September 25, 2020

Department of Justice, Executive Office for Immigration Review
Via electronic submission

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

The City of New York ("the City") submits this comment to oppose the Department of Justice ("DOJ"), Executive Office for Immigration Review's ("EOIR") proposed rule entitled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," which was published in the Federal Register on August 26, 2020 ("Proposed Rule"). The Proposed rule will have a detrimental impact on the City by compromising access to justice and due process for immigrant New Yorkers and undermining public trust in the legal system.

The New York City Mayor's Office of Immigrant Affairs ("MOIA") and the Department of Social Services ("DSS") contributed to this comment. MOIA promotes the wellbeing of the City's immigrant residents through programs, policy recommendations, and community engagement efforts that facilitate their successful integration into the civic, cultural and economic life of New York. Using this multipronged approach, MOIA works to eliminate barriers to opportunity, promote immigrant rights, expand civic engagement, and further the empowerment of immigrant New Yorkers. This includes supporting immigrant access to justice. DSS includes the City's Office of Civil Justice, which operates a range of City-funded immigration legal services programs for thousands of immigrants in New York City, including legal services for immigrants in cases in the immigration courts.

As a city that takes pride in and depends on the myriad contributions of immigrant New Yorkers, we have a vested interest in ensuring that our noncitizen residents have effective legal support in navigating an ever-changing and complicated legal process, and that the legal process is fair. As such, the City objects to the Proposed Rule, because it does not ensure fairness, but rather, severely dilutes due process protections for noncitizens.

The Proposed Rule threatens to gut important due process protections from noncitizens in the appellate process before the Board of Immigration Appeals (BIA), and before the immigration court in many ways, including by:

- stripping the BIA and immigration court judges' authority to administratively close cases and thereby properly prioritizing cases on their dockets (Proposed Rule at 8 CFR §§ 1003.1(d)(ii) and 1003.10);

- preventing the BIA from remanding cases for further fact-finding or in "the totality of circumstances" except in very limited circumstances (Proposed Rule at 8 CFR §§ 1003.1(d)(3)(iv); (d)(7)(ii));
- allowing the BIA to remand or reopen a case when the government presents negative evidence against an immigrant but preventing the same when new favorable evidence is presented by the immigrant except under strict limitations (Proposed Rule at 8 CFR §§ 1003.1(d)(7)(v); 1003.2(c)(3));
- establishing limitations on timeframes for adjudicating appeals (Proposed Rule at 8 CFR § 1003.1(e)(8));
- requiring simultaneous briefing by the government and immigrants facing removal while not in custody, eliminating the opportunity for immigrants to fully understand and respond to the government's arguments for their removal (Proposed Rule at 8 CFR § 1003.3(c)); and
- further politicizing the immigration legal system by creating a system of review by a political appointee (Proposed Rule at 8 CFR §§ 1003.1(e)(8)(v); 1003.1(k)).

These attacks against due process will adversely impact hundreds of thousands of immigrants, their communities, and the cities that depend on their contributions. For these reasons and those elaborated upon below, we call upon the DOJ to immediately withdraw the Proposed Rule and preserve due process protections in the immigration legal system.

New York City has a strong vested interest in welcoming and supporting immigrants because they are integral to the city.

The City enjoys a proud legacy as the ultimate city of immigrants. Almost 40% of the City's population, around 3.1 million people, are immigrants. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at least one immigrant.[1] Immigrants contribute to the City in myriad ways and are embedded in the social fabric of the City.

Of late, we have been reminded anew of the enormous contribution of immigrants, as many have been working on the front lines as essential workers at the height of the COVID-19 global pandemic. Immigrants make up 58% of the essential workers that help all New Yorkers meet basic needs like food and health care.[2] In New York City, immigrants make up 53% of nurses, 81.5% of home health aides, 65.5% of cooks, 53.4% of janitors and building cleaners, and 87.0% of laundry and dry-cleaning workers.[3] 19% of frontline workers are noncitizens; over a quarter of food and

[1] New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2019*, 12, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-AnnualReport-for-2019.pdf ("MOIA Annual Report 2019").

[2] Declaration of Sabrina Fong, Deputy Director of Research and Policy Advisor, New York City Mayor's Office of Immigrant Affairs, *Department of Homeland Security, et al., v. New York, et al.*, No. 19A785 (U.S. April 13, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19A785/141515/20200413153014307_19A785%20Motion%20to%20Temporarily%20Lift%20or%20Modify%20Stay.pdf.

[3] *Id.*

drug store, 22% of social service, and a striking 36% of cleaning service employees do not have citizenship status.[4]

This Proposed Rule impedes the ability of these immigrants to make these valuable and critical contributions to localities such as the City because it stifles their access to due process and their opportunity to pursue a full and fair appeals process. Notably, this Proposed Rule would have a detrimental impact on individuals of all immigration statuses, including those with Lawful Permanent Resident status. These longtime residents on the path to citizenship could be wrongfully removed from the country, not because they do not warrant relief, but rather because these newly proposed changes would prevent them from fully arguing their cases. By shortening the time these residents have to submit their appellate briefs, limiting the instances in which the BIA can remand or reopen a case, and eliminating administrative closure, our immigrant residents are left with fewer safeguards in fighting for the opportunity to stay with their families and to continue contributing to our City.

For almost a century, our country's legal system, including the highest court of the land has recognized deportation as "a particularly severe penalty,"[5] as it deprives one of "all that makes life worth living."[6] This Proposed Rule severely hinders our City's ability to support our residents in their fight to stave off an outcome that would separate them from their loved ones and "amount[s] to lifelong 'banishment or exile'" from the country and city they consider home.[7] Our City is strong because of our residents' ability to integrate and contribute. In fact, the City's economic health largely depends on the contribution of immigrants.[8] Without a meaningful and fair immigration court and appellate process, we face the dire possibility of losing residents who have been key to keeping the City afloat during this global pandemic.

New York City has a strong and vested interest in protecting the efficacy of its investment in legal services.

Recognizing that New York is a city that thrives because of our immigrant communities, this mayoral administration has increased and enhanced access to legal assistance for immigrants by investing over $30 million dollars in a continuum of free legal service programs for immigrant New Yorkers for fiscal year 2020.[9] Together with the New York City Council, the City has invested over $50 million in immigration legal services, with over $20 million dedicated to helping immigrant New Yorkers facing deportation proceedings.[10]

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[4] Office of the New York City Comptroller, *New York City's Frontline Workers*, Mar. 26, 2020, *available at* https://comptroller.nyc.gov/reports/new-york-citys-frontline-workers/#Who_are_our_Frontline_Workers.
[5] *Jae Lee v United States*, 137 S. Ct. 1958, 1968 (2017).
[6] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
[7] *Sessions v. Dimaya,* 138 S. Ct. 1204, 1213 (2018), quoting *Jordan v De George,* 341 U.S. 223, 231 (1951)).
[8] Office of the New York State Comptroller, *The Role of Immigrants in the New York City Economy*, Nov. 2015, *available at* https://www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2018-11/report-7-2016.pdf ("Immigrants account for 43 percent of New York City's work force and nearly one-third of the City's economic output.").
[9] New York City Office of Civil Justice, *2019 Annual Report*, *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf.
[10] *Id.*

In September 2019, the City partnered with New York State's Office of New Americans ("ONA") to fund the Rapid Response Legal Collaborative ("RRLC"), a coalition of immigration legal service providers that provide legal assistance to those detained, or at imminent risk of detention and deportation, who may not have the right to see an immigration judge or are otherwise facing a fast-track to removal.[11] This coalition and subsequent investment in it was created in response to a surge in Immigration and Customs Enforcement ("ICE") raids that were striking fear in communities and removing long-time residents. The City's investment in the RRLC has not only helped increase legal services providers' capacity to respond to raids and emergency cases, but also helped protect our communities better during a time when immigrants are being targeted and families are being separated through increased numbers of detentions and deportations.[12] Since its inception, the RRLC has screened over 200 people for relief and prevented several New Yorkers from being separated from their families by helping them file motions to reopen or reconsider, habeas petitions, and other applications for relief.

The Proposed Rule undermines the City's investments by inhibiting its funded legal services providers from representing noncitizen clients effectively by unnecessarily shortening appeals deadlines and effectively preventing immigrants from pursuing certain forms of relief. First, the Proposed Rule would set the BIA apart from almost every other appellate review system by imposing simultaneous briefing on the government and immigrants in non-detained proceedings. In any other appellate system, the appellant files a brief and the appellee is given the chance to meaningfully respond to these arguments. The Proposed Rule would significantly disadvantage immigrants and their counsel by forcing them to file a brief without knowing what arguments the government will advance against them. The Proposed Rule would also drastically decrease the extensions for briefing the BIA can grant from 90 to 14 days. These changes will dramatically shorten the appeal timeline, which in many cases will lead to legal service providers becoming suddenly and unpredictably overburdened and, more worryingly, could lead to fewer immigrants being able to properly appeal their cases, especially those without counsel.

Second, by stripping the BIA and immigration court judges' authority to administratively close cases, the Proposed Rule will result in immigrants who are eligible for relief being ordered deported. There are certain types of relief—many of them humanitarian and family-reunification based, like Special Immigrant Juvenile Status ("SIJS"), U visas, T visas, and provisional waivers of unlawful presence—for which USCIS has exclusive jurisdiction, meaning an immigration court or BIA judge cannot grant the relief even if an immigrant is eligible. Currently, judges often administratively close cases in which an immigrant can avail themselves of these types of relief and terminate the case once USCIS grants the relief. If the Proposed Rule were implemented and judges no longer had the authority to administratively close cases, these immigrants may be at risk of being ordered removed while their relief application is pending at USCIS. The Proposed Rule would essentially foreclose these humanitarian and family-reunification based forms of relief from many immigrants and force legal service providers to suddenly change their legal strategies. Legal

[11] New York City Mayor's Office of Immigrant Affairs, *MOIA & ONA Announce $1M Investment in Rapid Response Legal Services for Immigrants Facing Imminent Deportation*, Sep. 26, 2019, *available at* https://www1.nyc.gov/site/immigrants/about/press-releases/20190926-rapid-response-legal-services.page.
[12] *Id*.

service providers will therefore be required to make significant new investments in retraining and new systems.

The consequences of deportation are horrific for individuals and their families—resulting in permanent separation and potential return to unsafe conditions—and are hugely detrimental to our communities and the City as a whole. Through its historic investments in programs like RRLC and others, the City has recognized the paramount importance of ensuring that our residents have access to a fair process and to all possible avenues of relief in immigration court proceedings, including humanitarian relief like SIJS and U and T visas, forms of relief explicitly created by Congress to shelter specific populations who we as a county, our City being no exception, have a vested interest in protecting. The Proposed Rule will significantly weaken the impact of New York City's historic investment in legal services and place an undue strain on the City's legal service partners by requiring legal service providers to expend extensive time and resources to retrain attorneys on these changes to immigration court and appellate procedure and upending their case management systems.

The Proposed Rule undermines public trust in legal systems and government, negatively impacting New York City.

Government action at any level that undermines fairness in a legal system threatens to break the community's trust with all levels of government. The City has invested significant time and resources to building trust within immigrant communities for our local government, law enforcement, and legal institutions. Should the Proposed Rule go into effect, it would detrimentally impact the trust immigrant communities have in the immigration legal system and by extension, other government, law enforcement, or legal systems.

The Proposed Rule undermines fairness in the immigration legal system in fundamental ways that put a thumb on the scale towards removal and disadvantages immigrants. Even more alarming, the Proposed Rule impermissibly politicizes the immigration legal system by creating mechanisms through which a political appointee[13] can take over appeals and review final BIA decisions.

First, the Proposed Rule creates double standards that favor the government over immigrants. The proposed changes would allow the government to obtain a remand without making a formal motion and to move for reopening a case without any limitations, but would remove most mechanisms through which immigrants can request remand or move for reopening. The Proposed Rule would also prevent the BIA from remanding a case when an immigrant presents new evidence on appeal, but allows such an outcome for the government. Moreover, the proposed changes would take away the BIA's authority to remand cases on its own authority—*sua sponte*—based on changes in law or facts or to prevent a clear injustice. These changes will result in obviously unjust outcomes. For example, the BIA would be prohibited from remanding a case *sua sponte* even if there was a change in the law that would make the immigrant newly eligible for

[13] The insertion of the EOIR Director into immigration appellate procedures would be in addition to the Attorney General, who already has the authority to certify BIA decisions to himself for review. 8 C.F.R. § 1003.1(h) (2009).

relief, but if a change in law would make the immigrant deportable, the government would be able to obtain a remand.

The Proposed Rule makes similar double standards for motions to reopen, creating a bias against the immigrant and for the government. As it stands, there are no time or numerical limitations on motions to reopen filed by the government, but immigrants will be subject to these strict limitations. This is already unfair. Yet, the Proposed Rule would further tip the scale by removing the BIA and the immigration judge's *sua sponte* authority to grant motions to reopen at any time, which is the only way immigrants can avail themselves of reopening in circumstances that promote justice and fairness such as when an immigrant discovers evidence previously unavailable during the time limitation for motions to reopen or has since become eligible for relief.

The Proposed Rule jeopardizes judicial independence and finality by allowing a political appointee to personally adjudicate cases and review BIA decisions. This rule joins numerous attempts by the federal administration to exact its political agenda by politicizing the BIA.[14] The Proposed Rule requires that appeals cases that have been pending for more than 335 days to be referred to the EOIR Director, a political appointee, for him to adjudicate. By the end of the last fiscal year, there were 66,989 cases pending before the BIA,[15] and the BIA has 23 Member judges. For all pending cases to be adjudicated within the 335-day timeline, each Member would have to complete over 2,900 cases per year, which is simply not feasible. This means that a political appointee will adjudicate hundreds if not thousands of cases.

Further, if implemented, the Proposed Rule would permit immigration judges who disagree with the BIA's decision to remand a case back to them to certify those cases to the EOIR Director. The DOJ claims that this provision is supposed to promote "quality assurance," but, in reality, it undermines the integrity of the BIA. In addition, this provision would also disturb finality and potentially prolong many cases essentially achieving the opposite of what the DOJ claims this Proposed Rule is intended to achieve—finality and efficiency.

The BIA and EOIR are part of an adjudication system. As such, the DOJ should not apply a different, favored standard to only one of the parties and allow a political appointee to usurp its neutrality. Injecting so much unfairness into the immigration legal system will affect the City's immigrant residents' perception and experience of fairness in legal systems in general and contribute to mistrust in government as a whole. The City has a vested interest in all of its residents, regardless of immigration status, being able to avail themselves of legal systems to vindicate their rights. The City has invested a lot into building up fairer local adjudication systems. For example,

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[14]Tanvi Misra, *DOJ Memo Offered to Buy Out Immigration Board Members*, Roll Call, May 27, 2020, *available at* https://www.rollcall.com/2020/05/27/doj-memo-offered-to-buy-out-immigration-board-members/; Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, Jun. 9, 2020, *available at* https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/; Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, May 4, 2020, *available at* https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/; Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, San Francisco Chron., Aug. 23, 2019, *available at* https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php.

[15] *See* DOJ, *EOIR Adjudication Statistics*, Jul. 14, 2020, *available at* https://www.justice.gov/eoir/page/file/1248501/download.

the City encourages all residential tenants facing the threat of an eviction to participate in the housing court legal process by providing access to legal assistance to all such tenants, under the nation's first right-to-counsel law for tenants,[16] thereby fostering trust in the rule of law and the courts for citizens and noncitizens alike. Further, the City wants to encourage all residents, especially vulnerable populations like low-income individuals or immigrants, to come forward and use legal mechanisms to fight against unjust outcomes, including discrimination or labor violations.[17] If residents lose faith in legal systems or, worse, become afraid of them, the City's investments in making fairer local legal systems or encouraging participation of residents in legal systems will negatively be impacted.

Conclusion

Although the stated purpose of the Proposed Rule is to ensure efficiency and finality in immigration court decisions, it achieves neither, and, as with many pieces of regulation proposed by this Administration, "efficiency" is simply another term for expediting removal without regard to due process protections. Access to fair and just immigration proceedings are crucial first and foremost for the benefit of noncitizens fighting for the right to stay with their families and in the country they call home. For many immigrants in removal proceedings, access to counsel and a fair hearing could make the difference between continuing their contributions to their families and communities, like the City, and having to return to a place where they have little to no ties and/or may face dangerous and uncertain conditions, even persecution. For example, many of the immigrant New York City residents who will be affected by this rule are the primary earners or caregivers in their families; they are tax payers and workers with longstanding ties with their employers and communities.

When the consequences of these proceedings are so significant and life-altering, there must be no doubt as to the due process protections and fairness inherent in the adjudication. The Proposed Rule would corrode the due process protections afforded immigrants currently in immigration court and at the BIA and would inject bias and politics into what is supposed to be a fair and neutral system. For these reasons, and those articulated above, the Proposed Rule should be withdrawn.

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[16] NYC Office of Civil Justice *2019 Annual Report*, *supra* note 9.

[17] *See generally* New York City Administrative Code § 8-107; New York City Commission on Human Rights, *Legal Rights for Immigrant and Religious Communities and Communities of Color in NYC*, last visited Sep. 24, 2020, *available at* https://www1.nyc.gov/site/cchr/media/you-have-rights.page#publications.