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Via Federal eRulemaking Portal
Lauren Alder Reid
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Executive Office of Immigration Review
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EOIR Docket No. 19-0010: Procedures for Asylum Withholding and Removal

Dear Director Reid:

The Immigration Reform Law Institute ("IRLI") respectfully submits this public comment to the Executive Office for Immigration Review ("EOIR"), in response to the agency's notice of proposed rulemaking ("NPRM") published in the Federal Register. 85 Fed. Reg. 59692 (September 23, 2020).

IRLI is a nonprofit public interest law firm 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 ensure the efficacy of America's comprehensive immigration laws and regulations and the integrity of our nation's enforcement programs. IRLI serves the public interest by monitoring and holding accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI has provided expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public since 1986.

A. The recommended changes to Form I-589 filing requirements are consistent with the Immigration and Nationality Act and are withing existing EOIR authority.

IRLI supports EOIR's suggested rule changes because they will increase the agency's efficiency and bring asylum and withholding regulations within the plain meaning and intent of the Immigration and Nationality Act ("INA"). The changes reflect time limits contemplated by the INA and will ensure that EOIR complies with these obligations. It is in the best interest of both the government and asylum applicants to make these changes because they ensure that EOIR adjudicates asylum and withholding applications in a timely and efficient manner, as is already required by statute.

The proposed changes requiring the alien instead of the immigration court to assume responsibility for filing a complete asylum application reflect a commonsense shift that matches Congress's intent—clearly manifested throughout various provisions of the INA—that the burden is on aliens to file applications and prove their eligibility for asylum and other immigration benefits. The changes create clarity—for aliens and adjudicators alike—and will ensure proper and swift processing of asylum and withholding only proceedings in accordance with the INA. All parties involved have an interest in these limited proceedings being conducted swiftly—EOIR so that it can avoid a backlog of applications, and aliens whose lives are often on hold until their applications are adjudicated. Importantly, the proposed changes in no way prohibit or prevent aliens from filing applications for asylum, withholding of removal, or protection under the Convention Against Torture ("CAT"), and contain exceptions for good cause and exceptional circumstances that give immigration judges discretion to extend timelines in certain situations.

1. The proposed changes are consistent with the established procedures for Asylum and Withholding of Removal.

It is established within administrative law that all executive branch agencies are empowered to establish rules and procedures they determine are necessary to carry out their legislatively mandated purposes. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (explaining that it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."). Through the INA, Congress granted the Department of Homeland Security the power to establish immigration rules and procedures, including rules and procedures for asylum and withholding of removal. *In re S-M-J-*, 21 I. & N. Dec. 722, 723 (B.I.A. 1997) (internal citations omitted) ("Congress incorporated the international obligation into domestic United States law when it enacted the withholding of deportation provision . . . Congress also established asylum as a discretionary form of relief"). The current statutory grounds for asylum were established in 1980 when Congress amended the INA to implement international treaty obligations. Refugee Act of 1980. Pub. L. 96-212, 94 Stat. 102.

Asylum and withholding of removal are discretionary benefits, meaning that even applicants who meet their burden of proving eligibility are not automatically entitled to a positive disposition. 8 U.S.C. § 1158(b)(1)(A) (providing that "the Attorney General *may* grant asylum to an alien."). In fact, there are a number of behaviors that prevent these otherwise eligible aliens from receiving asylum or withholding. *See* 8 C.F.R. § 1208.13(c)(2)(i) (establishing mandatory denials for applicants for certain behaviors, including terrorist activity, serious crimes, persecution, and other national security threats). *See also, Kleindienst v. Mandel,* 408 U.S. 753, 761-62, (1972) ("We thus have almost continuous attention on the part of Congress since 1875 to the problems of

immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now").

Furthermore, when it comes to aliens, they are only entitled to as much due process as has been determined by Congress. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 688 (6th Cir. 2002) (internal citations omitted) ("Whatever process the government affords them, no matter how minimal, illusory, or secret, is due process of law, beyond the scope of judicial review."). It is therefore within the agency's authority to determine that applicants be responsible for filing complete applications and that they do so within a certain time frame. The suggested changes in no way interfere with an alien's ability to apply for asylum or withholding and in fact will benefit aliens and the agency alike by increasing efficiency and shortening adjudication periods.

a. Requiring the alien to be responsible for completing an application is consistent with the INA, which places the burden of proof on aliens throughout its various provisions.

Under the current regulations, the already burdened immigration court is responsible not only for determining an application is incomplete but also for mailing it back to the applicant within thirty days or else the application will be automatically deemed complete. 8 C.F.R. § 1208.3. By deeming such applications complete, some aliens are given a free pass for not complying with the required asylum procedures. Also, moving forward with such applications instead of requiring they be corrected results in an incomplete record for the immigration judge who eventually reviews the application. The proposed changes will encourage aliens to completely fill out their applications the first time and not allow them to skate by on a technicality. The new regulation provides clear rules and instructions to aid applicants—they must file a

complete application and if they do not, they must re-file a completed application within thirty days.

The intention that aliens have the burden of proving their eligibility for immigration-related benefits is manifest throughout the INA. *See, e.g.,* 8 U.S.C. § 1158(b)(1)(B)(i) ("The burden of proof is on the applicant to establish that the applicant is a refugee"); 8 U.S.C. § 1229a(c)(2)(A) (providing that, in admission cases, "the alien has the burden of establishing . . . that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible"). This burden is also a current requirement in withholding cases. 8 U.S.C. § 1229a(c)(4) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien" is both eligible and "merits a favorable exercise of discretion."). *See also INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (quoting *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967) (explaining that "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect."). It is therefore logical and consistent with existing law to put the responsibility of filing a complete application on the alien applicants. Alien applicants have a great incentive to file a complete application—it allows them the opportunity to provide as much relevant information as possible and decreases the likelihood of delays in the proceedings.

Furthermore, the new regulations are consistent with existing regulations that already provide that applicants who fail to comply with deadlines set by the immigration judge will have their applications declared waived or abandoned. 8 C.F.R. § 1003.31(c) ("If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file such an application or document shall be deemed waived."). Courts have considered and upheld the enforcement of deadline consequences and application waivers. *See Kushchak v. Ashcroft*, 366

F.3d 597, 602 (7th Cir. 2004) (upholding the immigration judge's decision to deem the application abandoned because the petitioner missed the deadline); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 756 (8th Cir. 2004) (internal quotations omitted) ("An IJ may set and extend time for filings, and if an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.").

It is thus consistent to determine that when an immigration judge rejects an application for being incomplete such application is waived if not resubmitted within the thirty-day deadline. Also, such consequence should not come as a surprise to applicants who should already be aware of their responsibilities to file complete and timely applications. The proposed change properly puts the responsibility on applicants to provide full and complete information and to respond to all deadlines in a timely manner.

2. The changes are within the established authority already granted to the immigration judges.

a. Immigration Judges have the power to set filing requirements and deadlines; reasonable deadlines are constitutional.

As stated, the Supreme Court has upheld the power of agencies to establish their own rules to carry out their statutory mandate. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544) (explaining that the courts, although empowered to review agency actions, may not "violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'"). Under this principle, it is permissible for EOIR to issue rules of procedure for the limited situation of asylum and withholding only proceedings. The proposed

changes are not new rules but updates to current agency procedures, based on the INA, that already contain provisions that contemplate time limits in multiple aspects of asylum proceedings.

The implementing regulations of the INA established the powers and duties of immigration judges in various proceedings. These regulations command immigration judges, among other things, to "seek to resolve the questions before them in a timely and impartial manner[.]" 8 C.F.R. § 1003.10(b). Current regulations also clearly establish that these judges have control over their own dockets:

> The Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any. If any application or document is not filed within the time set by the immigration judge, the opportunity to file such application or document shall be deemed waived.

8 C.F.R. § 1003.31(c). Finally, an immigration judge has "sole jurisdiction over applications for asylum" proceedings before him. 8 C.F.R. § 1003.14(b). Based on the plain language of these regulations, it is clear that requiring incomplete applications to be completed and returned by the applicant is permissible.

As EOIR pointed out in its proposal, "reasonable filing deadlines do not violate the immigration laws or any international treaty obligations." 85 Fed. Reg. at 59,694. The INA explicitly grants the Attorney General the power to "provide by regulation for any other conditions or limitations on the consideration of an application for asylum." 8 U.S.C. § 1158(d)(5)(B). The proposed changes reflect timelines provided for in the INA itself and are consistent with other time-limit provisions in immigration law that courts have held are within the authority of the agency to issue. *See Gaziev v. Holder*, 490 F. App'x 761, 765 (6th Cir. 2012) ("The IJ did not abuse its broad discretion in conducting its removal proceedings when it set a reasonable deadline

for submitting evidence and enforced that deadline."). *See also Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (explaining that "the application of reasonable procedural requirements" did not violate due process or any international obligations under the Convention Against Torture.); *Sukwanputra v. Gonzales*, 434 F.3d 627, 632 (3d Cir. 2006) (explaining that "the one-year statutory limitations period provided in [8 U.S.C.] § 1158(a)(2) does not violate the Due Process Clause."). It is logical that EOIR implement a deadline for the refiling of incomplete applications—it encourages the alien to respond in a timely manner that ultimately avoids extended delays in the proceedings. IRLI agrees that applicants have strong incentives—obtaining employment authorization and final adjudication of their claims—to respond in a timely manner.

The proposed changes would also amend the powers and duties regulations found at 8 C.F.R. § 1003.10(b) to implement the 180-day adjudication deadline required by the INA. 8 U.S.C. § 1158(d)(5)(A)(iii) ("[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed."). The proposed rule reflects the clear intention of Congress, manifested in the plain language of the INA, by requiring immigration judges to adhere to its adjudication deadline. As has been established, reasonable deadlines in asylum proceedings comport with federal and international law.

b. Supplementing the record is an important power of the immigration judge that the proposed changes will strengthen and clarify.

The power of immigration judges to supplement the record is established by 8 C.F.R. § 1003.36, which provides that "[t]he Immigration Court shall *create and control* the record of proceeding." (emphasis added). It is evident from the regulations governing EOIR that the immigration judges were intended to have broad control with respect to the proceedings before

them. *See* 8 C.F.R. § 1003.10(b) ("[I]mmigration judges shall exercise their independent judgment and discretion and may take any action . . . that is appropriate and necessary for the disposition of such cases."). This obligation to develop the record in the proceedings presents a direct benefit to applicants, because it ensures sufficient reliable information exists on which to base a decision and any subsequent appeals. *See Garcia v. INS*, 208 F.3d 725, 733 (9th Cir. 2000) ("Should the immigration judge fail to fully develop the record, information crucial to the alien's future remains undisclosed."). *See also In re S-M-J-*, 21 I. & N. Dec. 722, 726 (B.I.A. 1997) ("Although the burden of proof in establishing a claim is on the applicant, the Service and the Immigration Judge both have a role in introducing evidence into the record."). In fact, immigration cases have even been remanded with the specific instructions that the immigration judge further develop the record. *See Matovski v. Gonzales*, 492 F.3d 722, 733 (6th Cir. 2007) ("[W]e remand the case to the Immigration Judge for further proceedings to develop the record in order to make this determination."); *Perinpanathan v. INS*, 310 F.3d 594, 597 (8th Cir. 2002) ("[The BIA] remanded the case to the immigration judge to develop the record regarding the petitioner's claim").

The obligation to develop the record reflects that both Congress and EOIR recognized how important it is that immigration judges have sufficient relevant facts to adjudicate the proceedings before them. It is not uncommon for immigration judges to need general background information, especially concerning country conditions with respect to asylum cases, which, if not provided by the applicant, may come from outside sources or even their own experience, in order to assist in their determinations. *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (B.I.A. 1997) ("Although the burden of proof is not on the Immigration Judge, if the background information is central to an alien's

claim and the Immigration Judge relies on the country conditions . . . the source of the . . . knowledge . . . must be made part of the record.").

The proposed changes also reiterate that governmental agencies, particularly those listed, are reliable sources and may have information relevant to the disposition of an applicant's case. 85 Fed. Reg. 59699. The new language clarifies that it is the immigration judge who determines whether such sources are "credible and probative". *Id.* The changes also better explain the practice of developing the record by adding explicit language regarding the authority of an immigration judge to add and consider such "credible and probative" evidence "on his or her own authority" to the powers and duties of immigration judges. *Id.* This provides important guidance to immigration judges when considering what sources to turn to when they need to fulfill their duty to develop the record.

3. The proposed inclusion and definition of the term "exceptional circumstances" will ensure that statutory deadlines are met and provides both the agency and applicants with clear guidance.

IRLI supports the addition of the term "exceptional circumstances" and its definition to 8 C.F.R. § 1003.10(b). The regulation implements the above-discussed 180-day statutory time frame for adjudicating asylum cases found in the INA, which requires the timeline be followed "absent exceptional circumstances." 8 U.S.C. § 1158(d)(5)(A)(iii). It can be clearly discerned from the statutory language that Congress intended EOIR to adjudicate asylum and withholding claims within a certain time frame unless compelling reasons exist to delay. EOIR properly relied on another INA provision, 8 U.S.C. § 1229a(e)(1), which defines "exceptional circumstances" with respect to *in absentia* removal orders.

EOIR properly points to the important legal differences between a showing of good cause and a showing of exceptional circumstances to support its decision to include definitional language in the new regulation. 85 Fed. Reg. at 59,696. Exceptional circumstances is a higher standard than good cause, and it is thus important that the regulation make that distinction so that the immigration judges and applicants know what to expect during asylum proceedings. *See United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991) (explaining that exceptional circumstances require "a unique combination of circumstances giving rise to situations that are out of the ordinary"). Because of the need to stay within statutory timelines, it is essential that the immigration courts move ahead with proceedings as quickly and efficiently as possible. The inclusion of this new definition makes clear that only certain serious and uncommon situations will be sufficient to delay the proceedings, and that requirement and will likely decrease the number of non-meritorious attempts to delay such proceedings.

B. Recommendation.

IRLI supports the proposed rule and recommends its implementation. The basis, and often exact language, for the proposed changes is found in both the INA and existing regulations. The reasons and authority provided by EOIR thus support the proposed changes, which (as shown above) will have positive impacts on both the agency and alien applicants.

Respectfully submitted,

Immigration Reform Law Institute
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