IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590(fax)
www.irli.org

December 28, 2020

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

EOIR Docket No. 18-0503; RIN 1125-AB01

Public Comment of the Immigration Reform Law Institute Re: Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal

Dear Assistant Director Reid,

The Immigration Reform Law Institute ("IRLI") submits the following public comment to the Department of Justice ("Department"), Executive Office for Immigration Review ("EOIR") in response to the Department's Notice of Proposed Rulemaking ("NPRM") as published in the Federal Register on November 27, 2020. *See Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal*, (85 Fed. Reg. 75,942-959).

IRLI is a nonprofit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI fully supports the Department's proposed amendments to the regulations governing motions to reopen and reconsider in immigration proceedings, which would:

- update the departure bar to bring it in line with the Immigration and Nationality Act ("INA") and allow aliens to seek reopening or reconsideration from abroad while clarifying that a motion to reopen

or reconsider should be deemed withdrawn when an alien voluntarily departs the United States after filing the motion but before it is decided;

- require aliens who file a motion to reopen or reconsider to inform the agency of pertinent facts that would either influence the agency's exercise of discretion or prohibit reopening, such as whether the alien was ordered to surrender to the Department of Homeland Security ("DHS") for removal, whether the alien complied with any such order, whether the alien has been convicted of any crimes between the order of removal and the filing of the motion to reopen or reconsider, and whether any prior order of removal has been reinstated pursuant to section 241(a)(5) of the INA;

- prohibit an immigration judge or the Board of Immigration Appeals ("Board") from reopening proceedings based upon a pending application for relief with another agency if the immigration judge or the Board would not have authority to grant the relief in the first instance;

- clarify that allegations of fact and conclusions of law asserted in motions to reopen or reconsider are not evidence and should not be treated as such;

- establish a uniform standard for establishing prejudice in ineffective assistance of counsel claims by requiring all aliens to demonstrate that there is a reasonable probability that, absent counsel's ineffective assistance, the outcome of the proceedings would have been different;

- modify the requirements for raising an ineffective assistance of counsel claim established in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), by adding the following filing requirements: in addition to filing a complaint with the appropriate disciplinary authority that licensed the attorney to practice law, the alien must file a disciplinary complaint with EOIR disciplinary counsel; and for persons whom the alien reasonably but erroneously believed to be an attorney or accredited representative, and who was retained to represent the alien in immigration proceedings, the alien must file a complaint with an appropriate federal, state, or local law enforcement agency that has authority to address matters involving unauthorized practice of law or immigration-related fraud;

- limit the issues considered at reopened proceeding to those that were the basis for the grant of reopening or reconsideration, and matters directly related;

- require an alien to seek a stay of removal with DHS prior to requesting a stay of removal with an immigration judge or the Board;

- prohibit an immigration judge and the Board from granting a stay of removal unless the alien has also filed an underlying motion to reopen or reconsider; and

- provide a list of factors that the immigration judge or Board must consider when determining whether to grant an alien's request for a stay of removal.

Although IRLI fully endorses the NPRM as a whole, it respectfully submits comments on the following topics.

I. The Departure Bar and the Definition of Departure

IRLI supports the proposed amendment to the departure bar (including the proposed definitions of "depart" and "departure") because it will bring the regulation in line with the INA, and the proposed narrow withdrawal provision will be enforceable going forward. The current regulations prohibit an alien from filing a motion to reopen or reconsider following the alien's departure from the United States.[1] The regulations further instruct that a departure from the United States constitutes the withdrawal of a previously filed motion to reopen or motion to reconsider. The current regulations predate the enactment of section 240(c)(6) and (7) of the INA, which provide a statutory right to file one motion to reopen or reconsider without regard to whether the alien is in the United States.[2] Every court to address the issue has ruled that the current departure bar conflicts with the statutory right to seek reopening or reconsideration.[3]

Because the current departure bar conflicts with the INA, IRLI agrees that it should be rescinded. In lieu of the current departure bare, the Department proposes to add a narrow withdrawal provision stating that an alien's voluntary departure from the United States while a motion to reopen or reconsider is pending, constitutes a withdrawal of that motion to reopen or reconsider.[4] The Department also proposes defining the terms "depart" and "departure" to encompass only voluntary physical departures of an alien and excluding a compelled removal or deportation by DHS.[5]

These amendments to the regulations relating to the departure bar will eliminate any tension between an alien's right to file a motion to reconsider or reopen within 30 or 90 days, respectively, and DHS's requirement to remove an alien within 90 days of a final removal order.[6] Adoption of the proposed rule would also put aliens on notice of the consequences of voluntarily departing the United States while a motion to reopen or reconsider remains pending. The alien

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[1] *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1). The prohibition on motions to reopen or reconsider by aliens who have departed the United States is referred to the "departure bar."

[2] *See* 8 U.S.C. § 1229a(c)(6)-(7).

[3] *See Toor v. Lynch*, 789 F.3d 1055, 1057 n.1 (9th Cir. 2015) (noting decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits).

[4] *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (proposed).

[5] *See* 8 C.F.R. § 1001.1(cc) (proposed).

[6] *Compare* 8 U.S.C. § 1229a(c)(6)-(7), *with* 8 U.S.C. § 1231(a)(1).

would also know that if he or she were to illegally re-enter the United States after executing that order, he or she would be ineligible to seek to reopen that reinstated order.[7]

II. Failure To Surrender and Fugitive Disentitlement

The proposed rule would require aliens to notify the Board or an immigration judge in a motion to reopen or reconsider whether they have been ordered to surrender to DHS for removal, and if so, whether they complied with that order.[8] The Board or immigration judge then considers the alien's compliance or non-compliance with such an order as discretionary factor.[9] The fugitive disentitlement doctrine was succinctly summed up in *Sapoundjiev v. Ashcroft*:

> Litigation entails reciprocal obligations: an appellant (or petitioner) who demands that the United States respect a favorable outcome must ensure that an adverse decision also can be carried out. When an alien fails to report for custody, this sets up the situation that [a Ninth Circuit Court of Appeals panel] called "heads I win, tails you'll never find me." A litigant whose disappearance makes an adverse judgment difficult if not impossible to enforce cannot expect favorable action. . . . Someone who cannot be bound by a loss has warped the outcome in a way prejudicial to the other side; the best solution is to dismiss the proceeding. That proposition is as applicable to the fugitive alien as it is to the fugitive criminal defendant . . . .[10]

IRLI supports the proposed rule because it will require aliens filing motions to reopen or reconsider to present the agency with the information necessary to determine whether the fugitive disentitlement doctrine may apply. Although the Department has proposed rules in the past that established a bar to reopening or reconsideration for aliens who were notified of their duty to surrender in their Notices to Appear or removal orders, the prior proposed rules were never finalized. There is no requirement that an alien be notified of the consequences of failing to surrender prior to receiving an order to surrender for removal (which is typically referred to as a "bag-and-baggage letter").[11] Thus, the notice requirements that would have been established

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[7] *See* 8 U.S.C. § 1231(a)(5).

[8] *See* 8 C.F.R. § 1003.48(c) (proposed).

[9] *See id.*

[10] 376 F.3d 727, 728-29 (7th Cir. 2004) (internal citations omitted) (quoting *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003)).

[11] *See Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) ("[F]or an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with the letter."); *Sapoundjiev*, 376 F.3d at 729 ("[A]nyone who is told to surrender, and does not, is a fugitive.").

under the prior proposed rules were unnecessary in order to bar reopening or reconsideration under the fugitive disentitlement doctrine.

The proposed rule merely states that "failure to comply with a notification to surrender may result in the denial of the alien's motion."[12] However, longstanding case law holds that an alien's failure to report for removal represents a "deliberate flouting of the immigration laws" and therefore counts as "a very serious adverse factor which warrants the denial" of a discretionary motion, such as a motion to reopen or reconsider.[13] IRLI urges the Department to consider exercising its discretion categorically by regulation and amending the proposed rule to bar reopening or reconsideration in cases involving fugitive aliens.[14]

III. Standards for Motions to Reopen or Reconsider Generally

The proposed regulation codifies many well-established standards and factors to be weighed in adjudicating motions to reopen or reconsider. For instance, an alien seeking to reopen his or her case is required to demonstrate *prima facie* eligibility for relief from removal.[15] Although *prima facie* eligibility is required for reopening, the proposed rule would not alter the authority of the Board and immigration judges to deny a motion to reopen as a matter of discretion even when the alien has established a *prima facie* case for the underlying substantive relief. As the Supreme Court recognized long ago, "[g]ranting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case."[16]

The proposed regulation would prohibit an immigration judge or the Board from reopening a case in which the agency lacks authority to grant the underlying relief unless that application for relief has already been granted by another agency, the granted application provides complete relief from removal, the motion is not otherwise barred by applicable law, and the motion otherwise warrants being granted under applicable law.[17] This requirement recognizes that it would be a waste of adjudicatory resources to reopen a case in which immediate and complete relief is unavailable. Reopening cases in which immediate relief is not yet available would leave the agency with nothing to do other than continue such cases for an uncertain and unknown

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[12] 8 C.F.R. § 1003.48(c) (proposed).

[13] *Matter of Barocio*, 19 I&N Dec. 255, 257 (BIA 1985).

[14] *See Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) ("An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.").

[15] *See* 8 C.F.R. § 1003.48(e)(2) (proposed).

[16] *INS v. Abudu*, 485 U.S. 94, 108 (1988).

[17] *See* 8 C.F.R. § 1003.48(e)(1) (proposed).

amount of time. Adding such cases to the agency's docket would be a waste of scarce adjudicatory resources.

The proposed rule would also add a new requirement for motions to reopen or reconsider. It would require an alien to disclose any convictions that occurred between the order of removal and the filing of the motion. This requirement will ensure that the agency has all relevant information about the alien's circumstances before evaluating whether the alien warrants a favorable exercise of discretion. Further, the proposed rule would require the disclosure of any reinstated order of removal. Without such a requirement, the adjudicator may inappropriately consider a motion to reopen that is otherwise prohibited by statute.[18]

IRLI supports the general provisions in the proposed regulation because it standardizes or clarifies longstanding standards and factors to be considered in one conveniently referenced regulation. It also introduces new provisions that will require aliens to disclose information pertinent to whether a favorable exercise of discretion is warranted.

IV. Specific Standards for Motions to Reopen Due to Ineffective Assistance of Counsel

IRLI supports the proposed regulation because it would establish uniform procedural and substantive requirements for filing and standards for adjudication of motions to reopen based upon a claim of ineffective assistance of counsel. The proposed rule would allow for possible relief due to ineffective assistance of counsel only if the alien can establish prejudice. In order to obtain such relief, and alien would be required to demonstrate both that the conduct of counsel was objectively unreasonable based on the facts of the case, viewed at the time of the conduct at issue, and that there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different.[19]

The proposed regulation also codifies and generally follows the familiar and longstanding procedural requirements for raising a claim of ineffective assistance of counsel first established in *Matter of Lozada*.[20] The proposed regulation would require three items to help the agency evaluate a claim of ineffective assistance of counsel. First, it would require an affidavit that details the agreement between counsel and the alien along with a copy of the representation

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[18] *See* 8 U.S.C. § 1231(a)(5) (which provides for the reinstatement of prior removal orders and prohibits the reopening of any such reinstated order).

[19] *See* 8 C.F.R. § 1003.48(i)(3)-(4) (proposed).

[20] 19 I&N Dec. 637, 639 (BIA 1988); *see also Matter of Assaad*, 23 I&N Dec. 553, 556-57 (BIA 2003) (affirming *Lozada*'s application in removal proceedings); 8 C.F.R. § 1003.48(i)(5) (proposed).

agreement.[21] Second, it would require the alien to submit evidence that he or she informed prior counsel of the allegations and that a motion to reopen will be filed based upon such allegations along with any response from prior counsel, if any.[22] Finally, the proposed regulation would require the alien to file a complaint with the appropriate disciplinary or law enforcement authorities, including in all cases EOIR disciplinary counsel.[23]

IRLI supports the proposed regulation governing claims of ineffective assistance because it promotes the purposes underlying the *Lozada* requirements—to discourage baseless claims of ineffective assistance and to provide sufficient information to evaluate the claim of ineffectiveness—and is subject to only minor exceptions. For instance, the filing of an affidavit and accompanying representation agreement may only be excused in the discretion of the immigration judge or the Board for aliens who appear *pro se*. The only exceptions to the requirement that prior counsel be notified of the allegations are when prior counsel is deceased or when the alien was unable to locate prior counsel despite exercising due diligence in attempting to do so. Finally, the only exception to the requirement that the alien file a complaint with the appropriate disciplinary authorities, including EOIR disciplinary counsel, is when the prior counsel is deceased. Limiting exceptions to these narrow circumstances would help ensure that the vast majority of unethical or unprofessional conduct are reported and investigated. It will also encourage professional and responsible representation in immigration proceedings.

IRLI notes that the new aspects of the procedural requirements will further the purposes of the *Lozada* requirements. For instance, in circumstances where the alien has been represented by a person whom the alien reasonably but erroneously believed to be an attorney or accredited representative, the proposed regulation adds the requirement that the alien file a claim with an appropriate law enforcement agency that has authority to investigate the unauthorized practice of law or immigration-related fraud. In all cases, the alien must also file a complaint with EOIR disciplinary counsel. These new requirements will help uncover unscrupulous individuals who prey on aliens in fear of removal. [24]

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[21] *See* 8 C.F.R. § 1003.48(i)(5)(i) (proposed). To ensure that the alien fully understands what he or she is alleging, the affidavit must also identify who drafted it, if the alien did not, and contain an acknowledgment by the alien that the affidavit had been read to the alien in a language the alien speaks and understands, and that the alien, by signing, affirms that he or she understands and agrees with the language of the affidavit.

[22] *See* 8 C.F.R. § 1003.48(i)(5)(ii) (proposed).

[23] *See* 8 C.F.R. § 1003.48(i)(5)(iii) (proposed).

[24] *See*, *e.g.*, *Deportation fears can mean big business for immigration consultant scams*, (available at: https://www.pasadenastarnews.com/2017/02/23/deportation-fears-can-mean-big-business-for-immigration-consultant-scams/) (last visited Dec. 22, 2020).

V. Motions to Reopen Based on Changed Country Conditions

IRLI also supports the proposed regulation because the provision limiting the scope of reopened proceedings will help prevent gamesmanship that currently allows aliens to evade the time and number limitations on motions to reopen. Under current practice, a grant to reopen a case effectively reopens the case for any purpose, regardless of the motion's articulated basis. For example, an alien may file a motion to reopen based on changed country conditions in their country of nationality that could affect their eligibility for asylum. Both the INA and the current regulations allow the agency to grant an otherwise untimely or number-barred motion to reopen if it is based upon such changed country conditions, but do not permit the agency to excuse untimely or number-barred motions based on a change in personal circumstances.[25] An alien seeking relief based on changed personal circumstances may therefore move to reopen based on changed country conditions, and then, if the motion is granted, withdraw or decline to submit an asylum application based on changed country conditions, thereby avoiding any chance that his or her asylum application may be found frivolous, and instead, pursue an alternative form of relief, such as adjustment of status, based solely on changed personal circumstances. The Department recognizes that this type of gamesmanship is common under the current system.[26]

Under the proposed rule, if the immigration court or the Board grants a motion to reopen, the reopened proceedings shall be limited to the issues upon which reopening or reconsideration was sought and granted, and issues directly related.[27] IRLI supports the proposed rule because limiting the scope of reopened proceedings to the issues upon which reopening was granted would prevent such gamesmanship and promote fairness.[28]

IRLI notes that in the NPRM, the Department states that under the proposed regulation, the immigration court or the Board would consider any application submitted with a motion to reopen to be filed once the motion is granted and that the alien would not be able to avoid filing the application later.[29] The Department further states that both civil monetary penalties for

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[25] *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. §§ 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

[26] *See* 85 Fed. Reg. at 75,953 ("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.").

[27] *See* 8 C.F.R. § 1003.48(e)(3) (proposed).

[28] Use of an asylum claim to reopen a case for other claims treats unfairly those aliens who have the same non-asylum claims barred by the time and number limitations but who lack an asylum claim with which to shoehorn their otherwise barred claims into reopened proceedings.

[29] *See* 85 Fed. Reg. at 75,953 ("The proposed rule would further clarify that, if the immigration court or the Board grants the motion, the immigration court or the Board would further accept the application submitted with the motion to reopen. For example, an alien who submits a motion to reopen based on changed country conditions is required to submit the

document fraud and the penalty for filing a false or frivolous asylum application would continue to apply in such circumstances.[30] Despite this language in the NPRM, no such language appears in the proposed regulation as published in the Federal Register.[31] Because this automatic filing of an application upon a grant of reopening would help deter gamesmanship of the system by imposing the frivolous penalty on such applications, IRLI suggests that the Department amend the proposed regulation to include this intended reform.

VI. Standards for Evaluating Stay Requests

In addition to setting forth the well-established factors to be considered in evaluating whether a discretionary stay is warranted, the proposed regulation would prohibit the immigration judge or Board from granting a stay of removal if: the alien has not also filed an underlying motion to reopen or reconsider; the underlying motion to reopen or reconsider is not *prima facie* grantable; the alien did not exercise diligence in filing the stay request; the alien has not first sought a stay of removal with DHS (and provided DHS with at least five days in which to rule on the stay request); and the opposing party (DHS) has not been given at least three business days to respond to the stay request.[32]

Requiring an individual to first file a stay request with DHS before being allowed to request a stay with EOIR is a commonsense procedural mechanism that ensures an alien multiple opportunities to have a stay request considered. It also promotes efficiency inasmuch as DHS, as the agency seeking to remove the alien, is in the best position to evaluate a stay request in the first instance. IRLI supports the stay provisions in the proposed regulation because it preserves scarce adjudicatory resources in an already overwhelmed immigration court system.

In conclusion, the proposed regulation would standardize motions practice in this area. Such consistency would benefit all stakeholders in immigration proceedings by making procedural expectations both clear and consistent across all cases in removal proceedings. The proposed regulation would also promote fairness and efficiency by reducing manipulation that is too common under the current system. Because adopting the proposed regulation would promote the

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accompanying asylum application. Under the proposed rule, that new asylum application would be considered filed as of the date the immigration court grants the motion to reopen, and the alien would not be able to later avoid filing the application.") (citations omitted).

[30] *See id.*

[31] *See id.* at 75,955-959.

[32] *See* 8 C.F.R. § 1003.48(k) (proposed).

expeditious and efficient adjudication of cases in the immigration courts, IRLI strongly supports the proposed rule.

Respectfully submitted,

Immigration Reform Law Institute
by Matt A. Crapo