Comment in Opposition to the Proposed Rule on Good Cause for a Continuance in Immigration Proceedings

Reference: RIN 1125-AB03 and EOIR Docket No. 198-0410

VIA: Federal eRulemaking Portal

ATTN: Lauren Alder Reid, Assistant Director, Office of Policy, EOIR

DATE: On or before December 28, 2020

Dear Assistant Director Adler Reid,

We write to oppose the proposed regulation on Good Cause for Continuances. This proposed rule punishes migrants, refugees, trafficking victims, and families for inefficiencies in the immigration system. Furthermore, it violates due process by impinging the rights of people in immigration proceedings to present their case, pursue relief and benefits to which they are entitled, and obtain legal counsel.

1. 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. Since 2017, we have also implemented our Immigration Court Observer project, which has monitored thousands of cases through volunteer observers utilizing international court monitoring practices. 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. The proposed rule will impact the ability of organizations like ours to provide pro bono assistance, violating due process rights

The proposed rule impacts the ability to obtain counsel, in particular pro bono counsel, by instilling inflexible timelines inconsistent with the demands of professional legal practice and incompatible with a system that fails to provide appointed counsel for indigent respondents. The system relies on charitable legal services organizations and private attorneys who donate their time to provide essential legal services to respondents. People in immigration proceedings are not provided government-appointed counsel. Despite incredibly high stakes, including exile to face torture or persecution, people in immigration proceedings must either represent themselves or rely on pro bono attorneys if they cannot afford or find a lawyer. For over 30 years, our organization has provided pro bono representation through volunteer attorneys supported by a small staff. To do so, we volunteer attorneys must have time to prepare—particularly since few are full-time immigration lawyers with expertise in the field—and generally will only be able to take-on cases if they can be assured it will not interfere with their representation of paying clients. Historically, continuances have been a crucial means by which people in proceedings can request time to find an attorney, allow that attorney to prepare the case, and pursue any relief for which they are eligible. None of these actions is an abuse of the system, as the Department incorrectly alleges. Instead, these are crucial means by which due process rights are protected at a base level in proceedings. Nonetheless, the proposed rule seeks to severely restrict timelines without providing evidence of the need or weighing the severe impacts on organizations like ours and the people we represent.

3. The proposed rule violates due process by restricting access to counsel

The Advocates vigorously opposes the sections related to counsel. Through our Immigration Court Observation Project, we have documented the serious due process violations associated with lack of access to counsel in removal proceedings. Because government-appointed counsel is not provided, people in immigration proceedings must either represent themselves, rely on pro bono counsel like our organization, or pay for an attorney. Immigration law has been documented as one of the most complex areas of law second only to tax. Yet, the stakes have never been higher. People face exile, loss of livelihood and families, and, in many cases, torture or persecution. Quality counsel is, therefore, essential. This is something that the Department itself has noted through its recent proposal on standards of conduct for representation in proceedings. The proposed rules, however, further exacerbate these issues by making it nearly impossible to secure pro bono counsel and ensuring that all counsel face insurmountable obstacles to mounting a strong defense.

For example, the proposed rule would limit judicial discretion and violate due process by allowing only one continuance to secure counsel, and in that case only when the hearing date is within 30 days of the date on the NTA. Furthermore, the rule would demand that the person
show diligence in seeking representation since that date. Yet, it is unclear how this standard will be applied, resulting in arbitrary and capricious application of the rule.

In addition, the rule would bar continuances for counsel preparation or conflicts. The rule states “Because representatives are presumed to take on no more cases than they can handle in accordance with professional responsibility obligations of diligence and competence, a representative's assertions about his or her workload or obligations in other cases do not constitute good cause.” Additionally, the rule would allow continuances based on scheduling conflicts in only a narrow set of cases. Under the proposed rule, an immigration judge may only grant a continuance for scheduling conflicts arising after the immigration hearing was scheduled in open court, only if it involves the court appointment of a representative to a case and the immigration judge was notified of the conflict in a timely manner. The Department provides no evidence that it weighed how this will impact organizations like ours, which rely on pro bono attorneys to provide representation. Indeed, while citing administrative efficiencies and timelines, the rule provides no analysis as to how restricting counsel will impact efficiencies as there will be a precipitous drop in pro bono representation—and, therefore, representation full stop—because volunteers will be unable to comply with such arbitrary restrictions on continuances and conflicts.

The rule also proposes to limit to one the number of continuances for attorney preparation, and notes that such a request must be made prior to pleadings and for no longer than 14 days. This is an arbitrary standard that will result in due process violations for migrants. Either counsel will be denied the time necessary to adequately prepare or counsel will refuse to take-on cases, resulting in lack of counsel. EOIR itself has found that provision of counsel improves administrative efficiencies. Yet, it herein proposes to limit access to counsel under the pretense of administrative efficiencies. The justification of the proposed rule, therefore, is insufficient.

Due process in the law is a cornerstone of the American judicial system, and a key foundation in international human rights. Counsel plays a vital role in ensuring those protections. The proposed rule, without evidence or analysis of the impact, seeks to limit access to counsel in immigration proceedings by severely curtailing the ability of migrants to seek and obtain counsel and, once secured, for counsel to adequately prepare and present the case. The Department alleges that it must implement these new rules to ensure administrative efficiencies and disallow migrants from prolonging removal by requesting unnecessary continuances. Time to find counsel and sufficiently prepare a defense is not an unnecessary continuance. Immigration law is incredibly complex and many people in removal proceedings would be forced to navigate the process without sufficient language, educational, cultural or other resources. Counsel plays a key role in ensuring migrant rights are protected. Without access to counsel, migrants risk being returned to countries in which they face torture or persecution. This will violate U.S. obligations under international law and thwart Congressional intent in the Refugee Act of 1980. It will also increase administrative burdens by slowing immigration proceedings, increasing appeals, and opening the Department to litigation for unlawful removals.
4. The proposed rule creates arbitrary and capricious restrictions on continuances related to collateral relief

As relates to collateral relief, the proposed rule will violate due process by restricting people’s ability to defend their case and pursue relief for which they are eligible. Furthermore, it improperly places people in removal proceedings at the mercy of opposing counsel—DHS—as DHS controls processing times for collateral relief. The proposed rule suggests that continuances related to collateral relief will generally not show good cause except in certain circumstances. The Advocates again notes that it is improper and arbitrary to regulate by defining what something is not, rather than what it is.

The proposed rule suggests that collateral relief—even where the person shows prima facie eligibility and approval would vitiate the grounds of removability—would not constitute good cause unless 1) there is an immediately-available visa or a priority date within six months; 2) the person demonstrates prima facie eligibility; and 3) the immigration judge has jurisdiction, including of any waivers. This standard is improper, unclear, and does not consider the harm that will be caused. First, the new provision creates arbitrary timelines that do not adequately reflect visa processing. The rule requires that a priority date must be within six months of the motion for continuance; however, the Department fails to detail how retrogression will impact that timeline. Moreover, it arbitrary holds people in removal proceedings to narrow timelines that will result in removal of people with bona fide eligibility for immigration benefits. This will result in the separation of families, loss of employees and employers, as well as removal of crime victims or witnesses, who have viable immigration benefits that will not be processed by DHS within the timeline. Most importantly, The Advocates notes that the rule violates congressional intent by restricting continuances for collateral relief to only those instances where the immigration judge has jurisdiction. Congress specifically separated benefits processing from other processes in immigration proceedings. For trafficking and crime victims, Congress determined this was essential to ensure victim protections.

As relates to non-immigrant visas, the rule (again, defining something by what it is not, rather than what it is) provides that good cause is not shown unless: “(A) Receipt of the non-immigrant visa, including any applicable waiver, vitiates or would vitiate all grounds of removability with which the alien has been charged; and (B) The alien demonstrates that final approval of the visa application or petition and receipt of the actual visa, including approval and receipt of any applicable waiver, has occurred or will occur within six months of the request for a continuance.”

The Department, with the instant proposed rule, seeks to foreclose numerous bona fide applicants from relief for which Congress intended them to be eligible. This is particularly so in the case of trafficking victims. Congress intended—through unanimous reauthorization of the TVPA—to protect foreign-born trafficking victims and prevent and punish traffickers through the T visa. The T visa may only be processed by the specialists of the Vermont Service Center in USCIS. Prior DHS regulations restrict eligibility for T visas to those in the U.S. and vitiate eligibility upon removal. The proposed regulations will result in removal of bona fide T visa applicants because DHS—opposing counsel-- controls processing times for T visas, is unwilling
or unable to process applications within the 6 months proposed herein, and will deny benefits where the person is removed.

Despite the severe impact this will have on crime victims, victims of trafficking, families, and others, the Department’s only justification for the proposed rule is administrative efficiency. It sites long processing times, which are solely the responsibility of DHS, opposing counsel. It also relies heavily on the administrative “burden” to the Department in either reopening cases or maintaining cases on the docket over which they ultimately lack jurisdiction. This is untrue. First, The Advocates notes that the Department contributed heavily to this burden by foreclosing opportunities for administrative closure until a respondent may request termination upon grant of collateral relief (see Matter of Castro Tumt) and opposing counsel, DHS, creates such burden by continuing to pursue removal in cases where one has proved prima facie eligibility for relief. Second, the Department analyzes only the “administrative burden” caused by processing cases, without accounting for its congressionally-prescribed role in ensuring just outcomes and due process. The Department cannot simply regulate its way out of doing the job Congress intended. If the burden of processing cases is too much to bear, the Department must request additional resources—not punish people in immigration proceedings.

5. The proposed rule also violates the intention of Congress and infringes on the discretion of judges.

The proposed rule must also be withdrawn as it violates the intentions of Congress and impermissibly infringes on judicial discretion. Congress, in recognition of the myriad nuances and circumstances impacting immigration courts and those in proceedings, provided discretion to judges to handle their dockets. Congress allowed continuances for good cause and left the standard vague to ensure responsiveness to unpredictable issues. Such discretion reflects Congressional determinations that immigration judges are best-placed to analyze the issues presented to them and must be empowered with sufficient discretion to make just decisions that protect rights and uphold the rule of law. The proposed rule ignores Congressional intent in this regard and unlawfully infringes on the discretion provided immigration judges. Where Congress provided broad authority to determine good cause for continuances, the Department proposes new, narrow and arbitrary strictures that constrain discretion.

Under the proposed rule provides five “non-exhaustive factors” that immigration judges must consider when determining whether good cause exists. These include: (i) The amount of time the movant has had to prepare for the hearing and whether the movant has exercised due diligence to ensure preparedness for that hearing; (ii) The length and purpose of the requested continuance, including whether the reason for the requested continuance is dilatory or contrived; (iii) Whether the motion is opposed and the basis for the opposition, though the opponent does not bear the burden of demonstrating an absence or lack of good cause; (iv) Implications for administrative efficiency; and (v) Any other relevant factors for consideration.

In addition to the scenarios outlined in more detail above, the proposed rule would codify as a scenario failing to show good cause, those that “would cause the immigration court to exceed a statutory or regulatory deadline, unless an exception applies or the movant demonstrates good
cause.” This language will result in arbitrary and capricious decisions, and improperly punishes respondents for EOIR- and DHS-caused inefficiencies that already result in exceeding statutory and regulatory timelines. The regulation proposes to disallow continuances where an IJ determines the continuance is for dilatory or contrived reasons. Such requests already fail to meet the good cause standard. Additionally, the Department provides no clarity as to how the new regulation will be implemented by IJs to ensure such determinations are not arbitrary or capricious. Additionally, while the rule requires IJs to consider the amount of time the movant has had to prepare as well as the length of time requested, the proposed change does not require IJs to consider how language ability, mental health, age and other factors impact reasonableness for such time limits.

6. **The proposed rule undermines the efficiency of the immigration court itself**

While the Department purports to limit continuances to enhance “efficiency,” it chooses not to invest in what is needed to create efficient court processes, assumes respondents benefit from delays, and blames respondents who seek a fair day in court for backlogs in the system. Decades of overinvestment in enforcement resources (approximately $25 billion annually); unfettered charging of administrative immigration violations with little prosecutorial discretion, chronic underfunding of EOIR and USCIS; and refusal to create a federally funded public defender system all contribute to delays in the immigration system. The Department’s attempt to fix its problems by infringing on due process and denying people who are facing exile from their families, communities, and careers an opportunity to raise a defense to deportation is reprehensible.

For the foregoing reasons, The Advocates calls on the Department to withdraw its proposed regulation that will violate due process rights and create arbitrary and capricious decisions.

Sincerely,

Michele Garnett McKenzie
Deputy Director