rising backlogs lay at the feet of the Government itself. In addition to under-resourcing adjudicative functions, the Government fails to exercise appropriate prosecutorial discretion when filing removal proceedings, insists on litigating even the most clear-cut of cases, and files baseless appeals when immigration judges grant protection in an effort to coerce detained people into giving up their protection claims and agreeing to deportation. That the Government attempts to increase the burden on individuals alone rather than seeking constructive solutions to its backlogs belies its true intent.

About the Organization Submitting this Comment

The Advocates for Human Rights (“The Advocates” or “AHR”) is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights’ mission is to implement international human rights standards to promote civil society and
reinforce the rule of law. Holding Special Consultative Status at the United Nations, The Advocates regularly engages UN human rights mechanisms. The Advocates has provided free legal representation to asylum seekers for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, The Advocates also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. The Advocates is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. The Advocates has worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, The Advocates helps draft laws that promote the safety of women and has provided commentary on new and proposed domestic violence laws in nearly 30 countries. The Advocates works with host country partners to document violations of women's human rights, including domestic violence, and to train police, prosecutors, lawyers, and judges to implement effective domestic violence laws. In addition, The Advocates' Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working with the UN, The Advocates developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

The Proposed Rule Violates International Treaty and Human Rights Law Obligations Prohibiting the Return of Persons to Countries Where They Face Persecution, Torture, or Other Gross Human Rights Violations

International law is clear and unequivocal: the United States is absolutely and without exception prohibited from deporting a person to a place where there are substantial grounds for believing that the person would be at risk of irreparable harm on account of torture, ill-treatment, or other serious breaches of human rights obligations. These non-refoulement obligations are included in, but not limited to, international refugee law and, they apply to “all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and … wherever a State exercises jurisdiction or effective control, even when outside of that State’s territory.”

While States can—and indeed, must—establish procedures for adjudication of protection claims, these procedures must be designed and implemented to ensure that no one is returned to a country in violation of these absolute obligations. States and individuals alike have an interest in having clear, predictable,

---

and expeditious procedures to adjudicate protections claims. Indeed, The Advocates for Human Rights represents countless clients whose lives are on hold, whose families remain in danger of persecution, and who often languish in ICE detention while in removal proceedings. But procedures which establish insurmountable barriers, unrealistic timeframes, or block consideration of new evidence of persecution, torture, or other gross human rights violations, fail to comply with human rights obligations, including those treaty obligations to which the United States has committed itself. Such is the case with the proposed rules, which place unrealistic burdens upon people fleeing persecution, torture, and other gross human rights violations and render them vulnerable to deportation in violation of U.S. legal obligations.

The proposed rule fails to address how the United States will meet its non-refoulement obligations under international refugee law, the Convention Against Torture, or international human rights law, all of which are implicated by the proposed changes. The proposed rules would exacerbate existing derogation of the United States’ duties and would create new breaches of international law which exists to protect people from gross human rights violations. Importantly, the proposed rules must be viewed in the context of already and increasingly narrow interpretations of asylum, withholding of removal, and CAT relief.

The Proposed Rule Violates Due Process and Must Be Withdrawn

The Government proposes to prohibit the BIA from receiving new evidence on appeal, remanding a case for the Immigration Judge to consider new evidence, or even consider a motion to remand based on new evidence, subject to narrow exceptions that are prejudicial to noncitizens.3 The Government further proposes to limit the scope of a permissible remand so that only new evidence favorable to the Government and prejudicial to the noncitizen may be considered by the Immigration Judge, barring consideration of equally relevant and available new evidence supporting the noncitizen’s case.4 The proposed rule would also eliminate the Immigration Judges’ and BIA’s sua sponte authority to reopen a noncitizens case,5 further restricting noncitizens’ ability to reopen their cases—which would be the only way for noncitizens to present bona fide new evidence under the new regulations.6 These changes would leave the most vulnerable noncitizens, especially those detained, initially without counsel, or represented by ineffective counsel, without a reasonable opportunity to present evidence at a full and fair hearing. The Proposed Rule would therefore render immigration proceedings before Immigration Judges and the BIA procedurally unconstitutional.

As a threshold matter, “all persons, aliens and citizens alike, are protected by the Due Process Clause.”7 “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in

3 Id. at 52500.
4 Id. at 52502.
5 Id. at 52504–06.
6 Id. at 52500.
7 Mathews v. Diaz, 426 U.S. 67, 78 (1976); see also Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through
a meaningful manner.”8 Thus, “[d]ue process requires that a hearing ‘must be a real one, not a sham or a pretense.’”9 Put differently, “[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.”10

Due process protection extends to immigration proceedings before Immigration Judges and the BIA.11 “As a result, an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.”12 Additionally, the Third Circuit has held that procedural due process in immigration proceedings is comprised of “three key protections”: “(1) factfinding based on a record produced before the decisionmaker and disclosed to him or her; (2) the opportunity to make arguments on his or her own behalf; and (3) an individualized determination of his or her interests.”13 “Due process is denied when an immigration proceeding is ‘so fundamentally unfair that the alien was prevented from reasonably presenting his case.’”14

The Time Limits on Briefing Violate Due Process

The Advocates opposes the severe limitations placed on briefing, which inhibit the due process rights of migrants to mount an effective appeal. The proposal reduces the maximum extension available for briefing to 14 days and creates simultaneous briefing for non-detained cases. This timing is insufficient and the requirement of simultaneous briefing does not serve justice. Simultaneous briefing prevents parties—both DHS and the respondent—from responding to issues raised. This serves only to shorten timing of a case, but does not allow the BIA to receive relevant and constructive evidence by which to make a decision. EOIR incorrectly claims that these changes would have "relatively little impact on the preparation of cases by the parties on appeal." But briefing extensions are key to ensuring attorneys who are newly retained at the appeals level have adequate time to review the case history, including the transcript.

The 14 day timeline is also an impossible standard that will dilute the quality of case preparations and result in improper denials, which will only serve to lengthen the timing of a case and consume further government resources as respondents will appeal to the federal courts. The timing is particularly worrisome as transcripts do not come until the briefing schedule is issued. There is no predictable

---

9 Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951)).
12 Colmenar v. I.N.S., 210 F.3d 967, 971 (9th Cir. 2000); see also Calderon-Rosas v. Attorney General United States, 957 F.3d 378, 386 (3d Cir. 2020) (“[P]etitioners seeking discretionary relief are entitled to fundamentally fair removal proceedings, which constitutes a protected interest supporting a due process claim.”).
13 Calderon-Rosas, 957 F.3d at 384 (citations and internal quotations omitted).
timeline for how long after the Notice of Appeal will the transcript and briefing schedule be issued, making it impossible for counsel to meaningfully review the transcript once it arrives.

With extensive hearings, it can take a long time to sift through the transcript. Such a requirement will unfairly impact pro bono attorneys, as well. Attorneys must effectively clear their calendars to work on the brief. A tightened timeline will be particularly challenging for pro bono teams working on briefs, thereby reducing the willingness of volunteers to take appellate cases. Policies aimed at restricting access to counsel and the ability of migrants to present their defense cannot stand.

The Proposed Rules also undermine already abysmal access to counsel, particularly for people who are detained. The Advocates for Human Rights regularly represents people in ICE detention and fields calls from many more each year who cannot obtain representation. Because the Government fails to provide counsel, access to justice for indigent persons falls largely to charitable institutions and volunteers. Detained persons, in particular, can struggle to contact and engage attorneys who can assist them in preparing and filing appeals. By stripping away the ability to grant extensions, the Government will effectively eliminate any meaningful right of appeal for thousands of persons.

**Proposed Restrictions on Evidence and Remand Violate Due Process**

The proposed rule is particularly troublesome in terms of the due process violations it will cause by placing improper restrictions on evidence. The rule would bar new evidence to be introduced on appeal.

This is problematic as the BIA represents the first opportunity to migrants to appeal their cases. Numerous applicants are pro se when they initial argue their case in immigration court. As such, they are unable to present their best case and may not fully understand what is required. Indeed, The Advocates has represented numerous clients who have approvable cases for asylum or other relief, and who have won at the BIA, but who lost at the IJ level because they lacked legal counsel capable of guiding them through the incredibly complex process.

These concerns are all the greater where the respondent is detained. Detained migrants, particularly those without legal representation, have no access to documents and very limited technology for research and briefing—all the more so if they lack English language skills. Even those with legal representation face challenges in presenting a strong case from detention. Further, the detained docket moves at a rapid pace, meaning attorneys and respondents are forced to prepare and present their case without sufficient time to obtain evidence, introduce experts, gather research, and the like. Thus, preserving opportunities to present new evidence on appeal is a crucial safeguard in ensuring due process rights of those in immigration proceedings.

The proposed restrictions will further infringe due process rights as a respondent is limited in their appeal to a circuit court to the record from below. Thus, by limiting the record at the BIA level to that which was provided to the IJ, this rule essentially restricts respondents in the life of their case from ever providing new evidence.

The proposed changes not only bar new evidence on appeal, they bar remand on new evidence except within a very narrow set of circumstances. Already, the immigration laws narrow the instances of
remand and place an onus on applicants where evidence was not previously available. However, this proposed rule would go further, barring remand where evidence was not previously available. The limited circumstances proposed where remand would be allowed are too narrow and undefined. For example, one would only be allowed to present new evidence disputing removability under 8 USC 1182 or 1227, or related to jurisdiction and alienage. These narrow circumstances do not account for the myriad cases—such as, for example, where a respondent learns of new information from home country that would show they would be persecuted or tortured upon return—that would result in a violation of rights if ignored. Moreover, such sections are not specific enough to meet the burden under the APA. Would new evidence that the person is a victim of trafficking, for example, allow for remand? The Government’s attempt in this rule to arbitrarily limit adjudicators from considering evidence that a person will face persecution, torture, or other gross human rights violations ensures that the United States will violate its international obligations and the constitutional rights of respondents.

Similarly, the rule makes no mention of whether new evidence would be allowed if new case law or statutory/regulatory change created a path for relief that was not previously available. For example, The Advocates represents a client whose bona fide asylum claim was denied by the IJ based on the “Safe Third Country” rule. However, the Ninth Circuit since issued a decision invalidating that rule, making our client once again eligible for asylum. It is unclear whether the Administration considered such instances in proposing the instant rule. Yet, if this client were denied the opportunity to bring this new evidence to the BIA, that would violate due process as well as the requirement that EOIR follow binding circuit court law.

Conversely, the Rule proposes to allow remand on the basis of new evidence from identity/security checks—evidence that will overwhelmingly benefit DHS. Indeed, it is unclear whether this would only be in the case of negative evidence found by DHS or if it would equally allow a respondent to remand if such checks dispute a fact alleged by DHS. Moreover, the rule makes no mention of whether DHS would be held to the same evidentiary standards, such that they would be barred from arguing improved country conditions on appeal or remand.

A recent Third Circuit case illustrates the fundamental unfairness that would occur under the Proposed Rule. In Calderon-Rosas v. Attorney General United States, the noncitizen had moved the BIA to remand his proceedings on grounds of ineffective assistance of counsel, supporting his motion with new evidence. The BIA denied the motion to remand, “explain[ing] only that it ‘conclude[d] that [Calderon-Rosas] ha[d] not established that he was prejudiced by his prior counsel [sic] alleged ineffectiveness’ because he ‘ha[d] not established what additional corroboration he would have submitted that would have impacted the outcome of the case.’” But at the same time the BIA faulted Calderon-Rosas for failing to offer new evidence, “the BIA stated that ‘[t]o the extent that [Calderon-Rosas] seeks to submit new evidence on appeal in the form of evidence regarding his ineffective assistance of counsel claim . . . we

15 Calderon-Rosas, 957 F.3d at 383.
16 Id.
are without authority to consider new evidence offered for the first time on appeal.”17 The court reversed the BIA’s denial of the motion for remand, finding that the BIA’s “decision was an abuse of discretion in two respects: It misapplied the legal standard and it was wrong on the merits.”18 The court faulted the BIA for “entirely fail[ing] to discuss the significance of the hundred-plus pages of new evidence Calderon-Rosas submitted” and found that, “[i]f the BIA had applied the correct legal standard to the evidence set forth by Calderon-Rosas, it would have concluded, as we do, that his motion to remand should have been granted.”19

That court also held that Calderon-Rosas was prejudiced by his former counsel’s errors, including the attorney’s failure to submit relevant and highly beneficial evidence to support his case.20 It found that “[c]onstitutionally adequate counsel would have introduced this evidence and . . . there is a reasonable probability the IJ would have granted cancellation [of the government’s removal claim against Calderon-Rosas].”21 Thus, through his ability under the current rules to seek remand based on ineffective assistance of counsel through a motion supported by new evidence, Calderon-Rosas was not stuck with the result of a fundamentally unfair proceeding that prevented him from reasonably presenting his case. The Proposed Rule, however, would require the BIA to act in the manner described in Calderon-Rosas—denying those noncitizens facing precisely the same predicament the opportunity to seek remand to fairly and reasonably present their cases.

Exacerbating these adverse due process implications is the Government’s proposal to limit the scope of a remand so that a remand for a limited purpose (the three exceptions described above) would be restricted solely for such purpose.22 The Proposed Rule would therefore preclude the Immigration Judge from considering any issues on remand aside from the limited grounds upon which the remand was granted—grounds that, under the Proposed Rule, would be prejudicial to the noncitizen. Thus, where noncitizens had relevant, bona fide new evidence supporting their case available to present on remand, not only would the noncitizen be unable to move for remand based on that new evidence, but even if remand were granted under one of the exceptions, the Immigration Judge would also be prohibited from considering the noncitizen’s new evidence and could only consider the prejudicial evidence for which remand had been granted.

The narrow option for noncitizens to move to reopen their cases does not provide sufficient process to avoid the Proposed Rule’s unconstitutionality. Contrary to the Government’s suggestions otherwise,23 the option for noncitizens to move to reopen is not a viable alternative to remanding for new evidence. Under 8 C.F.R. § 1003.23, an Immigration Judge lacks jurisdiction to decide a motion to reopen that is filed while an appeal is pending before the BIA.24 Thus, the Proposed Rules would force noncitizens with new

---

17 Id.
18 Id. at 387.
19 Id. at 387–88.
20 Id. at 388.
21 Id.
22 Id. at 52502.
23 See id. at 52500–01
24 8 C.F.R. § 1003.23(b)(1).
evidence relevant to their case to either allow the BIA to render a final decision based on incomplete evidence or withdraw their appeal entirely—sacrificing all of the progress made in their case—to even file the motion to reopen. The existing regulations currently remedy the procedural unfairness of forcing such a choice by allowing a motion to reopen filed while an appeal is pending before the BIA to be deemed a motion to remand. The Proposed Rule, however, would eliminate this crucial section of the regulation.

Additionally, noncitizens may file “only one motion to reopen deportation or exclusion proceedings,” and “only one motion to reopen removal proceedings . . . .” Thus, noncitizens are disincentivized from utilizing the motion to reopen on account of new evidence because doing so would preclude them from moving to reopen for any reason thereafter. The Government compounds this problem by also proposing to revoke Immigration Judge’s and the BIA’s *sua sponte* authority to reopen or reconsider. Therefore, under the Proposed Rule, if noncitizens are otherwise procedurally unable to obtain reopening or reconsideration of their cases, Immigration Judges and the BIA would be prohibited from employing this procedural safeguard to reopen or reconsider cases, despite any good cause to do so.

**The Proposed Rule Improperly Attempts to Incorporate Disputed Caselaw to Deny Due Process by Barring Administrative Closure**

The proposed rule also seeks to codify in regulations the disputed case of *Castro-Tum*. Doing so is improper for a number of reasons. First, *Castro-Tum*, which sought to eliminate administrative closure at all levels of the EOIR, is beyond the scope of the instant regulation. Second, that decision is being disputed in federal courts. The Administration cannot attempt an end-run around procedure by creating a regulatory change on a disputed issue. Third, restrictions on administrative closure are improper whether through case precedent or regulation.

Barring administrative closure results in foreclosing bona fide claims for relief from removal by respondents. Many immigration benefits created by Congress require DHS to process applications or grant benefits which EOIR is not empowered to grant. Recognizing this fact, Congress provided the Attorney General the power to administratively close proceedings as a docket management tool and to allow bona fide applicants to remain eligible for benefits by not facing premature removal. This is particularly important as many benefits require the applicant to remain in the U.S. For example, under the Regulations, trafficking victims may lose eligibility for T nonimmigrant status if they are removed from the United States. Similarly, many family members may be eligible for immigration benefits but would trigger the three- and ten-year bars if they depart the U.S. and do not have a qualifying relative who can file a waiver on their behalf. Administrative closure of cases ensures those to whom Congress intended benefits would be granted are not improperly denied them by being forced to litigate their removal case prematurely.

---

26 8 C.F.R. § 1003.2(c)(4).
27 Proposed Rule at 52501.
28 8 C.F.R. § 1003.2(c)(2).
29 Proposed Rule at 52504–06.
Moreover, foreclosing EOIR power to administratively close cases improperly places power solely in DHS to both adjudicate a benefit and determine the outcome of removal proceedings. DHS is responsible for adjudicating many benefit applications which EOIR has no authority to adjudicate. It, therefore, may delay adjudication or improperly deny an application for a case DHS is also processing for removal. Respondents should not be foreclosed from relief and punished by DHS’s unwillingness or inability to timely process benefits applications. Yet, the proposed rule and Castro-Tum do just that by giving DHS ultimate power to force the respondent to prematurely litigate their removal case while relying on DHS’s pacing and timeline for adjudicating the application that would provide relief in proceedings. This improperly allows DHS to sit on an application and, thereby, force the applicant’s removal. Congressionally provided authority for EOIR to administratively close cases where the applicant is applying for benefits with DHS restores some level of due process by ensuring a more neutral adjudicator in removal proceedings. Castro-Tum and the proposed regulation eliminate this due process protection and create a conflict of interest in which the Respondent is solely at the discretion of DHS.

Further, barring administrative closure unnecessarily burdens the courts by forcing cases to be heard and docketed that require only time for application processing—exacerbating the very issues the proposed rule claims it alleviates. Moreover, refusing administrative closure requires the court to expend additional resources hearing and deciding motions for continuances by respondents who simply await DHS processing of applications but whose cases remain on the active docket. The Department cannot regulate away its duty to process cases while respecting due process rights by foreclosing a viable path for benefits. Indeed, this not only violates the Congressional intent in creating the immigration court system and providing for administrative closure, but violates respondents’ reliance interests in obtaining benefits to which they are entitled.

**The Proposed Rule’s Elimination of Sua Sponte Reopening Is Unconstitutional**

The proposed rule further infringes on due process rights and violates judicial independence by eliminating sua sponte power of immigration judges. The rule erroneously claims that the change is necessary as there is no meaningful guidance or standardized approach to what constitutes exceptional circumstances to allow sua sponte reopening. However, this reasoning ignores the very reasoning underlying Congress’s delegation of such power—the unique issues in each case necessitate flexibility and discretion amongst judges, and the lack of standardized definitions in such cases is precisely what makes them exceptional. The power to analyze each case on its own merits to determine whether it requires reopening is a crucial due process safeguard that ensures respondents who should not have been ordered removed or who have bona fide reasons for reopening and accessing relief are not improperly denied their right to present their case.

The rule claims that this change is necessary to "bring finality to immigration proceedings," but EOIR ignores an equally important goal of immigration law: ensuring due process. Sua sponte motions to reopen or reconsider are a vital tool for curing errors and injustices that may have occurred during removal proceedings and allow judges to grant relief to immigrants who qualify. Eliminating access to this key safety net will lead to intolerable results.
This power is not, as the Government claims, used to circumvent timing or numerical limitations and is certainly not abused, as it is rarely exercised. If *sua sponte* reopening is requested because time limits bar reopening, it often reflects the reason *sua sponte* was created by Congress in the first place—to cure prior injustices. This is particularly important in the case of ineffective assistance of counsel—a due process issue that may be one of the most common reasons a respondent is forced to request *sua sponte* reopening.

The rule attempts to circumvent opposition by offering to eliminate time and numerical limitations, but does so only in a narrow set of circumstances and—despite its complaint that *sua sponte* should be removed due to lack of clarity and consistently—provides no clarity as to what might be considered in those circumstances. For example, the proposed rule would allow motions to reopen *notwithstanding* time/number bars where there is a change in law/fact rendering no longer removable. It is unclear if “no longer removable” would incorporate bona fide trafficking victims who have not yet had Ts adjudicated.

For the foregoing reasons, The Advocates for Human Rights calls on the Department to withdraw this unconstitutional proposal.

Sincerely,

Michele Garnett McKenzie  
Deputy Director  
The Advocates for Human Rights