

September 25, 2020

*Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 1800  
Falls Church, VA 22041*

**Re:** RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020,  
Proposed Rules on Appellate Procedures and Decisional Finality in Immigration  
Proceedings; Administrative Closure

Dear Assistant Director Reid:

On behalf of Casa de Esperanza: National Latin@ Network for Healthy Families and Communities, we submit this comment in response to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) proposed rule, entitled “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure” initially published in the Federal Register on August 26, 2020 (hereinafter “proposed rule”). Casa de Esperanza opposes the proposed rule as both a matter of public policy, since this rule will be harmful for immigrant survivors of violence, and because it violates numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol.

## **I. Introduction**

Casa de Esperanza works directly with immigrants, including those who are survivors of domestic violence and sexual assault, those affected by human trafficking, and children who have suffered abuse, abandonment, or neglect. As an organization, we are deeply concerned about the myriad ways this proposed rule will foreclose such survivors from accessing the humanitarian relief that Congress specifically created for them through the Violence Against Women Act, putting them at risk of continued harm. For the reasons outlined below, we urge EOIR to withdraw the proposed rule entirely and immediately.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter and support services for women and children experiencing domestic violence. Additionally, in 2009 Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center that provides training & technical assistance, research, and national policy advocacy focused on addressing and preventing gender based violence, primarily in Latino and immigrant communities. Our organization works directly with immigrant victims of domestic and sexual violence seeking services and safety and collaborates with other organizations around the country that also provide services for immigrant victims. Additionally, our research staff has been involved in community participatory research projects and other research initiatives that highlight the experiences of immigrant survivors, the barriers they encounter, and the ways in which they experience re-traumatization due to inadequate systems

responses.<sup>1</sup> The research indicates that immigration status is often used as a tool of abuse by perpetrators and can result in significant barriers that prevent immigrant survivors from accessing services and safety. Based upon these experiences providing services and support to survivors and advocates at the local and national level, we strongly oppose the proposed rule, which will only further undermine victim safety, and urge that it be rescinded.

The rule represents the Administration's latest effort to advance an agenda of creating procedural barriers for individuals with matters in immigration court or before the Board of Immigration Appeals (BIA), undermining due process and their right to just and fair proceedings. For survivors of gender-based violence, these issues are of particular importance. Immigrants who have experienced violence - including horrific domestic violence, sexual assault, and other forms of gender-based abuse - often must navigate a complex and confusing immigration court system to plead their case. As such, survivors who have a strong case for protection may nevertheless have their case denied, especially if they are unrepresented by legal counsel. A recent national study found only 37% of immigrants facing removal were represented by an attorney in cases in immigration court. Additionally, about 86% of immigrants in detention went unrepresented. It is exceedingly difficult for respondents without counsel to navigate the enormous complexity of the U.S. immigration system. The U.S. immigration system then becomes a sharper tool that abusers utilize to instill fear, hopelessness, and isolation for their victims. Moreover, as survivors whose cases have been denied are often deported back to extremely dangerous, even life-threatening, situations, it is crucial that immigration court proceedings provide all immigrants with every opportunity to have their fair day in court.

## **II. DOJ has provided insufficient opportunity to comment**

The proposed rule is extremely problematic in both substance and in form. Executive Order 12866 provides that agencies “should afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.” DOJ has placed unjustified administrative and personal burdens on organizations like ours by providing such an inadequate timeframe in which to submit public comments. The importance of a sufficient comment period is even more critical due to the extraordinary changes to working conditions caused by the COVID-19 pandemic.

It takes time to collect information, particularly given that many of our advocates, researchers and programmatic staff members are spread throughout the country, in different time zones with varying situations of “work from home.” Some staff are now juggling work as full-time caretakers and others have had to scale back the number of hours of work. Additionally, gathering information from our direct service providers, those who provide assistance to survivors of intimate partner violence, do not have “traditional” work hours and it takes longer periods of time to gather relevant information for these kinds of public comments. Therefore, we need at minimum 60 days to respond with more precision. This short time frame has placed an

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<sup>1</sup> Rodriguez, R., Serrata, J. V., Macias, R. M., Hidalgo, R., Nava, N., & Garcia, O. (In press). IPV among Latina survivors: Unique considerations, strategies and opportunities. In Geffner, R., Vieth, V., Vaughan-Eden, V., Rosenbaum, A., Hamberger, L.K., & White, J. (Eds.), Handbook of interpersonal violence across the lifespan. Springer International Publishing. (2020); See also: Rodriguez, R., et al., Action research at the intersection of structural and family violence in an immigrant Latino community: a youth-led study. Journal of Family Violence, 2018. 33(8): p. 587- 596.

undue burden of urgency when we need to prioritize providing assistance to survivors and service providers, in keeping with our mission.

### **III. The Proposed Rule Will Create Barriers for Immigrant Survivors of Violence**

Over the last several years, DOJ has created significant barriers to immigration relief in a variety of ways--some by way of major regulatory overhauls, such as the asylum rule, while others have been through certification procedures, and others through discrete and calculated procedural shifts. This proposed rule is DOJ's latest attempt to leverage bureaucracy to limit access to protections.

#### **A. Limits to Administrative Closure Undermines Access to Safety**

The proposed rule prohibits judges from using "administrative closure" to temporarily halt deportation proceedings for any reason. However, survivors typically rely on judges to close their cases while United States Citizenship and Immigration Services (USCIS) reviews their petitions for humanitarian immigration relief. This review can take years as USCIS works its way through a massive, historic backlog. For example, there currently is a backlog of over 150,000 principal applications for the U visa for victims of eligible crimes who have been willing to assist law enforcement or government officials in the investigation or prosecution of the crimes. As a result of the backlog, it currently takes nearly five years to even be put on the waitlist for a U visa. Without administrative closure, survivors are at an increased risk of deportation before their applications or petitions are considered.

If survivors are deported while their cases are pending, they will face significant hardships, including:

- lack of access to social services, counseling, and safe housing;
- renewed threats from abusers in countries where protection from domestic and sexual violence may be inadequate or nonexistent;
- dangers of retaliation for having reported the crime to law enforcement in the US and having assisted in the investigation or prosecution of a crime;
- loss of child custody/separation from children or being forced to leave children in the custody of an abuser;
- challenges to receiving and responding to critical case correspondence such as requests for additional evidence; and
- increased challenges in obtaining or retaining the assistance of legal counsel.

One example is that of an immigrant survivor who recently received advocacy services from our organization, whom we will refer to as Survivor 1. After receiving a denial letter on her application for a T-visa, as a victim of trafficking, Survivor 1 received a letter saying that she was put in removal proceedings. Survivor 1 received legal assistance and immediately started applying for U-Visa. After a few weeks, she received the receipt number indicating that USCIS had received her application. Meanwhile, Survivor 1 had to increase her therapy sessions because she started showing signs of depression again. Survivor 1 shared how painful the uncertainty was, and how difficult it was to handle not knowing if she could stay in the United States after her experience of gender-based violence.

Survivor 1's hearing was scheduled for September 2020. One week prior to the hearing, she was informed that her hearing would be delayed until June 2021. In the meantime, her attorney had filed for a work permit. However, because of the processing delays she has not received it.

Part of the fear and trauma that immigrant survivors experience is rooted in the uncertainty of not knowing whether they will be allowed to continue to wait for a hearing in the United States and contemplating the increased risks and harm if they are told that they must return to their home country. The survivor has to be prepared for many different scenarios that can perpetuate a cycle of trauma. Survivor 1 planned for a worst-case scenario, which included having to wait for years in her home country for that adjudication of her U-Visa application. Survivor 1 has shared that she cannot focus on long term goals of healing and recovery in either country since her immigration status is unstable.

Additionally, many survivors fear returning to their home country where they may have to face retaliation and the consequences of displacement without a support system. Typically, a survivor's home country has inadequate legal remedies to protect them, which was the case with Survivor 1. Survivor 1's lack of resolution in seeking humanitarian relief has added immense barriers, such as challenges in accessing social services and adequate housing, which have caused further stress and trauma for her.

Eliminating administrative closure not only harms survivors, but it also harms government interests by directly thwarting Congressional intent in creating survivor-based immigration protections. The proposed rule's provisions on administrative closure wastes DOJ and Department of Homeland Security (DHS) time and resources, unnecessarily contributing to significant backlogs instead of reducing them. In addition, the proposed rule will squander USCIS' limited resources as applicants will seek expedited review of their matters before they are deported, adding to USCIS' backlog and processing delays.

## **B. Erosion of Due Process**

The proposed rule further erodes due process and harms survivors by undermining the role of the Board of Immigration Appeals. The rule inappropriately allows immigration judges to ask the Attorney General (AG) to review its decisions when they are overruled by the Board of Immigration Appeals (BIA). The AG could then reinstate a judge's decision, upending long standing legal precedent to promote a specific political ideology, as former AG Sessions did in [\*Matter of A-B\*](#) by narrowing standards for asylum claims involving domestic violence. Furthermore, under the proposed rule, the BIA cannot remand cases where there has been a change in the law. As a result, survivors and others would have no opportunity to submit additional evidence to meet the new legal standard to which they will be held when there is a change in the law.

## **C. Limits on Briefs**

The proposed rule drastically limits the time allowed to file and respond to appellate briefs. Under the proposed rule, there will be a very short window of time within which respondents, including survivors, can prepare their own and respond to DHS' legal

arguments. This will make it much harder for survivors to retain *pro bono* counsel for their appeals, or to convince current counsel to continue representation.

In addition, the limits on briefing deeply prejudice gender-based asylum claims in particular as these cases involve 1) highly technical legal arguments requiring sufficient time to adequately develop; and 2) sensitive facts that survivors of severe trauma need time to process before recounting.

Our experience is that more of these cases involve increased legal complexities to maneuver ever-changing rules, as well as the fact that we are increasingly seeing immigrant survivors with compounded trauma. We often see immigrant survivors who have fled gender-based violence in their country of origin, experienced violence on the journey, and have often encountered additional violence and exploitation upon arrival in the United States. As a result of the challenges of obtaining legal assistance, the greater complexity of these cases, and the impact of compounded trauma on survivors, it significantly undermines access to legal protection by reducing the time in which to file and respond to appellate briefs.

Furthermore, these limits on briefings will result in swift, unlawful *refoulement* (return) of asylum seekers in violation of US obligations as a state party to the Refugee Convention.

#### **D. Limits on Reconsideration and Reopening**

The proposed rule needlessly limits reconsideration and reopening of cases and the length of time the BIA has to review appeals. Additionally, it prohibits submission of new evidence by respondents, including survivors. These provisions will all contribute to increased *refoulement*, especially of those fleeing gender-based violence as explained above. In addition, abusers and traffickers notoriously manipulate survivors by confiscating important documents that they could otherwise submit as evidence in their cases.

Survivors may have to put themselves at risk in trying to obtain their documents when in the possession of an abuser. If they go to court to obtain an order of protection that would require an abuser to turn over their documents and belongings, the delays in those court proceedings would not provide enough time to obtain necessary documents.

With such limited access to evidence, survivors should certainly not be thwarted twice – first by their abusers, and again by being arbitrarily blocked from submitting whatever new evidence they are fortunate enough to procure.

Furthermore, placing restrictions on reopening cases would foreclose forms of immigration relief that might have initially been missed. This is especially true for survivor-based remedies, as applicants, immigration judges, and attorneys may not have been previously aware of them. As such, even if a survivor is eligible for an alternative form of protection, the BIA would have no authority to reconsider the survivor's case on that or any other basis. This would lead to the wrongful deportation of vulnerable survivors who desperately need protection in the U.S. to enable them and their children to live free of violence and pursue healing and stability.

#### **IV. Conclusion**

The proposed rule raises many other issues of concern to our organization, including the many ways in which the Department fails to abide by their obligations under U.S. and international law, that we simply do not have the time nor capacity to address in this comment given the extremely restrictive comment deadline. We strongly oppose the proposed rule due to the significant, unique, and extremely harmful impact it would have on survivors of gender-based violence. We call on DOJ to promptly withdraw the proposed rule in its entirety.

Thank you for the opportunity to submit comments on the proposed rule. Please contact me if you have any questions relating to these comments.

Respectfully submitted,



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