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COMMENT BY THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Re: Proposed Rule - Procedures for Asylum and Withholding of Removal
85 Federal Register 59692 (September 23, 2020)
[EOIR Docket No. 19-0010; RIN 1125-AA93]

This comment to the above-captioned proposed rule is being submitted by the National Association of Immigration Judges (NAIJ). NAIJ is a non-profit, voluntary organization of United States immigration judges. NAIJ was founded in 1971 and in 1979 was designated the recognized collective bargaining representative for this group. Our mission is to promote independence and enhance the professionalism, dignity, and efficiency of the immigration courts. NAIJ speaks on behalf of all non-managerial immigration judges, and this comment is submitted in our NAIJ capacity.

On September 23, 2020, Attorney General William P. Barr published proposed regulatory changes that would have a significant--and negative--impact on Immigration Judges to fairly and efficiently handle the hundreds of thousands of claims for asylum and related forms of humanitarian protection before them. While many aspects of the proposed rule are problematic, we would like to focus on two particularly ill-considered proposed rules dealing with time limits on the filing and adjudication of protection law claims.

First, the proposed rule would require a decision on all asylum applications within 180 days of filing barring "exceptional circumstances." While the proposed regulatory language tracks the provisions of section 208(d)(5)(A)(iii) of the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),in that section, Congress granted the Attorney General the authority to establish procedures for asylum adjudications consistent with the general 180-day completion goal. In the ensuing quarter century, no such rule was promulgated, and for good reason: every administration recognized that the volume of asylum applications and the staffing levels of the Asylum Offices and the immigration courts made the 180-day goal aspirational rather than realistic. Indeed, even the current administration recognized this just a few months ago:

> Since IIRIRA, there have been no major statutory changes to the asylum provisions to address the immigration realities faced by the United States today. However, since 2016, the United States has experienced an unprecedented surge in the number of aliens who enter the country unlawfully across the southern border. In Fiscal Year 2019, CBP apprehended over 800,000 aliens attempting to enter the United States illegally. These apprehensions are more than double of those in Fiscal Year 2018. If apprehended, many of these aliens claim asylum and remain in the United States for years while their claims are adjudicated. There is consistent historical evidence that approximately 20 percent or less of such claims will be successful. This surge in border crossings and asylum claims has placed a significant strain on the nation's immigration system. The large influx has consumed an inordinate amount of DHS's resources, which include surveilling, apprehending, screening, and processing the aliens who enter the country, detaining many aliens pending further proceedings, and representing the United States in immigration court proceedings. The surge has also consumed substantial resources at DOJ-EOIR, whose IJs adjudicate asylum claims.

Department of Homeland Security (DHS), Final Rule: Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532, 38545 (June 26, 2020). The 180-day adjudication rule was difficult to meet in 1996; even with increases in the numbers of Immigration Judges, the overwhelming numbers of applicants in 2020 make it impossible to meet the 180-day deadline while ensuring due process.

The rational approach--an approach fully consistent with congressional dictates--is to declare that the current "unprecedented surge" *is* the very type of "extraordinary circumstance" contemplated by Congress as a reason for deviating from strict adherence to the 180-day

adjudication guideline. But instead of recognizing the reality of the situation, the Department now proposes to graft an entirely inapposite definition of "extraordinary circumstances" onto section 208: the definition allowing aliens who failed to appear for their immigration court hearings to reopen their cases. That definition excuses the alien's failure to appear based on "battery or extreme cruelty to the alien or any parent or child of the alien, serious illness of the alien, or serious illness or death of the spouse, parent, or child of the alien, but not including less compelling circumstances." 85 Fed. Reg. at 59697, citing INA section 240(e)(1). In other words, things that are so important in anyone's life that failure to appear for an immigration court hearing--surely the next-most important thing--can be excused. This is no doubt why Congress included such definitional language limiting the types of circumstances that may warrant reopening an *in absentia* order of removal. Congress did not include such limiting language in section 208's 180-day completion standard. And this makes sense. Unlike the *in absentia* reopening provisions, which are directed to what the non-appearing alien must show, the 180-day asylum completion guideline is directed to asylum *adjudicators*: Department of Homeland Security Asylum Officers, and Department of Justice Immigration Judges. There are, of course, myriad reasons why the 180-day standard may not be practicable that have nothing to do with the asylum applicant's alleged foot-dragging. For example, the 180-day standard applies to asylum applications filed affirmatively with the Asylum Office. The workflow in that situation may look something like this:

- Applicant files Asylum Application with the Asylum Office on Day 1.
- Applicant is interviewed by the Asylum Office on Day 90.
- Asylum Officer and supervisor review the case and a decision is issued referring the case to the Immigration Judge for further consideration on Day 120.
- Applicant makes his first appearance before the Immigration Judge on Day 150, and requests a continuance for the purposes of obtaining counsel; pursuant to policy protecting due process rights, a short 25-day continuance is granted. See Executive Office for Immigration Review, Operating Policies and Procedures Memorandum (OPPM) 17-01: *Continuances* (July 31, 2017) (noting that "at least one continuance should be granted" for the purpose of obtaining counsel).
- Applicant obtains counsel just ahead of a master calendar hearing on Day 175.

The DHS's new rule ("Asylum Application, Interview, and Employment Authorization for Applicants") establishes new waiting periods for eligibility for work authorization for applicants, but it says nothing about adjudication deadlines for its own Asylum Officers. And this is not some far-fetched scenario; in fact, Asylum Office referrals consuming much of the 180-day period have long been recognized as common. *See, e.g.,* OPPM 13-02: *The Asylum Clock* (stating that cases referred to the Immigration Judge fewer than 75 days after filing with the Asylum Office were expedited cases to be completed within 180 days unless the applicant sought a delay, whereas cases pending for 75 or more days at referral were not).

Given this scenario--recall that we are already at Day 175--unless the applicant is seriously ill or has been battered, or a close relative is seriously ill or has died, under the proposed rule the

Immigration Judge would be duty-bound to complete the case within 5 days. The Department's proposed adoption of the *in absentia* extraordinary circumstances definition allows for no further delay. But marching forward in 5 days may not be practicable or consistent with applicable policies and case law, and violative of the due process rights of the asylum seeker.
For example, under a settlement agreement entered into by the Department, a merits asylum hearing in a nondetained cases cannot be set sooner than 45 days after the master calendar hearing at which the application is filed. *See* OPPM 13-03: *Guidelines for Implementation of the ABT Settlement Agreement* (December 2, 2013); Executive Office for Immigration Review, Policy Memorandum 19-05: Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii), n. 3 (noting the Department's continuing obligations under that settlement). The Immigration Judge would then be faced with violating the proposed rule, or violating the settlement agreement; even if that settlement is superseded, the core principle remains that a final hearing cannot be unduly rushed in this manner. Or perhaps the hearing may be completed by the 180th day, but the Department of Homeland Security cannot affirm that required background investigations have been completed. Assuming the Immigration Judge was otherwise ready to grant the application, she cannot do so under a different longstanding rule. See 8 C.F.R. 1003.47(g) ("In no case shall an immigration judge grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations under this section until after DHS has reported to the immigration judge that the appropriate investigations or examinations have been completed and are current as provided in this section … .") In this case too the Immigration Judge is forced to choose which regulation she wishes to violate. Suffice to say this is not a desirable situation.

In this manner the Department's proposed rule is not only tone deaf to the tenor of the asylum surge; it also sets up various scenarios in which competing regulatory mandates simply cannot be harmonized. The clear solution is to read Congress's "exceptional circumstances" clause in a rational manner consistent with the objects of that clause: the asylum adjudicators sworn to faithfully apply the laws in a manner consistent with due process. As the DHS recognized just this summer (*see* 85 Fed. Reg. at 38545), we have seen an unprecedented influx of asylum applicants; as the Department recognizes in the commentary to the proposed rule, this is exactly what the term means. *See* 85 Fed. Reg. at 59697, citing *United States v. Larue*, 478 F.3d 924, 926 (8th Cir. 2007) ("In short, 'exceptional circumstances' are circumstances that are out of the ordinary, uncommon, or rare.") If "out of the ordinary," "uncommon," or "rare" fit the bill, surely "unprecedented" does too. If the Department sees fit to promulgate regulations after 24 years in which asylum and other case backlogs have only worsened, we urge a reality-based rule that recognizes the exceptional circumstances under which we live and work, and that therefore allows for longer than 180 days in which to complete an asylum adjudication when factors outside the control of the Immigration Judge make meeting such a timeline while ensuring due process impracticable.

The Department also proposes to set a filing deadline of 15 days from a first appearance before the Immigration Judge for the filing of an application for asylum and/or related forms of protection in "asylum-only" or "withholding-only" proceedings." While the proposed rule would

allow the Immigration Judge to extend that filing deadline for good cause, the setting of such a default deadline will reduce rather than improve adjudication efficiencies. Under the Department's proposed rule, even where an extension appears clearly warranted (for example: when interpreters in the alien's primary language are not readily available, or when the alien is unrepresented by counsel), the Immigration Judge will have to exhaust valuable court time to determine whether "good cause" has been established. *See, e.g., Matter of L-A-B-R-*, 27 I&N Dec. 405, 418 (A.G. 2018) (noting that the Immigration Judge should provide a reasoned explanation for the grant or denial of a continuance of a removal proceeding). While many applicants in withholding-only proceedings have already gone through the credible fear or reasonable fear process before DHS, there is no requirement that DHS provide an alien referred to the Immigration Judge for a withholding-only hearing a copy of the application (Form I-589) and instructions on how to fill it out, or a warning that the application will be due 15 days after his or her first appearance before the Immigration Judge. In the absence of such a warning, the Immigration Judge cannot presume that an unrepresented alien knows how to submit an application, and certainly would invite credible due process based legal challenges. The Department's commentary simply states--without explanation--that "claims for asylum and withholding of removal are the sole issues to be resolved in the proceeding and are squarely presented at the outset of the proceeding; thus, there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible." 85 Fed. Reg. at 59694. If the Department wishes to truncate the default filing period for aliens in asylum or withholding-only proceedings, the proper approach would be to issue a joint regulation with DHS ensuring that such aliens are fully apprised of the obligations that await them as soon as they appear in immigration court. Why the Department here has decided to go it alone is unexplained.

In closing, NAIJ urges withdrawal of the proposed rule, which threatens only further confusion and yet more radical reshuffling of our 1.2 million pending cases. Under the proposed rule, the influx of new asylum applications would cause virtually all other types of cases to be pushed years into the future, resulting in significant transaction costs and intractable conflicts in the various regulations and policies that already burden our asylum adjudications system. The fix to a broken system is not the addition of another layer of completion deadlines and another epicycle of priorities within priorities. Rather, it is the establishment of an independent Immigration Court in which cases are heard in a rational and predictable manner, insulated from shifting political winds.