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**Public Comment Opposing Proposed Rules on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal**

**TEMPLATE COMMENT - INSTRUCTIONS**

Attached is a template to help immigration services organizations draft a public comment in response to the administration’s proposed rule that would greatly restrict noncitizens’ rights in immigration court and before the Board of Immigration Appeals, or BIA. (The Notice of Proposed Rulemaking is available [here](https://www.federalregister.gov/documents/2020/11/27/2020-25912/motions-to-reopen-and-reconsider-effect-of-departure-stay-of-removal).)

**Why submit a public comment?** When the government proposes a new rule, it is required (by the Administrative Procedure Act) to give the public an opportunity to read the rule and submit comments. The comment you submit will be public record and available for anyone to read. After the comment period closes, the government agency that proposed the rule must read all of the comments submitted, and consider the comments when drafting the final version of the rule. If a very large number of people submit comments, and/or the comments identify significant problems with the regulation, then it will take longer for the final rule to be published and take effect, or the agency may make amendments to the rule after considering the comments. Furthermore, if the agency disregards substantive comments, the comments can be helpful to later litigation about the process followed in publishing the rule. Substantive comments might also provide the Biden administration with justification for formally ending the rulemaking and abandoning this rulemaking effort.

**How do I submit a comment?** You can submit comments online at regulations.gov [click [here](https://beta.regulations.gov/document/EOIR-2020-0011-0001) to go directly to the proposed rule]. Click on the “comment now” button and either enter your comment in the text box (must be fewer than 5,000 characters) or upload your comment as a PDF. CLINIC has published step-by-step commenting instructions that are available [here](https://cliniclegal.org/resources/step-step-instructions-how-submit-public-comment). Below are some important tips to keep in mind as you are drafting your comment.

**Write comments in your own words.** The template on the following pages is intended to help guide you and give you an example and ideas, but ***the comment should be edited with your original words***. Feel free to delete whole sections or paragraphs and replace them with your organization’s perspective on the issue. It is extremely important to use your own words as much as possible because the agency will bundle any comments that are too similar to each other, and they will consider this bundle as one comment, rather than as individual submissions.

To find your own words in drafting your comment, it may be helpful, to do some research on your own program and practice, the demographics of your clients, and the local community. Consider what aspects of the rule would be particularly troublesome to your organization and your clients. Gather some numbers and statistics that you can use to demonstrate how many of your clients or people in your community will be affected, how and to what extent, and at what financial cost.

**Attach research and supporting documents.** If you cite to statistics or supporting documents in your comments, we recommend including them as an attachment so that they are clearly part of the administrative record. Another option is to include a live link to cited sources.

**If you have experience in an issue area, say so.** If you are a subject matter expert and want to offer comments on your area of expertise, explain why you are qualified to offer this perspective. Feel free to explain your educational and professional background, or attach a copy of your CV to your comment. If your faith motivates you to work with immigrants or requires you to advocate for immigrants,, feel free to talk about your faith in your comment.

**Provide contact information for a representative of the organization.** Organizational comments should be signed by a representative of the organization, and provide the business contact information of the representative for any follow-up questions or concerns. However, keep in mind that this comment will be publicly available, so do not include personal addresses or cell phone numbers.

Submitted via [www.regulations.gov](http://www.regulations.gov)

DATE

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**RE: RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021,**

**Public Comment Opposing Proposed Rules on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal**

Our organization, NAME, submits this comment urging the Department of Justice (DOJ) to withdraw the majority of these proposed rules. The Notice of Proposed Rulemaking (NPRM) makes numerous proposed changes that would strip important due process rights from noncitizens filing motions before the immigration courts and Board of Immigration Appeals (BIA or Board). The Supreme Court has emphasized that “[t]he motion to reopen is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.”[[1]](#footnote-1) Yet these proposed regulations significantly undermine noncitizen’s ability to pursue this important safeguard and make it significantly more likely that noncitizens will be unlawfully and improperly removed to a country where they may be killed or permanently separated from their family. In addition, the rule erects substantial barriers to obtaining a stay of removal, which will inevitably lead to many people with meritorious claims being unjustly removed from the United States before the BIA or the Immigration Judge rules on their motions. The U.S. government should ensure that, before it imposes such grave consequences through removing someone from the United States, every noncitizen has a fair opportunity to pursue their statutory right to file a motion to reopen or a motion to reconsider. We thus urge you to withdraw the vast majority of these proposed rules.

ORGANIZATION NAME’s mission is . . . [DESCRIBE ORGANIZATION’S WORK WITH IMMIGRATION. IF ORGANIZATION IS FAITH-BASED, DESCRIBE RELATIONSHIP BETWEEN THE ORGANIZATION’S FAITH-BASED ROOTS AND ITS WORK WITH IMMIGRANTS. IF POSSIBLE INCLUDE DATA ABOUT THE POPULATION YOU SERVE.

IF POSSIBLE, INCLUDE ANECDOTES ABOUT THE IMPORTANCE OF MOTIONS TO REOPEN AND RECONSIDER, STAYS OF REMOVAL, AND POST-DEPORTATION WORK TO YOUR ORGANIZATION.]

**We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)**

As discussed below, the proposed regulations would dramatically alter motions practice before the immigration courts and the BIA. The public should have adequate time to consider these dramatic revisions to existing law in order to provide thoughtful and well-researched comments. Instead, DOJ has given no reason for allowing only 30 days for the public to submit comments to these dense and complicated proposed rules rather than the customary 60-day comment period. DOJ issued the notice of proposed rulemaking on the Friday immediately following the Thanksgiving holiday, and the shortened comment period closes just after the Christmas holiday. While this time of year is always busy, this year the shortened comment period presents exceptional challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance childcare with work activities. [Moreover, many of our clients and/or staff have been infected with COVID-19 and are currently recovering or caring for ill family members.]

[FILL IN ANY SPECIFIC COVID RELATED CHALLENGES HERE. ARE YOU STILL PHYSICALLY NOT IN YOUR OFFICE? HAVE STAFF, FAMILY, OR CLIENTS BEEN AFFECTED DIRECTLY BY COVID? IS STAFF FINDING IT DIFFICULT TO WORK BECAUSE OF CHILDCARE DUTIES OR COVID-RELATED NEEDS TO CARE FOR A FAMILY MEMBER?]

This proposed rule, with its broad changes to EOIR motions practice, follows closely after DOJ proposed rules that would bring sweeping changes to long-established rules for appellate and motions practice.[[2]](#footnote-2) Significant agency revisions to established practice should be cogent and allow the public the opportunity to fully comment. Instead, the agencies have used the summer and fall months during a pandemic to rush through proposed rules that would radically alter procedures that have been in place for decades and leave tens of thousands of noncitizens who could qualify for lawful status with no recourse. Furthermore, despite losing the presidential election, this administration continues to hastily pursue its anti-immigrant agenda in defiance of the voters’ will. For these reasons, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

**The Agency Wrongly Asserts that This Rule Would Not Have a Significant Economic Impact on a Substantial Number of Small Entities.**

We object to the agency’s assertion that this rule would not have a significant economic impact on a substantial number of small entities, including nonprofit organizations like [name of your organization].

[EXPLAIN THE LIKELY ECONOMIC IMPACT OF THESE SUBSTANTIAL CHANGES TO MOTIONS PRACTICE ON YOUR ORGANIZATION. WILL YOU NEED TO HIRE MORE STAFF? WILL YOU NEED SPEND SIGNIFICANT ADDITIONAL TIME ON EACH CASE INVOLVING A MOTION TO REOPEN/RECONSIDER OR A STAY REQUEST? WILL YOU NEED TO APPLY FOR ADDITIONAL GRANT FUNDING?] Because of the significant economic impact to organizations like ours, this regulation must be closely scrutinized by the Office of Information and Regulatory Affairs.[[3]](#footnote-3)

**We Strongly Object to the Substance of the Majority of the Proposed Rule and Urge the Administration to Rescind Most of It.**

Although we object to the agencies’ unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations that would greatly reduce the rights of noncitizens appearing before EOIR and would result in increased, permanent family separations and the potential death of asylum seekers who are removed to their home countries to be killed.

1. *Proposed 8 C.F.R. § 1001.1(cc) —***The proposed regulatory definition of departure as any physical departure from the United States not pursuant to exclusion, deportation, or removal fails to account for involuntary exits from the United States and wrongly overrules *Matter of Arrabally and Yerrabelly*.**

The preface to the proposed regulations states that the proposed definition of departure is about voluntariness, but the actual regulatory language does not incorporate any voluntariness language.[[4]](#footnote-4) Instead, the proposed regulation merely says,

The terms depart or departure, unless otherwise specified, refer to the physical departure of an alien from the United States to a foreign location. A departure shall not include the physical removal, deportation, or exclusion of an alien from the United States under the auspices or direction of DHS or a return to contiguous foreign territory by DHS in accordance with section 235(b)(2)(C) of the Act, but shall include any other departure from the United States….[[5]](#footnote-5)

We suggest that the regulatory language be amended to clarify that the term “departure” refers only to voluntary departures. The clarification of the regulatory language is critical to assuage the concerns rightly noted in *Matter of Arrabally and Yerrabelly* that the word departure understood in its broadest sense, and indeed as currently defined in the proposed regulations, includes “departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnaped outright and spirited across the border against their will.”[[6]](#footnote-6) [Add anecdotes about clients who have left the United States in circumstances that were not entirely voluntary, e.g. in connection with human trafficking or domestic violence, because the driver took a wrong turn while the client was in a car, due to an emergency landing of an airplane, where a close relative became ill or died, etc.] The addition of the term voluntary to the regulatory language is crucial for ensuring that noncitizens do not suffer severe immigration consequences where they left the United States through no fault of their own.

In addition, we urge the agency to retain the rule announced in *Matter of Arrabally and Yerrabelly* that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA § 212(a)(9)(B)(i)(II). [Provide examples and data about how your clients have benefitted from *Arrabally* and relied on it. Also discuss how it has increased efficiency in cases you have handled.] Accordingly, rather than overruling *Matter of Arrabally and Yerrabelly* through regulation, we urge EOIR to instead codify by regulation that leaving the United States pursuant to a grant of advanced parole is not a “departure” for purposes of INA § 212(a)(9)(B)(i)(II).

Moreover, we object to the agency’s plans to retroactively apply this new rule even where a person has traveled on advance parole prior to the effective date of the rule. Our clients have relied on the rule announced in *Matter of Arrabally and Yerrabelly,* [provide information regarding your reliance interests, including why they reasonably depended on settled law in planning their travel and why suddenly changing this rule would amount to pulling the rug out from under them. Give data and specific examples where possible.]. If EOIR adopts any interpretation of a departure that narrows *Matter of Arrabally and Yerrabelly,* it should not apply this interpretation to any person who traveled on advance parole prior to the effective date of the rule.[[7]](#footnote-7)

1. *Proposed 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) —***EOIR should rescind the departure bar in its entirety—including the withdrawal provision—and should not replace it.**

Our organization strongly supports the removal of the departure bar from 8 C.F.R. §§1003.2(d) and 1003.23(b)(1), but opposes replacing it with a narrow withdrawal provision that would still apply where a noncitizen leaves the United States while a motion is pending. Instead, the departure bar—including the withdrawal provision—should be rescinded in its entirety and should not be replaced.

EOIR correctly points out that every circuit court to have considered the issue has held that the departure bar “clearly conflicts” with the Immigration and Nationality Act (INA) or “impermissibly restricts” the BIA’s jurisdiction.[[8]](#footnote-8) The agency therefore rightly proposes eliminating the departure bar from the regulations.

However, EOIR cannot keep a narrower withdrawal provision that applies where a noncitizen “voluntarily” departs from the United States while the motion is pending. Binding Supreme Court and circuit court precedent requires EOIR to exercise its congressionally-delegated jurisdiction even where a noncitizen leaves the United States while awaiting EOIR’s adjudication of their motion.[[9]](#footnote-9) Congress delegated the authority to adjudicate all motions to immigration judges and the BIA and, therefore, the agency does not have the power to ignore the Supreme Court and the U.S. courts of appeal by refusing to adjudicate a subset of motions (i.e., post-departure motions) on jurisdictional grounds.

Moreover, EOIR disregards the plain language of the motion to reopen statute by deeming a motion withdrawn simply because a noncitizen “volitionally” leaves the United States while the motion remains pending. The plain language of the statute contains no geographic limitation on who can file a motion, and the agency may not artificially create one—even for the smaller subset of individuals who leave the United States while their motion remains pending.[[10]](#footnote-10)

The statutory right to a motion to reopen makes motions different from appeals. There is no statutory right to an appeal, so even if the agency could limit a noncitizen’s right to file an appeal through a similar withdrawal provision, the agency may not defy Congress by imposing a withdrawal provision in the motions context. The agency’s justification that a motion “functions similarly” to an appeal, 85 Fed. Reg. at 75946, is therefore unpersuasive.

For these reasons, we strongly oppose the proposed regulation’s inclusion of a withdrawal provision that would still apply where a noncitizen “volitionally” leaves the United States while a motion is pending.

1. *Proposed 8 C.F.R. § 1003.48(b)—* **EOIR should entirely rescind this section of the proposed regulation and instead continue to accept as true factual assertions made in the motions to reopen unless those assertions are inherently unbelievable.**

We strongly oppose the inclusion of regulatory language purporting to do away with the rule that facts stated in an affidavit must be accepted as true unless inherently unreliable. The majority of U.S. courts of appeal have repeatedly chastised EOIR for failing to accept facts presented in a motion to reopen as true unless inherently unbelievable. These federal courts have explained repeatedly that “[t]he purpose of this rule is to ensure that the applicant has had her day in court to demonstrate the truth of facts alleged.”[[11]](#footnote-11)

Moreover, the specific prohibitions on accepting factual assertions as true enumerated in proposed section 1003.48(b)(2) are riddled with due process problems and clear statutory violations. First, the statement in subsections (b)(2)(i) and (ii) that an adjudicator should not accept as true anything that is contradicted by any evidence in the record (including material provided by sources such as the Department of State, the Office of International Affairs, international organizations, news organizations, or academic institutions) is preposterous. If the entire purpose of a motion to reopen is to determine whether to hold a new hearing, then the motion will likely present or seek to present evidence that contradicts the record—the whole point is to add to the record because the record is incomplete or inaccurate. For example, under this proposed rule, if the Government had submitted evidence that a particular foreign government was upholding all human rights norms and the Respondent later submitted with a motion to reopen previously unavailable evidence that the foreign government was actually torturing political dissidents, the adjudicator would be barred from accepting this new evidence as true for purposes of deciding whether to hold a new hearing. This outcome is fundamentally unfair. If there is a factual dispute, the parties should have the opportunity to be heard at a hearing and the adjudicator should only then make a final factual determination.

Second, the statement in subsection (b)(2)(iii) that an adjudicator may not accept as true any statements that are conclusory, uncorroborated, or unsupported by other evidence in the record directly conflicts with the statutory language at INA § 208(b)(1)(B)(ii) stating that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.”

[Insert anecdotes about clients who have submitted affidavits that could not be corroborated at the time that they submitted their motions to reopen (for example, because the noncitizen was detained and deportation was imminent, contacts abroad could not safely mail evidence to the noncitizen, contacts who might have otherwise provided a declaration were imprisoned or dead, etc.)]

Further, the prohibition on accepting as true affidavits that are based principally on hearsay is fundamentally unfair and contravenes longstanding rule that hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair.[[12]](#footnote-12) In immigration proceedings, it will often be necessary to submit hearsay statements. For example, the words of a persecutor are often critical to establishing nexus, but it is extremely unlikely that the persecutor would be willing to submit their own affidavit in support of the respondent’s case or be available to testify at the hearing. [Insert anecdotes about clients you have represented who have submitted affidavits from themselves or others that included hearsay statements from a persecutor and explain why this evidence was critical to the case]. The proposed regulation’s prohibition on accepting as true for purposes of a motion to reopen factual allegations based on hearsay is therefore extremely problematic. We strongly oppose its inclusion in the final regulations.

Finally, the statement in subsection (b)(2)(iv) that an adjudicator may not accept as true statements made by the Respondent about individuals who are not presently in the United States is patently absurd. Numerous forms of relief from removal—most notably asylum, withholding of removal, and protection under the Convention Against Torture—are based entirely on what individuals outside the United States have done and will do if the Respondent returns to their native country. As noted above, the persecutor is not likely to submit an affidavit in support of the Respondent. [Insert anecdote about a client who had very probative evidence about the persecutor, for example where the persecutor called and threatened the Respondent, etc.]. Further, the Respondent frequently will not be in a position to obtain statements from others in the country of feared persecution because those witnesses are in hiding, in jail, or dead. [Insert anecdote about a client who faced this type of barrier to obtaining corroboration from in country witnesses]. Congress considered the possibility that people who had fled persecution would be unable to obtain such statements, and the statutory language at INA § 208(b)(1)(B)(ii) states that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” The proposed regulatory language directly conflicts with this statutory language. Moreover, accepting statements as true at the motion to reopen stage does not prevent an Immigration Judge from later assessing credibility once the Respondent is before the Immigration Judge in reopened proceedings. Instead, this change fundamentally undermines a noncitizen’s ability to show that a hearing is warranted because of new, previously unavailable evidence.

Taken together, these proposed changes make it impossible for a respondent to meet the burden of proof and effectively render motions practice useless, especially for asylum seekers. The rule increases the likelihood that the United States will wrongfully deport people who will be persecuted or killed. We therefore strongly urge EOIR to completely eliminate the proposed 8 C.F.R. § 1003.48(b) because these proposed changes to the regulations are an affront to due process, conflict with the statute, and do not account for the inherent difficulties of obtaining certain kinds of corroborating evidence where the respondent [has fled persecution, is detained, etc.].

1. *Proposed 8 C.F.R. § 1003.48(c)—* **EOIR should eliminate the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that says that a noncitizen’s failure to comply may result in denial of the motion.**

We strongly urge EOIR to eliminate the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that says that a noncitizen’s failure to comply may result in denial of the motion. This incorporation of an expansive interpretation of the “fugitive disentitlement doctrine” into administrative proceedings is inappropriate, unfair, and extremely burdensome.

First, U.S. courts of appeals have held that the fugitive disentitlement doctrine is a severe sanction that should not be lightly imposed.[[13]](#footnote-13) Yet, the proposed regulations purport to apply this draconian doctrine to nearly all cases in which an individual has not complied with a notice to surrender. The proposed regulations contain no requirement that the adjudicator find that the respondent is intentionally evading the law or the agency’s jurisdiction, nor do they require the adjudicator to evaluate whether the respondent’s actions have made it impossible to enforce an adverse judgement. Instead, the proposed regulations bluntly apply this draconian sanction with little analysis or consideration.

Additionally, in our experience, respondents frequently do not receive proper notice of their obligation to surrender. [Insert anecdotes about when DHS has sent bag and baggage letters to the wrong address, only sent bag and baggage letters to the bond obligor (who may or may not pass the message on to the respondent), etc.]. Federal courts have cautioned against applying the fugitive disentitlement doctrine when the government repeatedly sends critical documents to the wrong address.[[14]](#footnote-14) Given how frequently DHS does not properly notify the respondent of their obligation to surrender, we anticipate that this new requirement would result in many wrongful denials of motions, wrongful deportations before all of the challenges can be litigated, and quite a bit of litigation.

Moreover, in our experience, DHS’ decision regarding if and when to send a notice to surrender, the so-called “bag and baggage letter,” is very arbitrary and unpredictable. [Insert anecdotes about when clients have received bag and baggage letters, highlighting disparities in the timing in which such letters are sent out. Also highlight examples showing disparities in whether DHS even decides to send bag and baggage letters]. Given the arbitrary nature of whether a person will receive and be forced to comply with a notice to surrender, it is manifestly unjust to base the viability of a motion to reopen on whether a person has received and complied with such a letter.

Further, the proposed requirement that a movant include in their motion a statement regarding whether they have received a notice to surrender, and if so, whether they have complied is quite burdensome given proposed subsection 1003.48(b)(i). Proposed subsection 1003.48(b)(i) states that “allegations of fact contained in a motion to reopen or motion to reconsider are not evidence and shall not be treated as evidence.” Yet this newly imposed obligation to discuss receipt of a notice to surrender will require movants to make detailed notice arguments, supported by affidavits and other evidence, to support their assertion that they have not received such a letter. Such arguments will likely take up a substantial portion of their motion to reopen, and will prejudice their ability to adequately develop other required statutory and equitable tolling arguments in the limited space permitted by the 25-page-limit listed in the Practice Manual. In addition, even where respondents submit affidavits and other evidence concerning whether they have received a notice to surrender, per proposed subsection 1003.48(b), the adjudicator will no longer presume that the affidavits are true. Also, drafting declarations and obtaining other supporting evidence is onerous. [Insert anecdotes about how much time it takes to draft even a simple declaration, particularly where a client is detained, suffers from mental illness, is a child, etc. Explain difficulties you have encountered in gathering supplemental evidence in cases involving notice. Such difficulties might be due to the client being detained and not having access to this evidence, the client not having access to evidence due to domestic violence or trafficking, evidence having been destroyed, etc.] This new requirement accordingly will be very burdensome for movants and their legal representatives.

Our organization therefore strongly urges EOIR to completely eliminate the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that says that a noncitizen’s failure to comply may result in denial of the motion.

1. *Proposed 8 C.F.R. § 1003.48(e)(1),(2)—* **EOIR should eliminate the proposal to disallow reopening and reconsideration based on a pending USCIS application.**

We strongly oppose EOIR’s proposal to prohibit adjudicators from granting a motion to reopen or reconsider that is premised upon a pending application for relief that the immigration judge or the BIA lacks authority to grant. Relief granted by another agency, typically U.S. Citizenship and Immigration Services (USCIS), is no less a form of relief than anything else. Indeed, Congress specifically created numerous forms of relief intended to allow a person to remain in the United States over which only USCIS has jurisdiction. These forms of relief include relief for some of the most vulnerable groups in society, such victims of human trafficking and unaccompanied children. USCIS adjudication of such applications in a non-adversarial forum is particularly important for these traumatized and vulnerable groups. EOIR may not frustrate Congressional intent by refusing to provide an opportunity for its sister agency to adjudicate an application.

This proposed regulation comes on the heels of policy changes at EOIR that discourage continuances and administrative closure to pursue relief before USCIS.[[15]](#footnote-15) Increasingly, respondents are being ordered removed simply because USCIS has not yet adjudicated their applications for relief. [Provide anecdotal examples of this happening to your clients].

Average USCIS processing times are extremely lengthy.[[16]](#footnote-16) USCIS itself provides case processing times that are sometimes upwards of 57 months.[[17]](#footnote-17) Yet, motions to reopen are normally subject to a 90-day filing deadline.[[18]](#footnote-18)

Previously, respondents could move to have their cases reopened *sua sponte* should they be unable to comply with the normally applicable statutory deadline because USCIS had not completed its adjudication of an application, but EOIR has separately finalized regulations that almost entirely do away with *sua sponte* reopening.[[19]](#footnote-19) The proposed regulations would therefore render reopening impossible in the vast majority of cases in which a person has relief available but USCIS has jurisdiction to adjudicate that form of relief. Such a result is unfair and undermines congressional intent. We therefore urge EOIR to rescind its proposal to disallow reopening based on an application pending before another agency.

1. *Proposed 8 C.F.R. § 1003.48(e)(3)—* **EOIR should eliminate the proposal to limit the scope of reopened proceedings to the issues upon which reopening or reconsideration was granted.**

Our organization opposes the proposal to limit the scope of reopened proceedings to the issues upon which reopening or reconsideration was granted. As explained in the preamble to the proposed rule, this change is a stark departure from past practices governing motions.

Limiting the scope of reopened proceedings is not a sensible way to avoid unnecessary expenditure of the court’s valuable and limited resources. Litigants often have multiple options for relief from removal and will include all arguments in their motion to reopen, but in reopened proceedings, may choose to go forward with the forms of relief that are the most straightforward or for which they have the strongest likelihood of prevailing. This strategic decision does not mean that their other claims were frivolous or false, rather the litigant has chosen to use resources efficiently. Permitting litigants to elect to go forward on whichever forms of relief they choose allows the court to avoid time-consuming hearings, and perhaps multiple appeals, on a complex asylum claim where it would have been more efficient to simply proceed on a straightforward and uncontested adjustment of status application.

Moreover, permitting an adjudicator to consider any and all issues in reopened proceedings is important because circumstances may change during the pendency of proceedings. [Insert examples of changes in circumstances that have occurred during reopened proceedings, such as where proceedings were reopened to pursue cancellation of removal, but while reopened proceedings were on-going, there was a change in country conditions in the country of removal such that an asylum claim suddenly became viable, where a new PSG arose, where a person became a victim of domestic violence after the motion was granted and thus newly acquired VAWA eligibility, where there is a change in law, etc.], If the proposed rule were to go into effect, the litigant could be forever barred from having the agency consider the [claim that arose during the pendency of reopened proceedings from the example above] because the adjudicator would be prohibited from considering the claim during the pending reopened proceedings, and the respondent might later be unable to show that the evidence was previously unavailable for purposes of yet another motion to reopen. Such a result is manifestly unfair.

The agency raises fairness concerns in the preamble to the regulations, noting that some litigants do not have the option to “shoehorn their otherwise barred claims into reopened proceedings.” The agency rightly notes that it is unfair that some people have viable claims to relief, yet their motions to reopen are numerically or time barred. However, the agency could address this fairness problem by making it easier for all movants to reopen where they have viable relief available. For example, the agency might have instead chosen to use regulatory changes to expand its *sua sponte* authority, and specifically encouraged granting motions under its *sua sponte* authority where relief is available. This alternative approach would have properly addressed fairness concerns without imposing unnecessary and unfair barriers for even more litigants. Instead, EOIR has repeatedly tried to impede noncitizens who are simply trying to legalize their status in the United States.[[20]](#footnote-20)

1. *Proposed 8 C.F.R. § 1003.48(i)(2)—* **The proposed rule has rightly clarified that respondents can file motions to reopen where they received ineffective assistance from a notario or other individual committing unauthorized practice of law.**

Our organization supports the proposed rule’s clarification that an ineffective assistance counsel claim may lie against an individual who the respondent reasonably but erroneously believed to be an attorney. Unauthorized practice of law and defrauding immigrant communities through so-called “notario fraud” is an unfortunately common problem that can have devastating consequences. [Insert data from your region or state about the prevalence of notario fraud. Insert anecdotes about clients you have represented that were victims of notario fraud.]. Our organization applauds EOIR’s efforts to combat notario fraud and the clarification that respondents may file a motion to reopen based on ineffective assistance, even where someone who is not a licensed attorney or a DOJ accredited representative provided assistance.

1. *Proposed 8 C.F.R. § 1003.48(i)(5)—* **EOIR should eliminate the regulatory language creating significant and unnecessary additional barriers to properly filing a motion based on ineffective assistance of counsel.**

The proposed regulation creates significant additional unnecessary requirements to properly file a motion based on ineffective assistance of counsel. These unnecessary requirements protect neither noncitizens from unscrupulous or incompetent attorneys or DOJ accredited representatives, nor legal counsel from improper or unfounded allegations, nor the integrity of immigration proceedings as a whole. Instead, these additional requirements serve as additional barriers to noncitizens achieving fair adjudication of their motions to reopen. We therefore urge EOIR to eliminate the remainder of the proposed regulatory language about motions based on ineffective assistance of counsel.

First, the additional procedural requirements are onerous and unnecessary. Currently, motions to reopen based on ineffective assistance of counsel must contain: (1) an affidavit explaining the agreement with former counsel and what prior counsel represented to the respondent; (2) that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) whether the respondent filed a complaint with the appropriate disciplinary authority regarding counsel’s conduct, or, if a complaint was not filed, an explanation for not filing one.[[21]](#footnote-21) In many circuits, substantial compliance with these procedural requirements is sufficient. The onerous procedural requirements that this proposed rule adds are particularly problematic because the proposed regulation first makes clear that substantial compliance will generally be insufficient; instead, strict compliance will be required, particularly where the noncitizen is represented by counsel. We oppose the strict compliance requirement because it prioritizes arbitrary procedures over the rights of noncitizens to effective representation and the important policy goals identified by EOIR. Flexibility in applying the procedural requirements comports with EOIR’s policy goals, “which are to provide a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.”[[22]](#footnote-22)

Secondly, the regulation requires that a motion based on ineffective assistance of counsel include an affidavit or written statement executed under penalty of perjury from the noncitizen that explains their agreement with former counsel regarding the representation. Strangely, the regulation goes on to require that such a statement “identify who drafted it” and where the noncitizen did not draft it themselves, the affidavit explicitly state that the affidavit has been read aloud to the noncitizen in a language they understand and that by signing, they affirm that they understand and agree to the contents of the affidavit. Many noncitizens are literate and can read documents themselves, rendering this requirement inapplicable to a large segment of noncitizens seeking to reopen proceedings. Second, it insinuates that it is somehow improper for a legal representative to assist with declaration drafting. However, competent representation requires counsel to assist with declaration drafting in order to ensure that the noncitizen understands what facts are necessary and relevant to the case, and what facts are superfluous. The noncitizen is already bound to include only truthful statements by the penalty of perjury, and legal representatives already have ethical duties to effectively communicate with their clients and present truthful information to EOIR. This additional requirement is unnecessary and seems intended only as an excuse for adjudicators to wrongfully deny motions simply because the affidavit does not contain certain magic words.[[23]](#footnote-23)

Further, the regulation requires that bar complaints be filed in all ineffective assistance of counsel cases, except where prior counsel is deceased. This regulation explicitly, but without any justification, states that a bar complaint must be filed even where an attorney has already been disbarred or suspended from the practice of law. In these circumstances, it is not even clear that the state disciplinary authorities would accept or have the capacity to review such a complaint. Moreover, it does not serve to protect the public because state authorities have already prohibited the disbarred attorney from practicing law. Additionally, the rule does not account for the myriad other perfectly reasonable reasons why a bar complaint might not be filed, including but not limited to: 1) the statute of limitations for filing an attorney grievance with state disciplinary authorities has already passed,[[24]](#footnote-24) 2) counsel acknowledges the ineffectiveness and makes every effort to remedy the situation.[[25]](#footnote-25) [Insert other examples of when your organization has declined to file a bar complaint and explained that such a decision was reasonable under *Lozada*].

Finally, the regulations require the filing of two separate complaints where a legal representative has provided ineffective assistance: one to state disciplinary authorities and one to EOIR disciplinary counsel. This requirement is duplicative and onerous. [Explain how much time and effort your organization must spend drafting the bar complaint, conferring with disciplinary counsel, etc. and how much additional time you estimate would be needed if you had to file two separate complaints in every case. Note how this additional time and effort would impact how many cases your organization is able to take on for representation].

We accordingly urge EOIR to eliminate these unduly burdensome additional requirements to motions to reopen based on ineffective assistance of counsel that only create additional obstacles for individuals who have viable claims for relief but were unable to present those because of an unscrupulous or incompetent attorney or DOJ accredited representative.

1. *Proposed 8 C.F.R. § 1003.48(k)—* **The proposed rule creates alarming barriers to obtaining a stay of removal.**

Our organization opposes in the strongest possible terms the inclusion of significant new requirements to obtaining a stay of removal and urges the agency to completely eliminate the proposed language regarding stays of removal. The proposed regulations stress that a stay is an extraordinary remedy, but many of our clients absolutely merit the agency’s exercise of discretion to grant this extraordinary remedy. [Insert anecdotes about clients who would face torture or death if removed and who ultimately prevailed on their motion to reopen.] Despite the high stakes, requests for a stay of removal are frequently submitted quickly because [Explain the circumstances how and when your organization typically learns of the need for a stay request. Explain that in your experience ICE frequently provides very little advanced warning concerning its plans for effectuating a removal, and ICE’s plans change frequently with little, if any, notice to counsel. Explain significant communication barriers with noncitizens in ICE detention and difficulties of gathering relevant evidence and records when client is detained. Note that the client may have appeared pro se in proceedings before the IJ and you may only take on representation after entry of the final order, and accordingly must submit numerous requests for records. Explain that the government frequently does not provide the requested records in a timely manner.] If a noncitizen is unable to obtain a stay of removal, the noncitizen could face permanent separation from family or removal to a country where they may be tortured or killed. Our organization consequently finds the proposed regulation’s addition of numerous significant requirements to obtaining a stay of removal extremely alarming given the urgent nature of most discretionary stay requests and the dire consequences that a noncitizen may face if the removal is carried out.

First, the proposed rule creates unnecessary and onerous hoops to jump through by requiring noncitizens to first file a stay request with DHS before they can file a stay request with EOIR. This requirement is extremely onerous, and usually ineffectual. [Explain how much time it typically takes your agency to draft and file a stay request with DHS. Be sure to note the significant amount of time needed to drive to the detention facility, meet with the client at the facility, and return to the office. Note difficulties associated with obtaining a passport, obtaining criminal records, and medical records, particularly where a person is detained. Explain how the filing fee may create an insurmountable barrier for indigent clients]. Despite the significant money, time, and effort that goes into requesting a stay before DHS, in our experience, DHS rarely grants stay requests. [Provide data, if available, concerning how long DHS typically takes to make a decision on stay requests filed by your organization and about the low percentage of stay requests that your agency has filed with DHS that are approved.]

Moreover, the proposed regulation makes the granting of a stay contingent on whether a noncitizen can afford the $155 fee for filing a stay request with DHS (and the additional costs associated with passport application fees). Although EOIR does not charge a fee for stay requests,[[26]](#footnote-26) by conditioning EOIR’s authority to grant a stay of removal on the noncitizen having first filed a stay request with DHS, EOIR is effectively imposing a cost of at least $155 for filing a stay request. This cost is out of reach for many of our organization’s clients. [Provide data on how many indigent clients you serve annually. Provide anecdotes about cases where you could not file a stay request with DHS because the client could not afford the fee for the I-246 and/or the cost of applying for a passport from their home country]. Our organization strongly objects to the imposition of these costs on all individuals seeking a stay because it makes the determination of who can obtain a stay of removal —a decision which in many cases may determine who lives and who dies— dependent on the individual’s financial resources.

The proposed regulatory language also improperly allows one party to the litigation to effectively control the ultimate decision of the Board or the Immigration Judge concerning a stay of removal. Subsection (vi)(A) states that a discretionary stay cannot be granted unless the opposing party: (1) joins or affirmatively consents, or (2) does not respond after 3 business days. Based on this proposed regulatory language, the adjudicator may not grant a stay request if the opposing party affirmatively opposes the stay request. This proposed regulation consequently allows DHS to single-handedly quash a noncitizen’s ability to obtain a stay of removal simply by registering its opposition without even providing an explanation. Providing one litigant—DHS—such unbridled power is fundamentally unfair.[[27]](#footnote-27)

Further, our organization opposes the regulatory requirement that the stay motion include a complete case history, all relevant facts, a copy of the stay motion filed with DHS, and a copy of the order of removal or description of the order. As noted above, stay motions often must be filed on an emergency basis, before counsel has received a copy of the complete record of proceedings. This has been especially true during the on-going COVID-19 pandemic because [EOIR has been especially slow in responding to Freedom of Information Act requests during the on-going pandemic [provide data from your organization on how long EOIR FOIAs are taking on average], courts are closed or have limited counsel’s ability to review the ROP at the Immigration Court because of the pandemic, mail has been significantly delayed [insert data from your organization on mail delays], and staff have been going to the office to collect mail on a limited basis]. In these circumstances, it is sometimes impossible to provide a complete case history when a stay motion must be filed to prevent a respondent’s imminent removal. Instead, counsel must put together the case history as best as possible with the limited information available, and then seek to supplement later when the remaining records become available. The agency should not deny a stay motion merely because the agency itself has made it impossible to obtain records.

In addition, our organization also opposes the addition of the requirement that the respondent demonstrate reasonable diligence in seeking a stay and filing a motion to reopen or reconsider.[[28]](#footnote-28) First, this requirement contravenes the statute when applied to many types of motions to reopen. Notably, the statute contains no diligence requirement for:

* motions timely filed within 90 days (or 30 days in the case of motions to reconsider);[[29]](#footnote-29)
* motions filed pursuant to changed country conditions, for which “there is no time limit” per INA § 240(c)(7)(C)(ii);
* motions filed under the special rule for battered spouses children and parents at INA § 240(c)(7)(C)(iv);
* motions to rescind and reopen based on extraordinary circumstances timely filed within 180 days,[[30]](#footnote-30); and
* motions to rescind and reopen based on lack of notice, which may be filed “at any time” per INA § 240(b)(5)(C)(ii).

Diligence is generally only relevant where the respondent seeks to equitably toll the normally applicable filing deadline, but it is not relevant where the noncitizen files within the period granted by statute for filing the motion. The agency’s addition of a regulatory requirement that a respondent always show diligence goes beyond the authority granted to the agency by Congress, and therefore the agency should rescind this proposed regulatory change.

Moreover, it is unclear what reasonable diligence even means in the context of filing a stay of removal. Presumably, the adjudicator would assess diligence between the point at which removal became imminent, which is the point at which it typically would become necessary or advisable to file a stay of removal, and the point when the noncitizen filed the stay request. However, the noncitizen often has very little advanced warning that their removal is imminent. [Explain the circumstances how and when your organization typically learns of the need for a stay request. Explain that in your experience ICE frequently provides very little advanced warning concerning its plans for effectuating a removal, and ICE’s plans often change frequently with little, if any, notice to counsel. If the proposed reasonable diligence requirement instead applies to another time period (one which does not start at the point at which removal had become imminent), it is unclear what that alternative time period would be. This ambiguity will likely lead to litigation over the contours of this requirement.

Our organization also opposes the requirement that service of a motion for a discretionary stay on an opposing party be simultaneous and be by the same method by which the stay motion is filed with the immigration court or the BIA. This requirement will cause respondents to unnecessarily incur additional costs for mail, delivery services, or courier services to send their stay motions to DHS because they will be forced to use the same method to serve DHS as they use to send their motion to the BIA or Immigration Court, even though DHS is already equipped for electronic service (which is nearly instantaneous, secure, reliable, and free), whereas EOIR continues to struggle to implement electronic filing. Further, this requirement does not serve its intended goal of ensuring fairness, and particularly in light of EOIR’s continued delay in implementing an electronic filing system nationwide, will increase mail or courier costs to respondents. Further, the preamble to the rule explains that this requirement is for reasons of fairness, and of course, it makes sense that the Board should not rule on a motion where the opposing party has not received timely notification of the filing of the motion. However, the regulatory language is an extremely clumsy attempt to ensure timely notification to the opposing party. Notably, it would require the adjudicator to deny a motion even if DHS received notice of the motion *before* the BIA or Immigration Court received the motion. For example, if a respondent had *first* served DHS and only later filed the stay motion with the Immigration Court or the BIA, the regulatory language would require denial of the motion. Similarly, the proposed regulation would require denial of the stay motion if counsel electronically served the motion on DHS (which allows for nearly instantaneous receipt of the motion by DHS), but used a mail or delivery service or a courier to send the stay request to the BIA or Immigration Court. Respondents often cannot electronically file a stay motion with the Immigration Court or the BIA because of EOIR’s exceedingly slow rollout of its electronic filing system—the EOIR Courts and Appeals System (ECAS). Similarly, counsel might be able to hand deliver a copy of the motion to DHS counsel, but be required to mail a stay motion to the BIA due to the physical location of the BIA in Falls Church, Virginia. In this scenario, DHS again would receive the motion before the BIA, yet under the proposed regulation, the BIA would deny simply because the identical method of service was not used.

Finally, our organization opposes the regulatory codification of the *Nken* factors for determining whether to grant an administrative stay of removal. EOIR should not adopt the four-factor test announced in *Nken* for U.S. courts of appeals considering stay motions filed in conjunction with a petition for review because this test assumes the agency has already reviewed and rejected the underlying claim on the merits. The *Nken* test is not appropriate when the agency has not yet considered the facts, arguments, and evidence supporting the claims.

Instead, should EOIR adopt through regulation a test for administrative stays of removal, EOIR should adopt a balancing test that prioritizes preventing irreparable harm. EOIR cannot focus its adjudication of stay motions on the likelihood of success of the respondent’s motion, as that would require the adjudicator to prematurely decide the entire merits of the case and would be contrary to the purpose of the stay process. Stays traditionally have resolved a two-pronged problem: “what to do when [(1)] there is insufficient time to resolve the merits and [(2)] irreparable harm may result from delay.”[[31]](#footnote-31) Focusing on the likelihood of success is especially inappropriate where the exigencies of the removal process may necessitate initially filing a skeletal motion and later supplementing it.[[32]](#footnote-32) Therefore, EOIR should heavily weigh the risk of irreparable harm when adjudicating a stay motion, especially where the motion to reopen presents never reviewed arguments and evidence.

**Conclusion**

These proposed rules rewrite many aspects of long-established motions practice and seek to deter respondents from filing motions to reopen and reconsider by creating new barriers that Congress did not intend, including burdensome procedural requirements and financial impediments. The agency should have given the public at least 60 days to respond to these far-reaching changes, and should therefore rescind the rulemaking on this basis alone. Substantively, many of the proposed rules will result in significant and unnecessary barriers to reopening and reconsideration by making it more difficult for noncitizens to successfully reopen proceedings, significantly undermining the very purpose of motions—“‘to ensure a proper and lawful disposition’ of immigration proceedings.”[[33]](#footnote-33) In addition, the proposed rules make it nearly impossible to obtain a stay of removal where removal is imminent, all but guaranteeing that countless respondents will be unjustly removed from the United States. These unjust and unnecessary removals will result in family separations and in many cases, torture or even death. If published in their current form, the proposed rules will further erode due process in immigration court and BIA proceedings. As detailed above, we therefore urge you to make significant changes to the proposed regulatory language and rescind many of the proposed changes.

 [Name, position and signature]

1. *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). [↑](#footnote-ref-1)
2. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020). [↑](#footnote-ref-2)
3. *See* Regulatory Flexibility Act, 5 U.S.C. § 603. [↑](#footnote-ref-3)
4. 85 Fed. Reg. at 75947. [↑](#footnote-ref-4)
5. 85 Fed. Reg. at 75955. [↑](#footnote-ref-5)
6. *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 775 (BIA 2012). [↑](#footnote-ref-6)
7. *See Matter of Z-R-Z-C-,* Adopted Decision 2020-02 at 9 (AAO Aug. 20, 2020) (“We acknowledge the Applicant’s reasonable reliance on the agencies’ erroneous past practice, and conclude that the statutory construction announced in this decision should not apply to her application based on such reliance.”). [↑](#footnote-ref-7)
8. *Toor v. Lynch*, 789 F. 3d 1055, 1057 n.1 (9th Cir. 2015) (enumerating the decisions of other circuit courts on this issue). [↑](#footnote-ref-8)
9. *See* *Union Pacific R.R. v. Brotherhood of Locomotive Engineers,* 130 S. Ct. 584 (2009) (prohibiting an agency from narrowing its own jurisdiction); *Luna v. Holder*, 637 F.3d 85, 101-02 (2d Cir. 2011) (“Nor has Congress indicated since it enacted IIRIRA that an alien’s departure after filing a motion to reopen should be a jurisdictional bar . . . The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed *or otherwise departs* the United States *before or after* filing the motion.” (emphasis added) (internal citations omitted)). [↑](#footnote-ref-9)
10. *E.g.,* *Luna v. Holder*, 637 F.3d at 101 (highlighting that when Congress amended the statute to provide relief from the motion to reopen filing deadline for victims of domestic violence, “Congress explicitly required presence only ‘at the time of filing the motion,’ not thereafter, and did not include any requirement of physical presence elsewhere in Section 1229a(c)(7). Congress’s choice to include this limitation in only one small subsection makes significant its decision to omit such a requirement from the rest of the law. . .”). [↑](#footnote-ref-10)
11. *Trujillo Diaz* *v. Sessions,* 880 F.3d 244, 252-53 (6th Cir. 2018). [↑](#footnote-ref-11)
12. *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); 8 C.F.R. § 1240.7(a). [↑](#footnote-ref-12)
13. *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as “an extreme sanction”); *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (“[t]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court’s authority and dignity.”). [↑](#footnote-ref-13)
14. *See Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005). [↑](#footnote-ref-14)
15. *See, e.g., Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of L-A-B-R*-, 27 I&N Dec. 405 (A.G. 2018). [↑](#footnote-ref-15)
16. USCIS processing delays are largely due to policy changes implemented under the current administration that have needlessly created inefficiencies. *See, e.g.,* *AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow* (February 26, 2020), <https://www.congress.gov/116/meeting/house/110946/witnesses/HHRG-116-JU01-Wstate-Dalal-DheiniS-20200729-SD002.pdf>. [↑](#footnote-ref-16)
17. *See* USCIS, “Check Case Processing Times,” <https://egov.uscis.gov/processing-times/> (last visited Dec. 7, 2020) (showing that USCIS currently estimates that adjudication of a Form I-918 by the Vermont Service Center will take 57 to 57.5 months) [↑](#footnote-ref-17)
18. *See* INA §240(c)(7). There is an even shorter window for timely filing motions to reconsider: only 30 days. INA §240(c)(6). [↑](#footnote-ref-18)
19. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020). [↑](#footnote-ref-19)
20. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020) (doing away with *sua sponte* reopening in nearly all circumstances); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (December 11, 2020). [↑](#footnote-ref-20)
21. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). [↑](#footnote-ref-21)
22. *See Matter of Lozada*, 19 I&N Dec. at 639. When these goals are met, EOIR should not insist upon strict compliance with arbitrary procedural rules. *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003). [↑](#footnote-ref-22)
23. EOIR’s new policy in this regard appears to mirror a similar USCIS policy to reject applications that contained blank spaces where an item was inapplicable. That policy is subject to litigation. *See* Class Action Complaint for Injunctive and Declaratory Relief, *Vangala v. USCIS*, No. 3:20-cv-08143 (N.D. Cal. Nov. 19. 2020). [↑](#footnote-ref-23)
24. *See, e.g.,* State Bar of Georgia Rule 4-222 (establishing a four-year statute of limitations for filing an attorney grievance). [↑](#footnote-ref-24)
25. *See* *Fadiga v. Att’y Gen*., 488 F.3d 142, 156-58 (3d Cir. 2007) (explaining that all of the policy objectives of *Lozada* are served in this situation). [↑](#footnote-ref-25)
26. EOIR has separately proposed regulations significantly increasing the fees for motions to reopen and reconsider. *See* Executive Office for Immigration Review; Fee Review 85 Fed. Reg. 11866 (proposed Feb. 28, 2020). These substantial fees, in combination with the new requirements that a noncitizen seeking a stay of removal pay the $155 fee for filing a stay request with DHS before even being permitted to file a stay request with EOIR, will effectively bar many indigent noncitizens from filing motions to reopen or reconsider and stay requests. [↑](#footnote-ref-26)
27. *Cf. Perez Santana v. Holder*, 731 F.3d 50, 60 (1st Cir. 2013) (rejecting the Government’s argument that even where a noncitizen “did everything right” by assiduously seeking relief and timely requesting reopening, the Government can still use its “exercise of its wholly discretionary authority to remove him from the United State” to “unilaterally preclude” the noncitizen from vindicating his rights). [↑](#footnote-ref-27)
28. *See* proposed subsection 1003.48(k)(iv). [↑](#footnote-ref-28)
29. *See* INA § 240(c)(6)(B), (c)(7)(C)(i). [↑](#footnote-ref-29)
30. *See* INA § 240(b)(5)(C)(i). [↑](#footnote-ref-30)
31. *Nken v. Holder*, 556 U.S. 418, 432 (2009); *see also id.* (“The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review.”) (quotation omitted). [↑](#footnote-ref-31)
32. *See Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (concluding that BIA erroneously denied a skeletal motion to reopen where counsel stated that additional evidence would be forthcoming within the 90-day statutory time period for filing a motion to reopen). [↑](#footnote-ref-32)
33. *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). [↑](#footnote-ref-33)