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Re: Department of Justice, Executive Office for Immigration Review, EOIR Docket No. 19-0410, RIN No. 1125-AB03, A.G. Order No. 4910-2020, 85 FR 229, Good Cause for Continuance in Immigration Proceedings - Public Comment Opposing the Proposed Rule

Dear Assistant Director Reid:

The Immigrant Legal Resource Center (ILRC) submits this comment on the proposed rule, issued by the Executive Office for Immigration Review, Good Cause for Continuance in Immigration Proceedings; RIN 1125-AB03; EOIR Docket No. 19-0410; A.G. Order No. 4910-2020 (November 27, 2020) and urges that the proposed rule be withdrawn.

The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission has been to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule. The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases in order to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and thousands of practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedure through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes Removal Defense: Defending Immigrants in Immigration Court, a manual which provides a thorough guide to the immigration court process with practice tips. In addition, the ILRC has particular insight into how immigration court practice affects survivors of domestic violence and crime. We publish practice manuals on U visa and VAWA benefits, which provide step-by-step guidance for preparing applications for U-visa, VAWA, and related benefits. Each manual has sections on representing survivors in removal proceedings.

The ILRC strongly opposes the proposed rule, as it is an unlawful attempt to restrict due process for immigrants and curb immigration judges' authority.

I. The Time to Comment is Insufficient and Violates Executive Order 12866

This rule marks a drastic departure from current immigration court practice. Pursuant to Executive Order 12866, agencies which proceed with notice and comment rulemaking under the Administrative Procedure Act (APA) should "in most cases" provide "a comment period of not less than 60 days," in order to "afford the public a meaningful opportunity to comment on any proposed regulation." The length of the comment period should be related to the overall complexity of the regulation, with short comment periods justified only for simple rulemaking. However, despite the sweeping scope of the changes in the proposed rule, the public was only provided 30 days to comment. The proposed rule is also inaccurately deemed "not significant" in the preceding explanation, even though it will cause a significant negative impact on the ability of respondents to obtain representation in immigration proceedings, as well as contravening Congressional intent with regard to protection from removal for domestic violence survivors and other crime victims.

Foregoing a 60-day comment period has had an enormous effect on the ability of organizations and individuals to properly respond to this comment, especially given other immigration-related proposed regulations with overlapping comment periods.[1] Indeed, on the same day that this proposed regulation was published, the Department published an additional substantive and far reaching proposed regulation: Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, which will also have significant impacts.

In addition, the ongoing COVID-19 pandemic has created substantial difficulties for commenters, a fact that other agencies have acknowledged when granting significant extensions of comment periods.[2] Furthermore, due to the holidays, many businesses, including the ILRC, are closed in the several days leading up to the comment deadline. As such, a 30-day comment period, during a pandemic, does not provide a meaningful opportunity to provide comments. These comments do not represent the full comments of the ILRC. Should the comment period be extended to appropriately reflect the breadth of the new rule, we would have more input. The Department has provided no reasonable explanation for the short timeframe given the broad-sweeping nature of the rule, the lack of urgency, and the current health crisis.

II. The Proposed Rule Would Have a Devastating and Unconstitutional Impact on Respondents' Due Process Rights in Immigration Proceedings

This proposed regulation is an attempt to strip noncitizens of their right to due process by further limiting meaningful representation in immigration court. Continuances are crucially important for individuals in removal proceedings. They allow a reasonable amount of extra time for critical matters like finding an attorney, determining whether removability should be contested, gathering necessary supporting evidence, and preparing their case, before both pleading to a Notice to Appear (NTA) and the final merits hearing.

If finalized, the rule will make it more difficult for individuals in immigration proceedings to obtain reasonable continuances. The proposed changes will have a chilling effect on respondents' ability to secure legal representation, thereby reducing the likelihood of winning immigration relief. Additionally, the rule does not allow

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[1] *See, e.g.,* Department of Homeland Security, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (Sept. 11, 2020); Department of Justice, Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 59692 (Sept. 23, 2020). AILA Doc. No. 20092831. (Posted 9/28/20).

[2] *See e.g.,* Bureau of Consumer Financial Protection, Debt Collection Practices (Regulation F); Extension of Comment Period, 85 Fed. Reg. 30890 (May 21, 2020) (agreeing that "the pandemic makes it difficult to respond to the SNPRM thoroughly" and providing an additional 90 days to comment on a proposal "in light of the challenges posed by the COVID-19 pandemic").

for sufficient attorney and respondent case preparation time, and will cause a severe adverse impact on survivors of domestic violence and crime who seek VAWA and U visa benefits.

a. The Proposed Changes Will Have a Chilling Effect on Respondents' Ability to Obtain Representation

The proposed regulation will create additional hurdles for noncitizens seeking legal representation, in addition to the already existing financial and language barriers, by giving respondents little to no time to obtain an attorney. Furthermore, it will make it nearly impossible for detained people in removal proceedings to obtain lawyers.

Under the proposed rule, immigration judges would not be permitted to grant even a single continuance to obtain an attorney if 30 days have passed since the Notice to Appear (NTA) was served, regardless of the circumstances. Even within 30 days of service of the NTA, a respondent would only be permitted a *maximum* of 30 days to obtain representation. This rule would, in effect, eliminate the right to counsel, especially for detained individuals.

Thirty days is simply not enough time to obtain legal representation in immigration proceedings. Only about 14 percent of individuals in immigration detention are represented.[3] This is because many attorneys will not take detained cases, or they charge higher fees that are inaccessible to low-income individuals, as the cases require much more time and resources than others, given the logistical hurdles. Detained individuals are often held in facilities in rural locations, several hours and hundreds of miles from the nearest city where most legal service providers are based. Phone calls in immigration detention are not confidential, and often extremely difficult to schedule, so attorneys must travel to the detention center to talk to a client. The wait time for confidential in-person visitation can be hours and subject to the scheduling vagaries of individual detention facilities. Non-profit immigration legal service providers have limited funding and resources, so they may take few or no cases for detained individuals.

Even for non-detained individuals, 30 days is often insufficient, particularly for respondents in small cities and rural areas. Many attorneys may only have availability for initial consultations a few weeks out and require substantial down payments to initiate representation. Non-profit legal service providers often have long wait lists for consultations or representation, given their limited resources. The authors know of many occasions where respondents have called every nonprofit organization on the EOIR pro bono legal service provider list and have not found anyone willing or able to take on their case. Respondents then typically call busy private attorneys and may not hear back for several days, just to schedule a future initial consultation, without knowing if that attorney will in fact take on representation. Thus, finding representation within 30 days can be impossible, especially for low-income immigrants.

EOIR's claim that most non-detained respondents are represented is simply false. According to Syracuse University's Transactional Records Access Clearinghouse (TRAC) data, less than half of respondents nationally are represented in immigration court, demonstrating that it is already challenging to obtain legal counsel in removal proceedings.[4] In fact, individuals in smaller cities are four times less likely to obtain legal representation than those in major cities.[5]

[3] "A National Study of Access to Counsel in Immigration Court," University of Pennsylvania Law Review 164, no. 1 (December 2015): 1–91.

[4] TRAC, "State and County Details on Deportation Proceedings in Immigration Court" (2020), available at https://trac.syr.edu/phptools/immigration/nta/. TRAC is a comprehensive, nonpartisan, and independent source for information and data related to U.S. federal immigration enforcement.

[5] "A National Study of Access to Counsel in Immigration Court," University of Pennsylvania Law Review 164, no. 1 (December 2015): 1–91.

Even in Houston, the fourth largest city in the country, less than half of non-detained individuals were represented in fiscal year 2018.[6]

Having legal representation in immigration proceedings can mean the difference between life and death for immigrants fleeing persecution, insecurity, and poverty. Given the complexity of immigration law, noncitizens with legal counsel are significantly more likely to win their cases in immigration court.[7] In fact, detained individuals with representation are ten times more likely to win their cases.[8] Ensuring that individuals have sufficient time to obtain counsel also allows immigration judges to preside over cases more effectively, as represented respondents are more likely to appear in court and understand the removal process – a benefit for all parties.

b. The Proposed Changes Do Not Permit Sufficient Time to Prepare and Present Cases

The proposed rule does not allow sufficient time for attorneys and respondents to adequately prepare cases. As a result, the proposed rule severely undercuts attorneys' ability to advocate zealously for clients and provide quality legal representation.

Under the proposed regulation, an immigration judge may only grant a single 14-day continuance for attorney or respondent preparation time, which is available prior to responding to an NTA and entering pleadings. Fourteen days is not enough time to prepare and fully present a case, especially a complex case. When an attorney is retained for an immigration case, significant research and preparation is required. An attorney may need to submit a Freedom of Information Act (FOIA) request to obtain the client's A-file, request criminal records, and/or obtain civil documents. If the client has had history with the immigration court, the attorney may need to review the record of proceedings before moving forward. FOIA requests take several months to process, even if submitted as an "expedited" Track 3 request with the National Records Center.

There are several instances where a longer continuance is necessary, appropriate, and materially impacts the result of proceedings. For example, DHS has frequently alleged entry without inspection and inadmissibility charges on NTAs for respondents who actually last entered the United States with a visa. In this scenario, the respondent must have sufficient time to obtain evidence of the lawful admission to rebut the allegations and charge. Not only is this important for pleadings, but it has a particular impact on respondents who are adjustment of status eligible due to the lawful admission. If the respondent is not given enough time to obtain that evidence, the court may erroneously sustain the charge of inadmissibility and pretermit an application for adjustment of status, resulting in an appeal.

Furthermore, under the proposed rule, continuances for attorney preparation are only available prior to entering pleadings. If a respondent must obtain a new attorney after pleadings have been taken, the newly retained attorney will be unable to obtain even a brief continuance to prepare. In particular, pro bono attorneys representing asylum-seekers may need additional time to prepare and become familiar with complex immigration laws and the barrage of recent developments in asylum law.

There are numerous circumstances in which an attorney and/or respondent needs more than 14 days to prepare. Placing a cap on preparation time will only lead to ill-prepared cases and frustration among immigration judges.

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[6] Houston Immigration Legal Services Collaborative, Communities Torn Apart: The Impact of Detention and Deportation in Houston, (Nov. 2020). https://www.houstonimmigration.org/communitiestornapart/.

[7] "A National Study of Access to Counsel in Immigration Court," University of Pennsylvania Law Review 164, no. 1 (December 2015): 1–91.

[8] *Id.*

III. The Proposed Rule Further Adversely Impacts the Due Process and Statutory Protections of Two of our Most Vulnerable Populations, Domestic Violence Survivors and Other Victims of Crime

The proposed rule will have a severe adverse impact on survivors of domestic violence and other serious crimes who seek VAWA and U visa benefits. Restricting continuances in removal proceedings where such "collateral" relief is pending unfairly punishes survivors contending with prolonged delays in USCIS adjudications of VAWA and U survivor benefits. Such restrictions also contravene the expressed intent of Congress in shielding survivors from deportation. Until recently, a long history of agency interpretations and precedent adhered to the intent of the VAWA and U visa legislation, but in contrast, this proposed rule would undermine the protections intended for survivors. In fact, the rule downplays the impact of deportation on survivors and the very real harsh and traumatic consequences the legislation was intended to prevent.

a. The VAWA and U Visa Adjudicatory Process and Backlog Creates an Ongoing Need for EOIR Continuances for Survivors of Domestic Violence and Other Serious Crime

The proposed regulation will have a particularly adverse effect on survivors of domestic violence and other serious crime, as it prohibits continuances for individuals seeking deferred action, which includes VAWA and U visa applicants, and penalizes them for USCIS adjudicatory delays beyond their control. Though the proposed rule details specific considerations for continuances related to collateral applications pending before USCIS, it disregards the circumstances of individuals applying for survivor-based benefits, even if there is a clear prima facie eligibility finding. Furthermore, USCIS has slowed down its adjudications of VAWA and U visa petitions significantly in recent years, which in turn creates the necessity for continuances of removal proceedings.

The VAWA legislation allows for certain survivors of domestic violence to self-petition and apply first for "deferred action" and later for adjustment of status to permanent residence, if eligible. For these applicants, after filing their I-360 self-petition, the first adjudicatory decision after background checks is a "prima facie" finding by USCIS, issued to those likely to later receive a favorable adjudication. When a VAWA self-petition is approved, the applicant is accorded "deferred action" and allowed to remain in the U.S. with employment authorization. Such deferred action may be extended indefinitely, and does not require that the survivor later be found eligible for adjustment to permanent residence. Similarly to I-130 visa petitions, an immigration judge has no authority over the I-360 self-petition; USCIS has original and sole jurisdiction.[9]

Due to lengthy adjudication times for USCIS generally, even before the pandemic, VAWA applications often took one and a half to two years to adjudicate. Presently the authors are aware of concurrently filed adjustment of status applications pending much longer, in at least one case almost five years, despite an approved I-360 and clear eligibility for adjustment of status. Current published VAWA I-360 processing times for the USCIS Vermont Service Center, the only USCIS Service Center that processes VAWA self-petitions, is currently 17-22 months, and processing times for VAWA related I-485s (applications for permanent residence) are not even listed.

This proposed regulation would punish VAWA applicants in removal proceedings for the adjudicatory process laid out by Congress in the VAWA legislation and the increasingly slow-paced USCIS adjudication of VAWA self-petitions. Such a result is a completely untenable and contrary to the intent and purpose of the VAWA statute to protect domestic violence survivors from deportation.

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[9] *See* 8 C.F.R. §§ 103.2; Immigration Court Practice Manual 1.5(b).

The U visa adjudicatory process also currently occurs in phases. The current processing time for actual U visa nonimmigrant status, available to victims of qualifying crimes who assisted law enforcement with the investigation and/or prosecution of the qualifying criminal activity, is more than ten years due to the statutory yearly visa cap. As a result, tens of thousands of U visa petitioners must first be put on a visa waitlist created by USCIS.[10] Once determined to have a prima facie approvable application, applicants receive a grant of deferred action. When a visa number is available, applicants are removed from the waitlist and granted a U nonimmigrant visa, valid for four years. After three years in U visa status, the U recipient can apply for permanent residence. As of December 2020, USCIS estimates it is taking almost *five years* (57 – 57.5 months) to process U visas for the first phase in the adjudicatory process – a finding that the application is prima facie approvable and results in the initial grant of deferred action.[11] While the backlog illustrates the success of the U visa as a tool for law enforcement, USCIS's lengthy delay in placing U visa applicants on the waitlist and according them deferred action leaves many crime victims subject to deportation under the proposed rule. Therefore, the extensive and growing U visa backlog is, if anything, an additional reason that EOIR should not restrict the grant of continuances to U visa applicants.[12]

b. The Proposed Regulation Contravenes Congressional Intent as Set Out in VAWA and TVPRA Legislation Protecting Immigrant Survivors

It is clearly the intent of Congress that those immigrants eligible for VAWA self-petitions, as well as "U" victim of crime visas, be shielded from removal until USCIS adjudicates their petitions. Many respondents in removal proceedings are eligible only for relief under the VAWA and U visa statutes, so denying continuances would effectively deny their ability to obtain relief, all but ensuring their deportation.

Congress created VAWA and the "U" and "T" visas as part of a decades-long legislative effort to encourage survivors of domestic violence specifically and subsequently immigrant crime and trafficking victims generally, to seek safety and justice by reporting and cooperating in the investigation and prosecution of crime.[13]

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[10] *See* Number of Form 1-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009-2019 (Fiscal Year 2019, Quarter 2), United States Dep't Of Homeland Security, Citizen and Immigr. Services (2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_isastatistics_fy2019_qtr2.pdf.

[11] *See* USCIS Processing Times*,* Form: 1-918, Field Office or Service Center: VSC, United States Dep't Of Homeland Security, Citizen and Immigr. Services (last accessed December 15, 2020), https://egov.uscis.gov/ processing-times.

[12] *See Matter of Alvarado-Turcio*, A201-109-166 2, 3 (BIA Aug 17, 2017) https://www.scribd.com/document/360077591/Edgar-Marcelo Alvarado-Turcio-A201-109-166-BIA-Aug-17-2017 (recognizing the significant U visa backlog and holding that "processing delays are insufficient, in themselves, to deny an alien's request for a continuance"); *see Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (holding that "delays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request."); *see Ahmed v. Holder*, 569 F.3d 1009, 1013 (9th Cir. 2009) (noting "concern about blaming a petitioner for an administrative agency's delay in processing an employment-based visa application").

[13] The legislative history accompanying these bills also demonstrates that Congress intended to alleviate the barriers that immigrant victims of violent crimes face and specifically address the fear of deportation that prevents many from reporting abuse. Senator Patrick Leahy explained that the U visa "ma[d]e it easier for abused women and their children to become lawful permanent residents" and ensured that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy). Senator Paul Sarbanes stated that this expansion of the Violence Against Women Act of 1994 "will also make it easier for battered immigrant women to leave their abusers without fear of deportation." 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes) (emphasis added); *see also* 146 Cong. Rec. H8094 (2000) (statement of Rep. John Conyers) ("There are still demographic groups that need better access to services and the criminal justice system. Predominantly among them are people who have not had their immigrant status resolved and are not yet citizens but are subject to lots of unnecessary violence."). More recently, during the debate on the Violence Against Women Reauthorization Act of 2013, Senator Amy Klobuchar described the importance of the U visa program

Those efforts first resulted in the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (Sept. 13, 1994). And in 2000, Congress expanded the program to include additional crime victims eligible for U and T visas. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513,114 Stat. 1464 (Oct. 28, 2000). The U visa offers a pathway to secure immigration status for victims of serious crimes who are helpful to law enforcement in the investigation or prosecution of their perpetrators. 8 U.S.C. § 1101(a)(15)(U)(i).

Congress' clear intent in creating VAWA self-petitioning and the U and T visas was to overcome noncitizen victims' fears that leaving their abusers and/or contacting law enforcement would result in their deportation.[14]

In fact, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, (TVPRA) reauthorized VAWA and specifically codified into the statute the right of a victim of crime or trafficking to apply for a "continuance or abeyance of removal proceedings" despite any denial by DHS of an administrative stay of removal. *See* INA § 237(d)(2). The TVPRA is also worded in such a way that a grant of "deferred action" is clearly also intended to halt removal proceedings. "The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, *deferred action*, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States." *Id.* (emphasis added).

Yet the proposed regulation simply ignores Congressional intent by essentially eliminating continuances for VAWA and U visa petitioners, making it more likely that the survivors applying for such benefits will be deported while their petitions remain pending.

c. Agencies Have Historically Interpreted VAWA and TVPRA to Provide Broad and Generous Protections from Removal

Over the years since Congress created VAWA and the U and T visas, legacy INS, USCIS and Immigration and Customs Enforcement (hereinafter "ICE"), have in the past implemented several systems to ensure legitimate domestic violence, crime and trafficking victims are not removed while awaiting decisions on their USCIS affirmative cases. These agency actions were necessary to give effect to congressional intent. However, this regulation, together with significant ICE policy changes, will eviscerate the agencies' historical efforts to ensure immigrant survivors of domestic violence and other crimes are not removed while their cases are pending with USCIS.

Because of the Congressional cap on U visas, the agency created a regulatory "waitlist" for U visa approvable applicants who would otherwise immediately receive a visa but for the yearly cap. 8 C.F.R. § 214.14(d)(2). USCIS grants deferred action and attendant work authorization to those approvable U visa applicants on the waitlist. *Id*. USCIS explained that it created the wait list "to balance the statutorily imposed numerical cap against the dual goals

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from a former prosecutor's perspective, recounting several cases where the perpetrator threatened to deport the immigrant victim if the victim came forward to law enforcement. 159 Cong. Rec. S497, 498 (2013).

[14] Congress has stated that "providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation . . . frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No, 106-386, § 1502(a)(1)(2) (Oct. 28, 2000). (emphasis added). *See also* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (2007).

of enhancing law enforcement's ability to investigate and prosecute criminal activity and providing protection to alien victims of crime. . ."[15]

Two 2009 ICE memoranda on U visa cases in proceedings stated that, when an individual provides proof that they have filed a U visa petition, "the OCC [Office of Chief Counsel] *shall* request a continuance to allow USCIS to make a prima facie determination."[16] These memoranda further stated that "[o]nce USCIS has determined that the alien has made a prima facie case, the OCC should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition."[17] It remains, moreover, the stated policy of ICE that in removal cases involving crime victims and witnesses, "ICE officers, special agents, and attorneys should exercise all appropriate prosecutorial discretion to *minimize any effect* that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice."[18] However, as outlined below, though ICE has not rescinded these policy memos formally, the agency has more recently issued an FAQ indicating that deportations of U visa eligible crime victims may now be effectuated.

d. The BIA Previously Articulated Its Own Prima Facie Protection for U Visa Applicants in Proceedings

The proposed regulation contradicts BIA precedent regarding continuances for individuals with pending U visa petitions. In 2012, the BIA issued *Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807 (BIA 2012) with the intent to ensure that crime victims seeking U visas would not be removed while USCIS determined the fate of their applications. The BIA held that in determining whether good cause exists to continue removal proceedings to await USCIS's decision on a U visa applicant's case, an immigration judge must consider the immigrant's "prima facie eligibility for the U visa."[19] For U visa applicants seeking a continuance, the BIA held that immigration judges should consider good faith factors including "(1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors."[20] As a general rule, the BIA determined that a rebuttable presumption exists that an individual who has filed a prima facie approvable U visa application with USCIS will warrant a continuance.[21]

In *Matter of L-A-B-R*, the Attorney General built upon *Sanchez-Sosa* and iterated more guidance regarding good cause for a continuance.[22] Then, in a recent precedent decision, the Board found "[i]n *Matter of L-A-B-R-*, the Attorney General *refined* this [*Sanchez-Sosa*] analytical framework" and the Board again chose not to overturn *Matter of Sanchez-Sosa* in this new decision. *Matter of Mayen,* 27 I. & N. Dec. 755, 757 (BIA 2020) (Emphasis added). Thus, *Sanchez-Sosa* remains good law today, and the proposed regulation contradicts such BIA precedent.

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[15] *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014 at 53,027 (Sept. 17, 2007).

[16] *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visas) Applicants*, United States Dep't Of Homeland Security, Immigr. and Customs Enforcement (Sept. 24, 2009), (available at https://asistahelp.org/wp-content/uploads/2018/12/ICE-Guidance-Adjudicating-Stay-Request-Filed-by-U-Applicants.pdf); *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal*, United States Dep't Of Homeland Security, Immigr. and Customs Enforcement (Sept. 25, 2009),

[17] *Id.*

[18] *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* United States Dep't Of Homeland Security, Immigr. and Customs Enforcement (June. 17, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf (emphasis added).

[19] *Id.* at 813 n.7.

[20] *Id*.

[21] *Id*. at 815.

[22] *See Matter of L-A-B-R*, 27 I. & N. Dec. 405,413,418 (A.G. 2018) (citing *Sanchez-Sosa* with approval).

e. Denial of Continuances for U Visa Petitioners Must Not be Based on Unlikely Future Scenarios

The proposed rule suggests that EOIR should proceed with removal proceedings, order U visa petitioners deported, and that stays of removal will still be available, or the petitioner can continue with the application from outside of the United States. Such statements ignore USCIS adjudication trends, Congressional intent, and the harmful effects of deportation.

i. U Visa Petitioners are Unlikely to Obtain Stays of Removal from ICE

Though DHS in multiple ways implemented a structure in that past that was designed to stay removals of U visa applicants,[23] that regulatory structure is no longer viable. In the last few years, ICE has refused to favorably adjudicate almost all stays of removal, even for the most meritorious of U visa applicants. In fact, ICE asserts, through an FAQ, that prior stay of removal guidance is no longer its policy. This FAQ asserts without evidence, that deporting U visa crime victims should harm neither the victim, nor law enforcement. Under its new "policy" created through FAQ, the thousands of U visa applicants waiting for USCIS to place them on the waitlist may be deported, making the U visa a false promise to both law enforcement and to crime victims.[24] Thus the assertion by the instant proposed EOIR regulation that respondents may request a stay of removal from ICE, is in fact completely ineffectual.

ii. U-visa Petitioners Face Severe Challenges in Pursuing U Visa Benefits After Deportation

The background to the proposed regulation asserts that eliminating continuances for deferred action and restricting continuances for "collateral" applications before USCIS is appropriate because a respondent with a pending U visa petition may continue to pursue that U-visa petition after removal. These statements reveal that EOIR either misunderstands or intends to undermine the Congressional goals of the U visa statute. While this assertion is legally true, deporting U visa crime victims contravenes the intent of Congress, inflicts significant harm on the victim and the victim's family, and undermines EOIR's stated goal of administrative efficiency.

The regulation embraces the misguided view that because U visa applicants may pursue cases from abroad, deporting them does no harm. This position reveals deep ignorance about the reality immigrant crime victims experience in this country and threatens the integrity of the U visa system Congress created to reduce the leverage of abusers' threats to have victims deported, and encourage full participation in the U.S. criminal justice system. It undermines the ability of law enforcement to investigate and prosecute crimes; in some instances, EOIR will be ordering the removal of U visa applicants who are assisting law enforcement in an ongoing matter.

The hazards of deportation are well-documented. The crime survivor loses financial stability, access to our civil and criminal justice systems, and, for the domestic violence survivor, the services they and their children need to escape and overcome domestic abuse. Instead, they and their family experience additional trauma and face possible violence, ostracization, and discrimination in their home country because, in some cases, they challenged male

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[23] *See* 8 C.F.R. § 214.14(c)(1)(i); 8 C.F.R. § 214.14(c)(1)(ii).

[24] *See Revision of Stay of Removal Request Reviews for U Visa Petitioners*, United States Dep't of Homeland Security, Immigr. and Customs Enforcement (Aug. 2, 2019), https://www.ice.gove/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners#wcm-survey-target-id.

privilege. Moreover, immigrants may come from countries in which authorities are “brazenly corrupt” and “horrifyingly brutal.”[25]

Not only does the proposed regulation contravene Congressional intent, it is simply not efficient to utilize government resources to deport a VAWA or U visa applicant whose application is pending with USCIS. By deporting the applicant, the government would need to expend additional resources for USCIS to adjudicate new waivers of inadmissibility due to the deportation of the U visa applicant, and communicate and send the visa approval file to the Department of State. The Department of State would then be required to schedule a visa interview with the applicant, issue a visa, and Customs and Border Protection (CBP) would be required to do a final review at a port of entry. None of this additional government action would be necessary if EOIR simply grants continuances or administratively closes such cases pending adjudication by USCIS.

Thus, implying that there is no harm done by deporting U-visa petitioners is simply nonsensical, false, and cruel.

IV. The Proposed Regulation Interferes with the Independence of Immigration Judges and Imposes Additional Burdensome Adjudicatory Requirements

The proposed rule severely and inappropriately limits the discretion of immigration judges, eroding their decisional independence. This is particularly true where the proposed rule requires denials of continuances, disallowing the exercise of discretion in a variety of circumstances. The proposed rule also substantially limits immigration judges’ authority to issue continuances of their own motion.

a. The Proposed Regulation Inappropriately Limits the Discretionary Authority of Immigration Judges

Though immigration judges currently have less judicial independence than Administrative Law Judges, current Justice Department rules state that “In deciding the individual cases before them ... immigration judges shall exercise their independent judgment and discretion.”

While the proposed factors to be considered in determining whether “good cause” exists are explicitly “non-exhaustive,” and an attempt to standardize adjudications nationally, the proposed rule would eliminate most discretionary considerations relating to *denials* of continuances. “Good cause” is defined by what it is *not,* inappropriately limiting an immigration judge’s discretion and explicitly prohibiting judges from granting continuances in many circumstances where a continuance is reasonably warranted.

In particular, the regulation states that requests for continuances “to seek parole, deferred action, or the exercise of prosecutorial discretion by DHS does not demonstrate good cause.” As set out earlier in this comment, such a prohibition will effectively eliminate continuances for domestic violence survivors and other victims of crime who seek VAWA or U visa deferred action adjudications from USCIS, thereby eliminating immigration judges’ discretion in such cases.

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[25] David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America,* Bepress Legal Series (May 18, 2006), https://law.bepress.com/cgi/viewcontent.cgi?article=6323&context=expresso.

b. The Proposed Regulation Eradicates Immigration Judges' Discretionary Authority to Issue Continuances on Their Own Motion

The regulation also completely eliminates immigration judges' discretion in granting continuances on their own motion ("sua sponte") and does not account for many circumstances in which such a continuance would be reasonably justified. It assumes very limited family structures by failing to provide for instances where a continuance is necessary due to the death or illness of a family member or cohabitant outside of the respondent, representative or judge's nuclear family, such as a sibling or grandparent. It also fails to provide for instances where a respondent or representative might be unable to appear for a hearing due to the illness of a child or elderly parent which might not be considered "serious" but still renders the parent or adult son or daughter unable to attend a court hearing due to caring for their child or parent, if no alternative care is available. A respondent or representative should not be forced to choose between neglecting a dependent relative and attending an immigration court proceeding. The regulation fails to provide for instances where a car or public transportation breaks down on the way to court – which may not be considered "exceptional or extraordinary" as provided for in the regulation, but is a common and uncontrollable occurrence, especially for respondents who must drive long distances from rural areas to reach the immigration court. Judges should have discretion to grant sua sponte continuances broadly. The list in the proposed regulation of circumstances where continuances could be granted, should not be "exceptions" to the general new rule that sua sponte continuances cannot be granted, but rather circumstances where such continuances are mandated or at least encouraged. Judges should also be allowed the flexibility and discretion to grant reasonable sua sponte continuances in additional circumstances outside of the listed "exceptions."

V. The Proposed Regulation Will Have an Adverse Effect on Administrative Efficiency

The proposed rule will cause a greater strain on EOIR's resources and curtail administrative efficiency. As outlined above, the proposed changes prohibit or restrict continuances in many reasonable circumstances. Continuances are an important docket management tool for immigration judges. Refusals to grant appropriate continuances will result in hasty and erroneous court adjudications. This will cause respondents to file more appeals and motions to reopen, adding to existing court and BIA backlogs. Many of the Trump administration's actions over the past four years have contributed to the backlog, such as severely restricting the use of administrative efficiency tools like administrative closure. Now, EOIR seeks to further limit immigration judges' caseload management tools by restricting continuances as well.

Moreover, EOIR continues to issue confusing guidance in order to restrict respondents' due process. In *Matter of W-Y-U-*[26]*,* the Board of Immigration Appeals (BIA) stated "the Immigration Judge's concerns regarding the most efficient use of limited resources" were "secondary." Now, the proposed rule states that "administrative efficiency" should be a factor in considering whether a continuance is appropriate. Such guidance is contradictory.

The proposed rule also limits continuances of merits hearings to 30 days and states that such continuances are "strongly disfavored," regardless of the circumstances. However, there are many situations in which a longer continuance may be warranted, such as a party's serious illness or injury. In those circumstances, the immigration judge will need to consider a new motion for continuance every 30 days, even if there is initial evidence demonstrating that a longer continuance was warranted.

[26] 27 I. & N. Dec. 17 (BIA 2017).

Lastly, immigration judges will be inappropriately burdened by the regulation's requirement that they make determinations that respondents have "demonstrated prima facie eligibility" for visas for which a petition is pending, for adjustment of status, if applicable, and for any necessary waivers. This would require a "pre-adjudication" of both relief for which an immigration judge has either original jurisdiction or jurisdiction to finally review, as well as a determination of the respondent's eligibility for that which the immigration judge has no jurisdiction – the underlying visa petition. The regulation further includes an excessively burdensome requirement that the immigration judges determine that a respondent has provided "clear and convincing evidence" of the bona fides of any marriage entered into while the respondent is in removal proceedings – which in fact is an adjudicatory factor also solely within the jurisdiction of USCIS. These requirements will result in increased inefficiency, as two separate agencies, USCIS and EOIR, will be expending time and resources to make the same determinations on immigration relief or benefits.

VI. Conclusion

The ILRC strongly opposes the proposed rule. We urge the Department of Justice to consider these comments and withdraw the proposed rule. These changes will eviscerate immigrants' due process rights in removal proceedings, subject survivors of domestic violence and crime to further harm, usurp immigration judges' ability to effectively preside over cases and manage their dockets, and curtail administrative efficiency.

Sincerely,

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