December 28, 2020

RE: Comment in Opposition to Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal, EOIR Docket No. 18-0503

VIA: Federal eRulemaking Portal

ATTN: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041.

Dear Assistant Director Alder Reid,

The Advocates for Human Rights writes to oppose the proposed rule on Motions to Reopen and the Departure Bar. We oppose the rule nearly in its entirety, except to the extent that it proposes to remove the departure bar. We oppose the rule because it will violate the due process rights of individuals in immigration proceedings by denying the opportunity to apply for and obtain congressionally-established benefits, will restrict access to counsel due to short time limits, and will violate our obligations under international and domestic law which forbid returning individuals to countries in which they face persecution or torture. Moreover, the newly-established rules on ineffective assistance of counsel claims violate due process rights as well as general principles of justice. In our recent report documenting observations from our immigration court observers, lack of access to counsel and rushed timelines overwhelmingly dominated Observers’ comments on their lack of trust in the immigration court’s legitimacy and ability to do justice. The proposed rule seeks to entrench and deepen these issues, which will give rise to mistrust, violations of rights, and litigation.

1. Information about the organization

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. We have also coordinated an immigration court observer project since 2017, which has used international court monitoring best practices and volunteer observers to monitor thousands of immigration court 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.

2. We vigorously oppose the rule as relates to ineffective assistance of counsel

In our recent report highlighting the experiences and observations of volunteers in the Immigration Court Observer project since 2017, The Advocates noted the largest concern of observers is the lack of access to counsel, which results in violations of due process and human rights as well as a general sense of injustice. Observers were overwhelmingly concerned with the lack of government-appointed counsel, noting that the stakes of immigration cases are just as serious—often, more so—as criminal proceedings, as immigration court can mean exile, permanent separation from family, removal to torture and death, and loss of country. Yet, because no government-appointed counsel exists, numerous applicants are unable to secure and pay for representation. This, all the more so as the Department simultaneously continues to tighten rules and practices around continuances to obtain counsel and allow for adequate preparation. And, for people who are detained, obtaining competent counsel is nearly impossible due to communications restrictions, language limitations, inability to work, and more.

Notwithstanding, the Department now seeks to make unjust outcomes more permanent by raising the standards for reopening and remand of cases due to ineffective assistance. Essentially punishing migrants for the failure of the government to provide counsel in an increasingly complex and impossible arena, the Department provides no justification other than broad generalizations about abuse of the system. Yet, it does so while failing to weigh the impact of the rule—making no mention of how the increased standards will bar reopening and remand in numerous cases, resulting in a miscarriage of justice because of ineffective assistance and, therefore, unlawfully removing persons to countries in which they face persecution or torture.

Under the proposed rule, motions to reopen based on ineffective assistance of counsel must: 1) show that the conduct was objectively unreasonable; 2) prove that there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different; 3) and include a written statement under penalty of perjury regarding the agreement with counsel as well as a copy of the representation agreement. In addition, the proposed rule would require “evidence of the date and manner in which he or she provided notice to prior counsel and include a copy of the correspondence sent to the prior counsel and the response from the prior counsel, if any, or state that no such response was received.” And, finally, the rule requires that the person file a complaint with the appropriate disciplinary authorities and with EOIR.

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The Advocates opposes the expansive additional requirements for motions based on ineffective assistance. First, the additional procedural requirements are onerous and unnecessary. Currently, motions to reopen based on ineffective assistance of counsel must contain: (1) an affidavit explaining the agreement with former counsel and what prior counsel represented to the respondent; (2) that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) whether the respondent filed a complaint with the appropriate disciplinary authority regarding counsel’s conduct, or, if a complaint was not filed, an explanation for not filing one. In many circuits, substantial compliance with these procedural requirements is sufficient. The onerous procedural requirements that this proposed rule adds are particularly problematic because the proposed regulation first makes clear that substantial compliance will generally be insufficient; instead, strict compliance will be required, particularly where the noncitizen is represented by counsel. We oppose the strict compliance requirement because it prioritizes arbitrary procedures over the rights of noncitizens to effective representation and the important policy goals identified by EOIR. Flexibility in applying the procedural requirements comports with EOIR’s policy goals, “which are to provide a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.”

The proposed requirement that the applicant file both a bar complaint and EOIR complaint in all ineffective assistance of counsel cases, except where prior counsel is deceased, is arbitrary and capricious. This regulation explicitly, but without any justification, states that a bar complaint must be filed even where an attorney has already been disbarred or suspended from the practice of law. Such a requirement is arbitrary and capricious because it does not consider that state disciplinary authorities might not accept or have the capacity to review such a complaint. Moreover, it does not serve to protect the public because state authorities have already taken the action that would have occurred if a complaint were filed. Additionally, the rule does not account for the myriad other perfectly reasonable reasons why a bar complaint might not be filed, including but not limited to: the statute of limitations for filing an attorney grievance with state disciplinary authorities or 2) counsel acknowledges the ineffectiveness and makes every effort to remedy the situation.

Additionally, the proposed requirement that an applicant file two complaints—one with the disciplinary authority and one with EOIR—is duplicative and onerous. Yet, the Department provides no justification which outweighs the harm to applicants for this requirement and organizations like ours. First, we note that Motions to Reopen or Reconsider are often filed within short timeframes to avert removal. This is all the more relevant now that the Department herein propose to limit stays of removal. The onerous and unnecessary demand that a respondent file two complaints, even where an attorney has already been disbarred or disciplined, will make timely filing all the more challenging. Since government-appointed counsel is not provided in

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3 See Matter of Lozada, 19 I&N Dec. at 639. When these goals are met, EOIR should not insist upon strict compliance with arbitrary procedural rules. Lo v. Ashcroft, 341 F.3d 934, 937 (9th Cir. 2003).
4 See, e.g., State Bar of Georgia Rule 4-222 (establishing a four-year statute of limitations for filing an attorney grievance).
5 See Fadiga v. Atty Gen., 488 F.3d 142, 156-58 (3d Cir. 2007) (explaining that all of the policy objectives of Lozada are served in this situation).
removal proceedings, people will either have to navigate this onerous process pro se, attempt to quickly find a new attorney that will not provide ineffective assistance, or rely on organizations like ours. Organizations like ours provide pro bono assistance through volunteer attorneys and limited staff. With a new requirement to not only timely prepare a motion—complete with all the new requirements contained in the proposed regulation—but to file two complaints, we will be required to expend significant resources and may result in lack of pro bono counsel.

These additional requirements essentially punish respondents who were already harmed by the Department’s failure to provide government-appointed counsel. Migrants in proceedings are particularly vulnerable to ineffective assistance—as the Department itself noted in recent regulations proposed related to standards for counsel—due to lack of resources, language and cultural challenges, lack of resources, and the fact that the government provides no appointed counsel. As noted in our report by our court observers, lack of counsel is the largest stumbling block to due process and justice in immigration proceedings. Yet, the Department herein proposes to add yet another challenge to this by making it harder for noncitizens to access justice where their bona fide claims would have succeeded but for ineffective counsel. The new requirements are arbitrary and capricious and must be withdrawn.

3. **We oppose the rules related to reopening for collateral relief**

The proposed rule seeks to severely limit reopening or remand based on collateral relief. Collateral relief simply refers to immigration benefits for which someone is eligible, but which must be adjudicated elsewhere. Congress carefully determined the ability of the immigration court to adjudicate benefits when establishing USCIS as a separate benefits-granting arm. Congress’ designation to USCIS for adjudication of such applications in a non-adversarial forum is particularly important for these traumatized and vulnerable groups. EOIR may not frustrate Congressional intent by refusing to provide an opportunity for its sister agency to adjudicate an application. Indeed, since DHS is both opposing counsel in proceedings and the Department in controlling of processing such applications, EOIR must be exceptionally careful not to violate due process principles in foreclosing applicants’ rights to apply.

This proposed regulation comes on the heels of policy changes at EOIR that discourage continuances and administrative closure to pursue relief before USCIS and, indeed, is simultaneously issued with an EOIR regulation restricting continuances. Increasingly, respondents are being ordered removed simply because USCIS has not yet adjudicated their applications for relief. Average USCIS processing times are extremely lengthy. USCIS itself provides case processing times that are sometimes upwards of 57 months. Yet, motions to reopen are normally subject to a 90-day filing deadline. This rule places applicants entirely at

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7 USCIS processing delays are largely due to policy changes implemented under the current administration that have needlessly created inefficiencies. *See, e.g.*, AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow (February 26, 2020), https://www.congress.gov/116/meeting/house/110946/witnesses/HHRG-116-JU01-Wstate-Dalal-DheiniS-20200729-SD002.pdf.
8 *See* USCIS, “Check Case Processing Times,” https://egov.uscis.gov/processing-times/ (last visited Dec. 7, 2020) (showing that USCIS currently estimates that adjudication of a Form I-918 by the Vermont Service Center will take 57 to 57.5 months).
9 *See* INA § 240(c)(7). There is an even shorter window for timely filing motions to reconsider: only 30 days. INA § 240(c)(6).
the mercy of DHS, which is both opposing counsel and the agency solely controlling application process, timing, and success.

Such restrictions harm individuals who will be unable to pursue relief for which Congress intended them to be eligible. In particular, many Congressionally-established benefits require that the person remain in the U.S. Yet, with the proposed rule, the Department will essentially be denying these benefits by depriving the applicant of the opportunity to remain in the U.S.

The proposed rule would allow reopening or reconsideration only in a narrow set of cases. Under the proposed rule, a person would be barred from reopening proceedings based on relief that USCIS must process unless the benefit was already granted, the benefit provides complete relief from removal, the motion is not otherwise barred by applicable law, and “the motion otherwise warrants being granted under applicable law.” The Department provides no guidance, however, as to what will warrant a grant. In addition to these requirements, the Department seeks to limit motions to reopen based on immigrant visas to only those with no numerical limits or where the visa bulletin is current. This requirement will result in arbitrary and capricious decisions and deny bona fide applicants the opportunity to obtain benefits in many cases. First, we note that the visa bulletin may retrogress or progress without the ability of respondents or their attorneys to predict this. The bulletin changes month-to-month based on unpredictable use. Yet, the proposed rule seeks to bar motions to reopen where the priority date is not current for that month. This will likely result in the bizarre scenario where a Motion could be denied under these new rules only to have visas become current the next month. Conversely, the bulletin could retrogress in cases where the motion has been approved. Additionally, the rule will result in the denial of relief for many Special Immigrant Juveniles where the visa category is oversubscribed. This will then result in the violation of state court orders because, by the very definition of the SIJS visa category, a state court will have found removal not in the best interest of the child.

Moreover, the rule is vague and unclear as to how it will be applied in cases of trafficking victims, and fails to explain how it will avoid conflicting with the Congressional intent of the TVPA/TVPRA. The rule proposes to bar reopening where the immigration court does not have the power to grant the relief. T visas, by explicit intention of Congress, may only be processed by a specific office within USCIS. This is based on a clear intention of Congress to protect vulnerable trafficking victims and ensure trauma-informed processing. By thusly restricting processing, Congress did not intend to foreclose the opportunity to obtain trafficking victims’ protections, but provided greater protections. Not only will this proposed regulation deny the opportunity for trafficking victims to reopen cases, it will risk their removal from the US which would result in complete bar to eligibility for a T visa because of current DHS regulatory interpretations. Thus, the proposed rule must be withdrawn.

The instant rule, combined with separate EOIR regulations that almost entirely do away with sua sponte reopening, would essentially render reopening impossible in the vast majority of cases in which a person has relief available but USCIS has jurisdiction to adjudicate that form of relief. Such a result is arbitrary, capricious, and undermines congressional intent. We, therefore, urge

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EOIR to withdraw its proposal to disallow reopening based on an application pending before another agency.

4. We oppose the limitations on discretionary stays of removal

The Advocates vigorously opposes the proposed changes to discretionary stays of removal. Despite caselaw and legislation allowing discretionary stays, the rule proposes to create new, nearly categorical bars on discretionary stays of removal. As justification, the Department states that stays are an extraordinary remedy. Yet, it does not analyze the extraordinary risks associated if stays are not granted. Many of our clients face torture, persecution and death if they are returned to their home countries. They may also be barred from obtaining relief for which they qualify, as removal will either vitiate eligibility (T visas) or require a waiver that may not be attainable (family-based options). Stays do not grant any immigration benefit. Rather, they slow the process of removal to ensure due process and protection of rights. This remedy has become more necessary as the rate of removals has increased, EOIR has attempted to erode other protections such as continuances, administrative closure and appeals, and the rate of denials has increased. This, despite the fact that migrants still remain without government-appointed counsel. Indeed, in many cases, it is only once an applicant obtains counsel through pro bono organizations like ours that they are aware of relief and then must reopen their case and request a stay in order to fix prior miscarriages of justice. Thus, discretionary stays of removal are an essential stalwart against improper removals. Indeed, The Advocates notes at least two cases in which an applicant was improperly removed and for which the government then faced significant cost and staffing to return the person to the U.S. Allowing stays of removal helps guard against these issues—for both migrants and the government—with very little harm because the person can be removed upon the conclusion of the case or expiration of the stay.

Notwithstanding, the Department here proposes significant new hurdles that noncitizens must jump—often without counsel and with language, educational, mental health and other gaps—for even the opportunity to remain and fight their case.

First, the proposed rule improperly requires noncitizens to first file a stay request with DHS before they can file a stay request with EOIR. This requirement violates congressional intent by demanding that applicants first apply to DHS for a stay despite Congress statutorily providing for stays that may be issued by EOIR. So doing, it places the applicant at the mercy of opposing counsel—DHS—and, therefore, violates standards of due process. In addition, the proposed regulation essentially makes the granting of a stay contingent on whether a noncitizen can afford the $155 fee for filing a stay request with DHS (and the additional costs associated with passport application fees). Although EOIR does not currently charge a fee for stay requests,11 by conditioning EOIR’s authority to grant a stay of removal on the noncitizen having first filed a stay request with DHS, EOIR is effectively imposing a cost of at least $155 for filing a stay request. This cost is out of reach for many of our organization’s clients and is essentially a poverty tax, allowing due process only to those who can pay for it (an issue, we note, rife across EOIR which does not provide government-appointed counsel and more). Even if an applicant

11 EOIR has separately proposed regulations significantly increasing the fees for motions to reopen and reconsider. See Executive Office for Immigration Review; Fee Review 85 Fed. Reg. 11866 (proposed Feb. 28, 2020). These substantial fees, in combination with the new requirements that a noncitizen seeking a stay of removal pay the $155 fee for filing a stay request with DHS before even being permitted to file a stay request with EOIR, will effectively bar many indigent noncitizens from filing motions to reopen or reconsider and stay requests.
could afford this fee, conditioning EOIR consideration of a stay on the application to DHS is improper and ineffectual. By virtue of applying to EOIR, an applicant has reason to believe DHS will not or has not granted a stay of removal. If DHS granted the stay, the applicant would have no reason to appeal to EOIR for protection. Thus, the regulation should be withdrawn as it demands that noncitizens not only undertake a futile exercise—but pay for it—when Congress provided EOIR power to grant stays.

Not only does the Department essentially make the applicant reliant on DHS by requiring filing first with DHS, it further allows one party to the litigation to effectively control the ultimate decision of the Board or the Immigration Judge concerning a stay of removal. Subsection (vi)(A) states that a discretionary stay cannot be granted unless the opposing party: (1) joins or affirmatively consents, or (2) does not respond after 3 business days. Based on this proposed regulatory language, the adjudicator may not grant a stay request if the opposing party affirmatively opposes the stay request. This proposed regulation strips EOIR of its Congressionally-assigned role as neutral arbiter and consequently allows DHS to single-handedly quash a noncitizen’s ability to obtain a stay of removal simply by registering its opposition without even providing an explanation. Providing one litigant—DHS—such unbridled power is fundamentally unfair.\(^\text{12}\)

Further, our organization opposes the regulatory requirement that the stay motion include a complete case history, all relevant facts, a copy of the stay motion filed with DHS, and a copy of the order of removal or description of the order. Discretionary stay motions must often be filed on an emergency basis, with new counsel who have not yet obtained a copy of the proceedings or other evidence. This has been especially true during the on-going COVID-19 pandemic because EOIR has been slow to respond to requests for files, counsel may be unable or unwilling to review the file in-person, and processing is more limited due to staffing. Even when there is not a pandemic, meeting these unreasonable burdens would be a challenge for counsel and impossible for unrepresented individuals—especially if attempting to navigate the system while detained. The agency should not deny a stay motion merely because the agency itself has made it impossible to obtain records.

In addition, our organization opposes the requirement that the respondent demonstrate reasonable diligence in seeking a stay and filing a motion to reopen or reconsider.\(^\text{13}\) Diligence is generally only relevant where the respondent seeks to equitably toll the normally applicable filing deadline, but it is not relevant where the noncitizen files within the period granted by statute for filing the motion. The agency’s addition of a regulatory requirement that a respondent always show diligence goes beyond the authority granted to the agency by Congress, and therefore the agency should rescind this proposed regulatory change. Moreover, it is unclear what reasonable diligence even means in the context of filing a stay of removal.

Our organization also opposes the requirement that service of a motion for a discretionary stay on an opposing party be simultaneous and be by the same method by which the stay motion is filed with the immigration court or the BIA. This requirement will cause respondents to

\(^{12}\text{Cf. Perez Santana v. Holder, 731 F.3d 50, 60 (1st Cir. 2013) (rejecting the Government’s argument that even where a noncitizen “did everything right” by assiduously seeking relief and timely requesting reopening, the Government can still use its “exercise of its wholly discretionary authority to remove him from the United State” to “unilaterally preclude” the noncitizen from vindicating his rights).}^{13}\text{See proposed subsection 1003.48(k)(iv).}
unnecessarily incur additional costs for mail, delivery services, or courier services to send their stay motions to DHS because they will be forced to use the same method to serve DHS as they use to send their motion to the BIA or Immigration Court, even though DHS is already equipped for electronic service (which is nearly instantaneous, secure, reliable, and free), whereas EOIR continues to struggle to implement electronic filing. Further, this requirement does not serve its intended goal of ensuring fairness, and particularly in light of EOIR’s continued delay in implementing an electronic filing system nationwide, will increase mail or courier costs to respondents. Notably, as written, the rule would require the adjudicator to deny a motion even if DHS received notice of the motion before the BIA or Immigration Court received the motion. For example, counsel might be able to hand deliver a copy of the motion to DHS counsel, but be required to mail a stay motion to the BIA due to the physical location of the BIA in Falls Church, Virginia. In this scenario, DHS again would receive the motion before the BIA, yet under the proposed regulation, the BIA would deny simply because the identical method of service was not used. Moreover, we note that there is not similar burden on DHS counsel as relates to oppositions to stay requests—undermining the argument that the proposal facilitates fairness. This bizarre situation is arbitrary and capricious and, therefore, must be withdrawn.

5. We oppose the rules related to claims under the Convention Against Torture and statutory withholding of removal

The proposed rule seeks to limit protections for those applying for relief under CAT, asylum and withholding of removal. The rule proposes to eliminate the automatic stay of removal where a motion is based on that relief. This is improper as it will result in the refouler of persons to countries in which they face torture and persecution. Additionally, the rule proposes to eliminate the eligibility to reopen proceedings where the original application was denied based on a finding that it was frivolous. This is improper because frivolous findings do not bar withholding of removal, may be waived for some forms of relief such as T nonimmigrant status, and can be challenged where the frivolous finding was improper. See INA § 208(d)(6); 8 C.F.R. § 1208.20 and trafficking. Yet, the proposed rule seeks to foreclose those options to individuals. No clear justification is provided for banning reopening of such cases, despite the overwhelming risks that doing so will deny statutorily required protections. The rule is, therefore, arbitrary and capricious, and must be withdrawn.

The proposed rule will also violate rights of asylum seekers and torture victims by removing automatic stays of removal. Automatic stays of removal in cases where a person claims fear of persecution or torture are a crucial protection. The U.S. obligations against refouler are so important that the law seeks to ensure no one is improperly removed to a place in which they face such harms. Often, asylum seekers and torture victims are unrepresented or unable to present their case due to language and cultural barriers, trauma from harms, and lack of resources. Too often, they are victim of predatory services that offer ineffective assistance. Thus, improper denials of cases are common and must have means of review. The proposed rule violates these protections by categorically denying Motions to Reopen and Reconsider—and stays of removal during such process—where a frivolous asylum finding was entered. This categorical bar will result in the unlawful refouler to countries in which a person faces torture or persecution because numerous cases of frivolous findings are improperly entered.
International law is unequivocal—states may not return a person to a country in which they face persecution or torture. The U.S. is not only bound by this international law, but has incorporated it into our domestic law through Congressional action. Therefore, no policy may be made that will result in the contravention of that norm. Notwithstanding, the Department now proposes to foreclose reopening and reconsideration for an entire class of those seeking protection and eliminate protections against removal where their case is being considered. This violates our international obligations and congressional intent and, therefore, cannot stand.

In attempting to legitimize these violative proposals, the Department suggests such changes are necessary because “Essentially, respondents commonly allege specific grounds that warrant reopening a case but then use the reopened proceedings as an opportunity to apply for other unrelated forms of relief from removal that are otherwise unavailable.” This is a gross mischaracterization which lacks evidentiary support. The Department seeks to bar someone from reopening their case based on one ground and then adding additional grounds for relief once opened. Due process requires that a person not be arbitrarily bared from seeking relief and raising defenses to which they are entitled. If a person is entitled to apply for relief, they must be given the opportunity to do so. If they happen to also be eligible for other relief that entitles them to reopen proceedings, then that should not bar them from raising all claims available.

6. We support the rule to the extent it eliminates the departure bar, but oppose the application of the bar to departures under advance parole

Our office applauds the Department for seeking to eliminate the arbitrary departure bar. The Department rightly recognizes that every circuit court to have considered the issue has held that the departure bar “clearly conflicts” with the Immigration and Nationality Act (INA) or “impermissibly restricts” the BIA’s jurisdiction. It further recognizes the harm done by the departure bar and the crucial due process interests involved in ensuring people are not foreclosed from presenting their cases, particularly where opposing counsel controls removal. Despite this important step, the Department then seeks to create new, arbitrary, and contrary provisions that would upend years of precedent related to departure under Advanced Parole and would violate the plain language of the statute related to motions.

Binding Supreme Court and circuit court precedent requires EOIR to exercise its congressionally-delegated jurisdiction even where a noncitizen leaves the United States while awaiting EOIR’s adjudication of their motion. Congress delegated the authority to adjudicate all motions to immigration judges and the BIA and, therefore, the agency does not have the power to ignore the Supreme Court and the U.S. courts of appeal by refusing to adjudicate a subset of motions (i.e., post-departure motions) on jurisdictional grounds. Yet, EOIR herein proposes to disregard the plain language of the INA by deeming a motion withdrawn simply because a noncitizen “volitionally” leaves the United States while the motion remains pending.

14 Toor v. Lynch, 789 F. 3d 1055, 1057 n.1 (9th Cir. 2015) (enumerating the decisions of other circuit courts on this issue).
15 See Union Pacific R.R. v. Brotherhood of Locomotive Engineers, 130 S. Ct. 584 (2009) (prohibiting an agency from narrowing its own jurisdiction); Luna v. Holder, 637 F.3d 85, 101-02 (2d Cir. 2011) (“Nor has Congress indicated since it enacted IIRIRA that an alien’s departure after filing a motion to reopen should be a jurisdictional bar . . . The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed or otherwise departs the United States before or after filing the motion.”) (emphasis added) (internal citations omitted)).
These provisions are essential to ensuring due process. Congress rightly recognized that Motions to Reopen and Reconsider serve as crucial due process protections where a persons’ immigration court case was wrongly decided or has a new interest requiring reconsideration. Despite these crucial interests, people in removal proceedings may be required to leave the U.S. during the pendency of a motion for myriad reasons. For example, they may have family emergencies in their home countries or may need to travel for work. Creating a new provision that deems a motion withdrawn when one is forced to travel violates the Congressional intent and must be withdrawn.

We further urge the agency to retain the rule announced in *Matter of Arrabally and Yerrabelly* that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA § 212(a)(9)(B)(i)(II). *Arrabally and Yerrabelly* has been good precedent for many years. Numerous people have relied on this precedent in making important decisions about their lives. That case, moreover, rightly analyzes the congressional intent behind advanced parole, and helps to eliminate confusion related thereto. Notwithstanding, the Department now seeks to retroactively apply this new rule even where a person has traveled on advance parole prior to the effective date of the rule—travel undertaken in reliance on settled precedent in *Matter of Arrabally and Yerrabelly*. If EOIR adopts any interpretation of a departure that narrows *Matter of Arrabally and Yerrabelly*, it should not apply this interpretation to any person who traveled on advance parole prior to the effective date of the rule. Accordingly, rather than overruling *Matter of Arrabally and Yerrabelly* through regulation, we urge EOIR to instead codify by regulation that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA § 212(a)(9)(B)(i)(II).

Sincerely,

Michele Garnett McKenzie
Deputy Director, The Advocates for Human Rights