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IMMIGRATION
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December 21, 2020

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Submitted via <http://www.regulations.gov>

Re: Executive Office for Immigration Review, Notice of Proposed Rulemaking: *Good Cause for a Continuance in Immigration Proceedings*, (EOIR Docket No. 19-0410, RIN 1125-AB03)

Dear Assistant Director Reid:

The American Immigration Council (the Council) and the American Immigration Lawyers Association (AILA) submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) proposed rule, EOIR Docket No. 19-0410, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75925 (November 27, 2020) (Proposed Rule).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

It is the long-settled policy of Congress and the executive branch that immigrants placed into removal proceedings shall be provided the right to obtain counsel, be protected against the arbitrary denials of the opportunity to be heard in violation of their Fifth Amendment right to Due Process, and be provided opportunities to seek relief from removal to avoid the "particularly severe penalty"¹ of deportation. The Proposed Rule would severely erode these rights.

¹ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

I. The Council and AILA Strongly Oppose the Proposed Rule

AILA and the Council strongly oppose the Proposed Rule because it strips respondents of their right to counsel, removes key procedural protections from immigrants, removes authority from immigration judges to manage their dockets, and will result in respondents being unable to vindicate their rights in court.

Throughout the Proposed Rule, EOIR overturns decades of precedent and discretionary policies that have protected the ability of immigrants to have a fair day in court and seek Congressionally created remedies to the harsh penalty of deportation. EOIR justifies these sweeping changes by claiming that they support “EOIR’s mission of adjudicating cases expeditiously and efficiently,”² but as the Supreme Court has made clear, “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.”³ The Proposed Rule would rush respondents through court hearings without any meaningful opportunity to protect their rights. EOIR should immediately withdraw the proposed regulation.

II. The Proposed Rule Violates the Right to Counsel

The right to counsel in immigration proceedings has been enshrined in the Immigration and Nationality Act (INA) for generations.⁴ This right is so inherent to a fair day in court that some circuit courts have declared that the Fifth Amendment may be violated in some circumstances when an immigration judge fails to grant a continuance to obtain counsel.⁵

Given the importance of the right to counsel, the Board of Immigration Appeals (BIA) and the circuit courts have long recognized that “the Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.”⁶ Similarly, EOIR has long provided in policy that immigration judges are required to give “at least one continuance” to obtain counsel.⁷

Despite the importance of this right, the Proposed Rule severely restricts the ability of respondents to obtain counsel. Among the ways it does so are by (1) adopting an *ultra vires* presumption that that 10 calendar days is a “reasonable” period of time to obtain counsel under the INA, (2) limiting continuances to obtain counsel to a maximum of 40 days, (3) barring continuances based on attorney workloads, and (4) preventing immigration judges from granting continuances in circumstances where good cause is

² Proposed Rule, 85 Fed. Reg. at 75938.

³ *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)

⁴ See 8 U.S.C. § 1229a(b)(4)(A); INA § 240(b)(4)(A).

⁵ See, e.g., *Montes-Lopez v. Holder*, 694 F.3d 1085, 1089 (9th Cir. 2012) (“We have recognized that denial of counsel or ineffective assistance of counsel in an immigration proceeding may violate the Fifth Amendment.”); *Castaneda-Delgado v. Immig. and Naturalization Serv.*, 525 F.2d 1295 (7th Cir. 1975).

⁶ *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012).

⁷ EOIR Operating Policies and Procedures Memorandum 17-01, *Continuances* (July 31, 2017) (“it remains general policy that at least one continuance should be granted” to obtain counsel); OPPM 13-01, *Continuances and Administrative Closure* (March 7, 2013) (“absent good cause shown, no more than two continuances should be granted . . . for the purpose of obtaining legal representation”).

inarguably shown. This rule, which is both unnecessary and overly narrow, erects barriers to obtaining new counsel following the withdrawal of prior counsel.⁸

Proposed 8 C.F.R. § 1003.29(b)(4)(i) and (ii) violate the right to counsel

Proposed 8 C.F.R. 1003.29(b)(4)(i) declares that “an immigration judge is not required to grant a continuance to any [person] in removal proceedings to secure representation if the time period described in section 239(b)(1) of the Act [10 days] has elapsed and the alien has failed to secure counsel.”

Under the Proposed Rule, an immigration judge would not be required to grant a continuance to obtain counsel at the first master calendar hearing because in EOIR’s view “[section 239(b) of] the Act already grants respondents a reasonable amount of time to secure counsel prior to the first hearing.”⁹ This proposition is untenable, and the legal authorities EOIR cites say no such thing.¹⁰

It is unsurprising that EOIR cannot find any support for the proposition that the INA itself provides that 10 days is a “reasonable” period of time to obtain counsel, given that no case has *ever* said as much. Indeed, federal courts and the BIA have repeatedly held otherwise. For example, the foundational BIA case on the right to counsel, *Matter of C-B-*, held that a respondent did not have sufficient time to obtain counsel when he was ordered removed within nine days of the issuance of the NTA. In unpublished decisions, the BIA has held that the denial of a second continuance after being given two weeks to obtain counsel meant that the respondent “was not afforded a reasonable and realistic time in which to obtain counsel.”¹¹

Not only does no support exist for EOIR’s contention that INA § 239(b)(1) represents “Congress’s further determination that a period of ten days . . . is a sufficient time to allow the [person] to seek such representation,”¹² but the overwhelming weight of legal precedent holds to the contrary. The circuit courts have repeatedly declared that denials of continuances after short periods of time, including

⁸ The Proposed Rule also continues to repeat a false claim that EOIR has made in other proposed and final rules—that nearly 90% of asylum seekers have representation. As AILA and the Council have previously explained in comments, EOIR fails to understand its own statistics. 87% of individuals *who have filed asylum applications* are represented by counsel—a figure that demonstrates that without counsel, it is extremely hard to properly complete and submit an asylum application in English, a language that the overwhelming majority of *pro se* asylum seekers do not speak.

⁹ Proposed Rule, 85 Fed. Reg. at 75935-75936.

¹⁰ The Proposed Rule cites two cases in support of this proposition, both of which it gets wrong. First, *Hidalgo-Disla v. I.N.S.*, 52 F.3d 444 (2d Cir. 1995) involved a legal challenge to the lack of a *waiver* of the right to counsel. *Id.* at 446-447 (“Hidalgo-Disla presented numerous claims of error to the BIA, including the assertion that he did not knowingly and voluntarily waive his right to counsel in proceedings before the IJ . . . We do not view as error the fact that the immigration judge proceeded with the hearing on the third occasion without again questioning Hidalgo-Disla as to whether he wished representation.”). The denial of a continuance after 26 days was neither challenged on appeal nor was an appeal on that issue found frivolous as EOIR contends. EOIR also cites *Ghajar v. Immig. and Naturalization Serv.*, 652 F.2d 1347 (9th Cir. 1981), but that case involved the denial of a continuance for attorney preparation, not a denial of a continuance to obtain counsel, and is thus inapposite.

¹¹ *Matter of Gaitan*, 2017 WL 1951549, at *1 (BIA Mar. 31, 2017).

¹² Proposed Rule, 85 Fed. Reg. at 75936.

periods of time longer than 10 days, are insufficient to vindicate the right to counsel.¹³ Similarly, courts have repeatedly inferred that the only reasonable measurement for the time it requires to obtain counsel is business days, not calendar days, since a respondent cannot reasonably be expected to hire a lawyer on a day in which law offices are closed.¹⁴ Yet because the 10 days in INA § 239(b) are calendar days, depending on the day of the week a respondent is arrested they may have significantly fewer than 10 business days in which to call law offices and pro bono legal service providers to seek counsel.

EOIR also errs by relying solely on INA § 239(b)(1) without taking into account the requirement in 239(b)(2) that individuals be provided a list of pro bono service providers—something that which the immigration judge has a regulatory duty to provide at the first hearing under 8 C.F.R. § 1240.13(a)(3), which conflicts with EOIR’s reading of the statute to create a presumption that counsel can be obtained prior to the first master calendar hearing. To the extent that EOIR presumes that the statute and the Notice to Appear provide *per se* notice of the right to counsel, that proposition too has been rebutted by the courts.¹⁵ Even where the list of pro bono service providers is appended to the Notice to Appear, courts have held that this too is not *per se* notice of the right to counsel.¹⁶

The risk that the right to counsel would be violated by the Proposed Rule is increased by the confusingly-worded Proposed 8 C.F.R. § 1003.29(b)(2)(4)(ii), which provides that an immigration judge “may grant one continuance to secure representation . . . not to exceed 30 days” if the initial master calendar hearing “occurs less than 30 days after the date the [person] was served with a Notice to Appear” and “the [person] demonstrates that [he or she] has been diligent in seeking representation since that date.” EOIR does not explain how this provision interacts with Proposed 8 C.F.R. § 1003.29(b)(2)(4)(i). Is a person who appears at their initial master 31 days after service of the Notice to Appear able to obtain additional continuances under subsection (i) and the general authority to grant a continuance for good cause provided in Proposed 8 C.F.R § 1003.29(a), or are they barred from obtaining more than one continuance under subsection (ii) because more than 30 days have passed after the service of the Notice to Appear?

EOIR appears to answer this question in two footnotes, first suggesting that the Proposed Rule “adopts a feature of a prior regulation” that “limited [respondents] to one continuance to seek representation

¹³ See, e.g., *Hernandez Lara v. Barr*, 962 F.3d 45, 55 (1st Cir. 2020) (violation of right to counsel where immigration judge denied continuance 14 business days after the time respondent became aware her prior counsel on a bond hearing would not be representing her); *Castaneda-Delgado*, 525 F.2d at 1300 (violation of right to counsel where immigration judge only granted a single continuance of two business days, even where initial hearing occurred 15 days after Order to Show Cause); *Rios-Berrios v. I.N.S.*, 776 F.2d 859 (9th Cir. 1985) (violation of right to counsel where immigration judge granted two continuances of 24 hours each and proceeded without counsel 10 days after the Order to Show Cause was issued); *Jiang v. Houseman*, 904 F. Supp. 971 (D. Minn. 1995) (overturning removal order on collateral attack after finding that a denial of a continuance 23 days after the Order to Show Cause was a violation of the right to counsel).

¹⁴ See, e.g., *Hernandez Lara*, 962 F.3d at 5 (calculating “business days”); *Biwot v. Gonzales*, 403 F.3d 1094, 1096 (9th Cir. 2005) (calculating “working days”); *Rios-Berrios*, 775 F.2d at 862 (calculating “working days”); *Jiang v. Houseman*, 904 F. Supp. at 979 (calculating “workdays”).

¹⁵ *Ignatov v. Ashcroft*, 71 Fed. Appx. 157, 160 (3d Cir. 2003) (“Merely informing a petitioner of his statutory right to counsel is insufficient absent adequate time to obtain such counsel.”) (citing *Castaneda-Delgado*).

¹⁶ *Picca v. Mukasey*, 512 F.3d 75, 79-80 (2d Cir. 2008): (“And, of course, appending a list of legal service organizations to a Notice to Appear cannot substitute for the requirement that the immigration judge “[a]scertain that the respondent has received a list of such programs.”).

unless ‘sufficient cause’ for more time was shown.”¹⁷ EOIR then states in a second footnote that the Proposed Rule “would give a diligent [respondent] potentially up to 40 days total to seek representation after being served with an NTA.”¹⁸

As an initial matter, these non-binding footnotes do not address the clear textual conflict in the Proposed Rule between subsections (i) and (ii). EOIR also does not even attempt to explain why they believe a limit which was abandoned in 1987 should be adopted 33 years later, nor why the current policies, which require at least one continuance, should be abandoned.¹⁹ The failure to provide a reasoned explanation for overturning generations of policy is a direct violation of the Administrative Procedure Act.²⁰

A bright-line rule barring a second continuance after 40 days would inevitably violate the right to seek counsel. “Whether an IJ has provided a reasonable amount of time to find counsel is a fact-intensive inquiry, consideration of which includes any barriers that frustrated a petitioner’s efforts to obtain counsel, such as being incarcerated or an inability to speak English.”²¹ In some circumstances that may require more than one continuance after 40 days—yet EOIR’s interpretation of subsection (ii) would bar the immigration judge from granting that additional continuance.

Proposed 8 C.F.R. §§ 1003.29(b)(1)(a), (b)(2)(iii), and (b)(5) violate the right to counsel

The Proposed Rule would also lead to the violation of the right to counsel by barring continuances, absent exceptional circumstances, that would push a hearing past a regulatory or statutory deadline such as the 180-day deadline for asylum adjudication, as well as barring continuances of a merits hearing except in two specific scenarios. In a recent Final Rule, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81698 (December 16, 2020), EOIR provides a new regulatory definition providing that:

[T]he term exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the parties or the immigration court.²²

¹⁷ Proposed Rule, 85 Fed. Reg. at 75935 n15.

¹⁸ Proposed Rule, 85 Fed. Reg. at 75936 n19.

¹⁹ EOIR also does not explain how a regulation adopting maximum rule of 40 days to obtain counsel “adopts” a regulation which permitted additional continuances following “sufficient cause shown.” Courts interpreting that prior regulation made clear that the “sufficient cause” standard did *not* create a bright-line rule. *See e.g., Castaneda-Delgado*, 525 F.2d at 1299 (faulting the immigration judge for acting “as if Section 242.13 forbade more than one continuance for the purpose of obtaining representation rather than authorizing an additional continuance for that purpose when ‘sufficient cause’ is shown.”).

²⁰ *See, e.g., F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.”).

²¹ *U.S. v. Moriel-Luna*, 585 F.3d 1191, 1201 (9th Cir. 2009).

²² *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. at 81750.

Taken together, these two regulations would prevent an immigration judge from granting a continuance where a respondent's counsel withdraws or becomes unavailable after the 180-day period has already passed or soon before a merits hearing, in violation of the right to counsel.²³

Similarly, the right to counsel may be violated under these regulations where good cause for a continuance existed but the judge's crowded docket would prevent a hearing from being scheduled before the 180-day period expired, or which would require a merits hearing to be rescheduled. As the Ninth Circuit has explained, "Petitioners should not be forced to proceed without counsel because of the scheduling problems of the immigration court. As frustrating as delays might be, an immigrant's right to counsel should not be sacrificed because of the shortcomings of the immigration system itself."²⁴

In addition, the Proposed Rule would violate binding precedent in the Ninth Circuit which holds that INA § 208(b)(1)(B)(ii) requires an immigration judge to grant a continuance to produce corroborating evidence once the judge concludes such evidence is necessary,²⁵ because this circumstance would neither present "exceptional circumstances" nor fall within the narrow exceptions to the ban on continuing a merits hearing in Proposed 8 C.F.R. § 1003.29(b)(5).

Proposed 8 C.F.R. §§ 1003.29(b)(4)(iii)-(iv) interfere with the right to counsel

Proposed 8 C.F.R. § 1003.29(b)(4)(iii) provides that "a representative's assertions about his or her workload or obligations do not constitute good cause." EOIR's stated justification that attorneys "are presumed to take on no more cases than they can handle" is arbitrary and capricious. Attorneys cannot fully anticipate how and at what pace their cases will proceed, nor can they control the behavior of their clients or circumstances outside their control. A case which may be simple upon the signing of a representation agreement may later turn out to be significantly more complex. Clients may become eligible for additional forms of relief or have an encounter with the criminal justice system which requires additional legal work. Cases may continue for years due to scheduling delays caused by the Department of Homeland Security (DHS) or the immigration court. A global pandemic may hit. And in all those scenarios, the attorney's workload would increase through no fault of their own.

Despite this basic reality about legal practice, the regulation would bar immigration judges from granting a continuance based on a representative's assertions about workload. EOIR is reminded that attorneys have more than just a duty not to take on more cases than they handle—they also have a duty of candor to the tribunal, and would be subject to ethical sanctions if they lied about their workload.

Similarly, Proposed 8 C.F.R. § 1003.29(b)(4)(iv), by barring any continuances for attorney preparation after pleadings are taken, violates the right to counsel as well as the right to present evidence in INA § 240(b)(4)(B). There are numerous situations in which an attorney may need additional time to prepare

²³ See, e.g., *Montes-Lopez v. Holder*, 694 F.3d 1085, 1087 (9th Cir. 2012) (finding that the right to counsel was violated by a denial of continuance to obtain new counsel when the respondent was given a withdrawal letter from prior counsel 11 days before hearing); *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 943 (9th Cir. 2004) (finding a violation of the right to counsel where respondent's prior counsel was disqualified by a different immigration judge and the respondent was not permitted to seek additional time to obtain counsel); *Gjeci v. Gonzales*, 451 F.3d 416, 422-23 (7th Cir. 2006) (finding violation of the right to a fundamentally fair hearing where immigration judge insisted on holding a merits hearing immediately after prior counsel withdrew).

²⁴ *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1084 (9th Cir. 2007).

²⁵ *Ren v. Holder*, 648 F.3d 1079, 1090-92 (9th Cir. 2011).

after pleadings are taken. This occurs most often when the attorney was not retained until after pleadings have already been taken—but under the Proposed Rule, an additional continuance for preparation would be barred. The Ninth Circuit held in *Mendoza-Mazariegos* that denying a continuance in that situation may violate the right to counsel.²⁶ Other situations in which attorney preparation would be necessary but barred by the Proposed Rule include where pleadings have already been taken but there is a material change in the respondent’s circumstances (for example, a government in the country of origin is overthrown, a qualifying relative dies, or the respondent becomes eligible for a new form of relief). Attorney preparation may also be necessary where there is a change in law or precedent that affects removability or eligibility for relief, which may require new legal briefing or applications for relief. Proposed 8 C.F.R. § 1003.29(b)(4)(iv) would bar continuances in those scenarios, even though each of those scenarios inarguably presents “good cause” for a continuance.

EOIR also fails to explain why the standards set forth in *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983), providing that attorneys must meet a “high standard” to obtain a continuance for attorney preparation, have not worked for nearly 40 years and should be overturned.

III. The Restrictions on Continuances for Collateral Matters Are Arbitrary and Capricious

For more than 40 years the BIA has consistently held that an immigration judge should generally grant an adjournment or a continuance where a respondent is *prima facie* eligible for an immigrant visa and the visa is immediately available, will soon become available, or has previously been immediately available but the visa category has since retrogressed.²⁷ This “presumption that discretion should be favorably exercised” has been extensively supported by the circuit courts since it was created.²⁸ In the decades that followed, the presumption was extended to other collateral matters beyond immigrant visas, including for collateral adjudication of I-751 petitions²⁹ and waivers,³⁰ U-visas,³¹ labor certifications,³² and Special Immigrant Juvenile Status (“SIJS”).³³ Even Attorney General Sessions has held that immigration judges should grant “a continuance [which] may allow an immigration judge to oversee [a noncitizen] minor’s progress in obtaining appropriate alternative forms of relief.”³⁴

Despite these decades of precedent, the Proposed Rule would radically rework these presumptions, overturn decades of precedent, and revoke discretion to grant continuances to seek collateral relief outside of the discretion of the immigration court, such as parole or deferred action. EOIR claims that it is required to do so because granting continuances for collateral DHS matters “is beyond the authority of the immigration judge to grant.”³⁵ EOIR does not explain why the BIA has apparently misunderstood its

²⁶ *Mendoza-Mazariegos*, 509 F.3d at 1084.

²⁷ See, e.g., *Matter of Garcia*, 16 I&N Dec. 653, 656 (BIA 1978); *Matter of Ho*, 15 I&N Dec. 692, 694 (BIA 1976).

²⁸ *Matter of Hashmi*, 24 I&N Dec. 785, 789 (BIA 2009) (collecting cases).

²⁹ *Matter of Mendes*, 20 I&N Dec. 833, 840 (BIA 1994).

³⁰ *Matter of Stowers*, 22 I&N Dec. 605, 613-14 (BIA 1999).

³¹ *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 812-13 (BIA 2012).

³² *Matter of Rajah*, 25 I&N Dec. 127, 130 (2009).

³³ The BIA in unpublished opinions has repeatedly affirmed that continuances should be granted to obtain family court orders for children seeking Special Immigrant Juvenile Status. See, e.g., *Matter of B-A-M-G*, 2016 WL 8471139, at * 1-2 (BIA Dec. 27, 2016) (unpublished); *Matter of W-E-PM-*, (BIA July 15, 2015) (unpublished), <https://www.scribd.com/document/274423255/W-E-P-MAXXX-XXX-859-BIA-July-15-2015>.

³⁴ *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 n.13 (A.G. 2018).

³⁵ Proposed Rule, 85 Fed. Reg. at 75931.

own authority since at least 1978, under which immigration judges have long held the ability to grant a continuance for collateral matters under DHS's jurisdiction.

The rule would also eliminate all continuances for U visas, even where the respondent is *prima facie* eligible for the visa, by declaring in Proposed 8 C.F.R. § 1003.29(b)(3)(iii) that a judge may not grant a continuance for a pending nonimmigrant visa application, unless the visa is not available within six months. EOIR entirely ignores the fact that this six-month exception is meaningless because the 10,000 cap on U visas provided by Congress has led to years-long backlogs in U visas and *no* person could ever qualify under this provision until Congress increases the available pool of U visas. Thus, the Proposed Rule would in practice create an absolute bar on continuances to seek U visas.

The Proposed Rule also violates long-standing precedent from the BIA and circuit courts that lengthy delays in USCIS adjudications are not “delay attributable to the respondent” and thus are not valid grounds to deny a continuance.³⁶

Similarly, the bar on a grant of continuance for “interim relief, prima facie determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the visa application”³⁷ would lead to the deportation of many individuals who, but for the denial of the continuance, would be permitted to remain in the United States. EOIR's suggestion that individuals could apply for DHS stays if they wanted to avoid the severe penalty of deportation³⁸ is cold comfort at a time where DHS routinely denies those stays.

EOIR also does not adequately justify its decision in proposed 8 C.F.R. § 1003.29(b)(2)(i) to apply a “clear and convincing evidence [of the] likelihood of obtaining relief” standard for granting a continuance for a collateral matter. Prior BIA precedent has always applied a *prima facie* standard for eligibility for relief in those circumstances. EOIR's sole justification for this change is a single footnote declaring that dicta in *Matter of L-A-B-R* saying that a respondent who presents a “compelling case” for collateral relief merits a continuance is support for the imposition of a “clear and convincing evidence” standard.³⁹ Not only does EOIR offer no explanation for why this dicta should be codified into binding regulation, the agency also offers no legal precedent for this interpretation of “compelling,” nor any explanation for why it chose this interpretation over other plausible interpretations. For example, EOIR could just as easily have declared that a “compelling case” is one in which the respondent's equities strongly support a continuance.

This choice could also have a severe effect on unaccompanied children applying for Special Immigrant Juvenile Status (SIJS) who must seek a both a family court order and a SIJS petitions from USCIS. Requiring applicants to prove by “clear and convincing evidence” that the family court would grant their

³⁶ See, e.g., *Marube v. Sessions*, 712 Fed. Appx. 246, 247 (4th Cir. 2018) (delay in USCIS processing of I-130s should be treated as “delay by the DHS” under *Matter of Hashmi*); *Matter of Garcia-Diaz*, 2017 WL 4118903, at *2 (BIA June 29, 2017) (finding that USCIS processing delays for U Visa applicants was “delay not attributable to” the respondent); *Matter of Alvarado-Turcio*, at 2 (BIA Aug 17, 2017) (“While we recognize that USCIS has a significant U visa backlog, processing delays are insufficient, in themselves, to deny an alien's request for a continuance.”), available at <https://www.scribd.com/document/360077591/Edgar-MarceloAlvarado-Turcio-A201-109-166-BIA-Aug-17-2017>.

³⁷ Proposed Rule, 85 Fed. Reg. at 75940.

³⁸ Proposed Rule, 85 Fed. Reg. at 75934.

³⁹ Proposed Rule, 85 Fed. Reg. at 75932 n8.

petition would increase the burden on applicants and counsel and frustrate congressional intent to maintain avenues of relief for children who have been abused, abandoned, or neglected by a parent.

The Proposed Rule's bar on most continuances for collateral applications represents a deliberate policy choice to increase deportations and separate families even where Congress has provided alternative means to avoid that harsh sanction. EOIR should withdraw the proposed rule.

IV. The 30-Day Period Does Not Provide a Meaningful Opportunity to Comment

Executive Order 13563 states that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”⁴⁰ Similarly, Executive Order 12866 states that agencies should allow “not less than 60 days” for public comment in most cases, in order to “afford the public a meaningful opportunity to comment on any proposed regulation.”

EOIR's choice to impose a 30-day comment period here directly contravenes the guidance provided in two Executive Orders and has prevented the ability to meaningfully comment, which is necessary because it allows for the creation of stable policy and alerts practitioners in the field as to potential changes in guidance from the executive branch. A shortened 30-day comment period greatly compromises the ability of even highly sophisticated and well-staffed organizations to provide meaningful feedback to proposed policy changes.

A 30-day comment period which began the day after Thanksgiving (when many offices are closed) and ends three days after Christmas is insufficient given the blizzard of other policy changes and regulations that EOIR has proposed or effectuated during the same period, as well as the ongoing delays in responding that are caused by the COVID-19 pandemic and the ongoing presidential transition.

The same day that EOIR proposed this regulation, it proposed *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75,942 (Nov. 27, 2020), which also has a 30-day comment period ending at the same time. EOIR has also published three separate final regulations during the comment period, each of which will have sweeping effects on immigration court practice. In addition, during the comment period EOIR has published five major new Policy Memoranda.⁴¹ Each of these regulations and Policy Memoranda may interact with the Proposed Rule. Unfortunately, given the sheer scope of these changes, the Council and AILA are unable to examine these changes in depth and comment on the multitudinous ways in which they may affect the Proposed Rule.

Thus, to the extent that EOIR has recently demanded that commenters identify the “additional issues the comment period precluded them from addressing”⁴² the Council and AILA wish to formally declare that the 30-day comment period precluded us from addressing in full:

⁴⁰ Executive Order 13563 of January 18, 2011, <https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf>

⁴¹ See EOIR, *Policy Memoranda*, <https://www.justice.gov/eoir/policy-memoranda>, last updated December 18, 2020.

⁴² *Appellate Procedures & Decision Finality in Immigration Proceedings*, 85 Fed. Reg. at 81643 (December 16, 2020) (rejecting commenters' objections to a 30-day comment period in part because commenters had failed to identify any specific issue that the 30-day comment period precluded them from addressing).

- The extent to which the Proposed Rule relies on a flawed and inaccurate representation of the history of continuances, including misrepresentation of the Government Accountability Office report on continuances, failure to engage with DHS’s role in increasing continuances, EOIR’s own admitted role in increasing the immigration court backlog through “docket reshuffling” practices, and flawed and inaccurate data on representation.
- The effect of the Proposed Rule on the Department of Homeland Security’s ability to exercise prosecutorial discretion, and the effect of the Proposed Rule on Immigration and Customs Enforcement trial attorneys.
- The effect of the Proposed Rule on pro bono service providers.
- The impact of the COVID-19 pandemic and related immigration court, State Department consulate, and USCIS office closures on the Proposed Rule.
- The interaction of the Proposed Rule with:
 - o Notice of Proposed Rulemaking, *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75942 (November 27, 2020).
 - o Policy Memo 21-05, Enhanced Case Flow Processing in Removal Proceedings.
 - o Policy Memo 21-06, Asylum Processing.
 - o Policy Memo 21-08, Pro Bono Legal Services.
 - o Final Regulation, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (December 16, 2020).
 - o Final Regulation, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020).
 - o Final Rule, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81698 (December 16, 2020).
 - o Final Rule, *Fee Review*, 85 Fed. Reg. 82750 (December 18, 2020).
 - o Policy Memo 21-10, Fees.
- All remaining provisions of the Proposed Rule not addressed in this comment.
- The “economic, environmental, or federalism effects that might result from this rule.”⁴³

V. Conclusion

The Council and AILA oppose the proposed regulations because they are arbitrary and capricious and will lead to the unjust deportations of thousands of immigrants every year and deny the fundamental right to counsel. These and other similar EOIR regulations published in recent months are intended to turn the immigration court system into a vast deportation machine that ignores the protections provided by Congress and the Constitution. We urge EOIR to reconsider the proposed rule and withdraw it from consideration.

Sincerely,

THE AMERICAN IMMIGRATION COUNCIL

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁴³ Proposed Rule, 85 Fed. Reg. at 75925.