Immigration Equality

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Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
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RE: Public Comment Opposing Proposed Rules on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, RIN 1125-AA96; EOIR Docket No. 19-0022; A.G. Order No. 4800-2020

Dear Assistant Director Reid:

Immigration Equality ("ImEq") writes in strong opposition to the proposed rules (the "Rules"), published in the Federal Register at 85 F.R., No. 166, 52491 on August 26, 2020. Under the pretext of "efficiency" the Rules undermine the appellate system and dramatically curtail due process rights for immigrants by removing the Board of Immigration Appeals' (the "BIA" or "Board") discretion to remedy injustice. Without legitimate justification, the Rules: 1) drastically limit an asylum seekers' ability to have their case remanded, even when unrepresented, 2) substantially restrict the BIA and an immigration judge's ability to grant motions to reopen, and 3) foreclose judges from administratively closing cases, leading to an increased backlog and preventing judges from managing their own dockets.

The consequences for our clients are dire. Under the Rules, many of the lesbian, gay, bisexual, transgender and queer ("LGBTQ") and HIV-positive (together, with LGBTQ, "LGBTQ/H") asylum seekers we serve will be denied due process and a fair hearing. Ultimately, many of them will be wrongly returned to countries where their lives will be in grave danger. For example, Apul is a gay man from Indonesia whose mother filed for asylum based on being Christian when Apul was a child. She lost her asylum claim and, consequently, Apul lost his claim as her minor derivative. When he was 19, ImEq filed a motion to reopen on his behalf explaining that Apul was a minor and was not out of the closet at the time of the initial proceedings. He also lived with his persecutors. His father beat him in the head for being effeminate until he went partially deaf and his mother forced him to undergo religious rituals in order to change his sexual orientation. Apul's case was reopened and he was granted asylum. However, under the Rules, Apul's case would not have been reopened and he would have been removed to Indonesia, where LGBTQ relations are criminalized.

I. Immigration Equality

Immigration Equality is a national organization that advocates for LGBTQ/H immigrants. For over 25 years, we have worked to secure safe haven and equality for immigrants facing persecution based on their sexual orientation, gender identity, or HIV status. To this end, we provide free legal services and advocacy through our in-house attorneys and nationwide network of pro bono partners. Through this program, we currently represent approximately 650 LGBTQ/H individuals in affirmative and defensive proceedings for

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asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") as well as related applications and appeals. Immigration Equality's asylum program has maintained a remarkable 97-99% success rate. In addition, Immigration Equality helps thousands of LGBTQ/H asylum seekers every year through the provision of *pro se* advice and materials, and via our online inquiry system and telephone hotline.

Immigration Equality also offers assistance, support, and training to other attorneys on LGBTQ/H immigration issues, publishes a comprehensive manual on the preparation of asylum claims related to sexual orientation and gender identity, and has provided training on the adjudication of LGBTQ asylum cases to Asylum Officers within the Department of Homeland Security and Immigration Judges in New York.

II. The 30-day Comment Period Is Inadequate and Unfair to Affected Parties

The Department of Justice ("DOJ") has provided a wholly insufficient 30-day timeframe to respond to what amounts to a dramatic overhaul of the BIA's appellate process. Given the scope of the Rule – published in the midst of an international pandemic no less – this truncated comment period fails to serve its intended purpose under the Administrative Procedures Act, namely: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

Upending the appeals process without an adequate notice and comment period, where the consequences are literally life and death for vulnerable refugees, is patently unfair and at the very least will result in an incomplete record. More likely, it will result in the imposition of unlawful regulations that have a detrimental effect on the justice system and lead to due process violations and the refoulment of vulnerable refugees. The COVID-19 pandemic has further complicated the notice and comment process. For ImEq, our entire staff is still working from home due to COVID-19 and many staff members have additional childcare responsibilities. Given the challenges posed by the pandemic, more time, not less, should be given for stakeholders to meaningfully comment on the sweeping changes proposed under the Rules. For these reasons, the government should rescind the Rules.

Should the DOJ reissue the Rules, they should grant the public at least 60 days to provide comprehensive comments. Because of the prejudicial 30-day public comment period, the below comments cannot address every problematic provision. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; given the insufficient comment period it may simply mean that we did not have the resources or the time to respond.

III. The Rules Would Severely Limit the BIA's Ability to Remand Cases for Additional Fact Finding

Under the new Rules, the BIA can only remand a case for further factfinding if all of the following conditions are met:

(1) The party seeking remand preserved the issue by presenting it before the immigration judge;
(2) The party seeking remand, if it bore the burden of proof before the immigration

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judge, attempted to adduce the additional facts before the immigration judge;
(3) The additional factfinding would alter the outcome or disposition of the case;
(4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and
(5) One of the following circumstances is present in the case:
(i) The immigration judge's factual findings were clearly erroneous, or
(ii) Remand to DHS is warranted following de novo review.

8 CFR § 1003.1(d)(3)(iv)(D). Given this high threshold, few applicants, whether represented or not, will meet these requirements. Common and critically important grounds for remand under the current framework, such as changes in the law that require additional fact finding or an immigration Judge's failure to develop the record, do not appear to meet the standard for remand under the new Rules. The impact on *pro se* litigants will be dire. How can the DOJ expect unrepresented applicants, some of whom are English-language learners, to understand complex legal concepts and attempt to "adduce the additional facts before the immigration judge" as would be required for the BIA in order to remand a case under these Rules?

Moreover, proceedings can only be remanded if the immigration judge's factual findings were "clearly erroneous." Thus, in a case where a judge's factual findings were completely inadequate, but fell short of the "clearly erroneous" standard, the BIA would have no ability to remand. This sends the wrong message to judges. With strict quotas, an enormous backlog and no potential for remand, immigration judges will be incentivized to usher applicants through their hearings without fully fleshing out the record.

In addition, under the Rules, the ability for the BIA to remand *sua sponte* would be all but eliminated. Under the Rules, the BIA will not be able to *"sua sponte remand a case for further factfinding unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case*." *See* 8 CFR § 1003.1(d)(3)(iv)(C). As a result, if an immigration judge fails to develop the record, but a Board Member sees an unexplored avenue for relief, the BIA would be constrained from doing anything about it. This will result in vulnerable refugees being removed, even where they have a viable avenue of relief. This is unfair and unjust.

The current immigration system already often fails refugees, resulting in the return of LGBTQ/H asylum seekers to countries where they are abused, tortured, and killed. Asylum seekers are routinely denied the most basic due process protections and many have no meaningful access to counsel to navigate the daunting labyrinth of U.S. immigration law – often in a language that they do not speak with no access to interpreters or attorneys to help them prepare their cases or appeals. Yet, instead of fixing this broken system, the Rules make it much worse. The whole purpose of the appellate process is to make sure that proceedings are fair and that the proper law is applied correctly. The new Rules undermine this purpose.

ImEq routinely provides advice to pro se applicants as well as full representation to clients in immigration court and in front of the BIA. Through this experience, we have witnessed LGBTQ/H asylum seekers with strong claims denied relief because of a judge's failure to develop the record. In many of these cases, we have been able to assist the applicant on appeal resulting in a remand. For example, Hadi,[1] a gay man from Yemen, was

[1] Pseudonyms are used throughout this comment to protect the identities of ImEq clients.

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represented by ineffective counsel. Hadi's attorney failed to file a *death sentence* that had been issued against him in Yemen for committing "sodomy" until the day of his individual hearing. The immigration judge excluded the death sentence as untimely, and Hadi was ordered removed. ImEq counsel took on the case and moved for remand to further establish the record. The Board granted the motion, the death sentence was entered into the record, testimony was adduced about the death sentence and, ultimately, Hadi was granted Convention Against Torture relief. Under the new Rules, remand would not have been possible and Hadi would have been removed to a country where he would have been executed on account of his sexual orientation.

That result would violate the United States' obligations under domestic and international law not to refoul refugees. Indeed, under the guise of efficiency, this near insurmountable standard will prevent applicants with meritorious claims, who are denied due process in front of an immigration judge, from obtaining relief.

IV. The Rules Will Prevent the BIA from Remanding Most Cases and Will Limit the Immigration Judge's Review Once a Case Is Remanded

In addition to the limitations on remand for fact finding discussed above, the Rules contain a host of other restrictions on the BIA's ability to remand cases to remedy injustice. *See* 8 CFR § 1003.1(d)(7). For example, the BIA will no longer be able to remand cases under the "totality of the circumstances," nor will the Board be able to remand *sua sponte*, unless there is a jurisdictional issue. This will strip the Board of its discretion to ensure that the proceedings were fair and the law was properly applied.

Additionally, the BIA will not be able to remand even if there is a change in fact or law unless the change affects *grounds of removability*. Essentially, it appears that the BIA would not be able to remand based on new grounds of relief available to the applicant. ImEq strongly opposes this provision. This would harm our client base. Many of our clients initially struggle with their sexual orientation or gender identity after coming to the Unites States. Many are terrified of coming out, or have fled violence because they were outed. Many others live with severe psychological trauma manifesting as post-traumatic stress disorder, anxiety, or severe depression. An applicant who enters the United States identifying as cisgender may begin to transition, and then develop a well-founded fear of persecution on the basis of their transgender identity. The process of transitioning can take years. It would be absurd for these refugees to be precluded from relief where they did not initially base their asylum claim on their sexual orientation or gender identity. However, the new Rules appear to do just that.

The Rules also limit the issues that an immigration judge may consider if a case is remanded. 8 CFR § 1003.1 (d)(7)(iv). Under the Rules, the BIA would divest itself of jurisdiction over the case once remanded, but at the same time, the immigration judge could not consider any issues beyond the issues specified on remand. Accordingly, if the applicant became eligible for another form of relief while awaiting a hearing, the immigration judge could not consider the relief. The judges would have no option but to remove the applicant even where there was an avenue of relief available.

These provisions of the Rules would cause irreparable harm to ImEq's clients. Many ImEq clients have been granted relief after their cases were remanded. Under the new Rules, nearly all of these clients would be returned to countries where they would face persecution. For instance, Maria, a transgender woman from

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Mexico, was denied asylum three times. After the initial denial, the government stipulated to remand. After the second denial, the BIA remanded. After Maria lost her asylum case for a third time, the BIA remanded again and the Immigration Judge finally granted Maria asylum. In this case, the Board fulfilled its mandate to ensure that applicants have a fair trial. However, under the new Rules, Maria's case would not have been remanded and she would have been returned to Mexico to mortal danger.

V. The Rules Substantially Limit the Ability of the Board and Immigration Judges to Grant Motions to Reopen

Under the Rules, the Board will no longer be able to "at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 CFR § 1003.2(a). Indeed, that sentence will be removed from the existing regulations. Under the new Rules, the Board will only be allowed to reopen proceedings upon a motion by a party (or to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service). This will result in applicants with valid reasons for reopening to be denied. For instance, because of time and numerical limitations, applicants generally can only file one motion to reopen and must do so within 90 days of a final order. Consequently, applicants who later become eligible for relief would be foreclosed from reopening their removal orders since the Board will no longer have the ability to reopen *sua sponte*.

In another provision of the Rules, the ability of an Immigration Judge to reopen cases is similarly restricted. 8 CFR § 1003.23(b)(1) (removing the sentence, "An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals"). Like in the BIA context, the Immigration Judge will only be able to reopen a case upon motion of a party or to correct a typographical or ministerial error. As noted above, applicants are subject to time and numerical limitations and even if they later become eligible for relief, the Immigration Judge's hands will be tied to grant *sua sponte* relief. Given that the government is not similarly subject to the numerical and time limitation on submitting motions, the new Rules unfairly disfavor applicants and favor the government.

These provisions of the Rules will constrain the Board in its ability to correct errors or prevent injustice and they will severely impact ImEq clients. Numerous ImEq clients have obtained relief by virtue of motions to reopen. Under the Rules, that relief would be foreclosed for many. For example, Jasmine (a citizen of the Philippines) met Janet (a U.S. citizen) in 1986 when Jasmine was vacationing in the U.S. The couple quickly fell in love. In the Philippines, Jasmine's cousin shot her mother and sister to death over an inheritance dispute, and shot Jasmine in the head. She recovered. Fearful that her attacker would harm her upon release from prison, Jasmine fled to the U.S. to be with Janet, her life partner. However, they were not allowed to marry (and Jasmine could not adjust status based on that marriage) because the state and federal governments unconstitutionally refused to recognize their same-sex relationship. Jasmine filed for asylum because her cousin tried to kill her. This claim was denied by the Immigration Judge, affirmed by the BIA, and remanded by the Ninth Circuit. The BIA denied the claim again, but failed to issue a decision to Jasmine or her counsel. After several years had passed, Immigration and Customs Enforcement showed up at Jasmine and Janet's house while their twin 12-year-olds were asleep and took Jasmine from the home in handcuffs. Janet and Jasmine had no idea she had a removal order. Ultimately, Jasmine's case was reopened *sua sponte* so she could adjust status.

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ImEq client, Carlos, is a gay man from Guatemala who entered the U.S. when he was nineteen. He received a Notice to Appear with "TBD" listed on the time and location. He had no real address at the time so he never received notice of his actual hearing date. Consequently, he missed his Master Calendar hearing. At about the same time, he tested positive for HIV and was in a physically abusive relationship with an older man. Eventually, after several years, Carlos was able to leave his abuser and began receiving medical and mental health care such that he was able to pursue immigration relief. ImEq filed a motion to reopen Carlos' case *sua sponte*, which was granted and Carlos was granted withholding of removal. Under the Rules, Carlos and Jasmine would have both been denied relief. As a result, Jasmine would have been separated from her wife and young children, and Carlos would have been returned to a country where he would be in grave danger.

VI. Under the Rules, the Board and Immigration Judges Will Be Foreclosed from Administratively Closing Cases

As the Immigration Courts grapple with an unprecedented backlog of cases, administrative closure is a valuable tool that judges should use in order to prioritize matters. However, under the Rules, the BIA and Immigration Judges will be expressly foreclosed from administratively closing cases. *See* 8 CFR § 1003.1(d)(ii); 8 CFR § 1003.10. Far from achieving efficiency, this will increase the backlog and strip judges of their discretion to manage their dockets.

Moreover, eliminating administrative closure will also harm vulnerable immigrants, in particular those who are pursuing relief from U.S. Citizenship and Immigration Services. For example, LGBTQ/H youth seeking Special Immigrant Juvenile Status (SIJ), or crime victims pursuing U visas and trafficking victims pursuing T visas, may all face removal before USCIS adjudicates their applications for relief. This would impact many ImEq clients who are often simultaneously pursuing forms of relief before USCIS. For example, Ana is a lesbian who was 17 when she entered the U.S. from El Salvador. She was put into removal proceedings, but the immigration judge administratively closed her case in order for Ana to go before USCIS on her asylum claim. Asylum was granted before USCIS, and the case was terminated in court. ImEq also has many clients who are simultaneously pursuing U and T visas or SIJ petitions while in removal proceedings. Given backlogs within USCIS, it would be manifestly unfair to strip immigration judges of the ability to administratively close cases to allow noncitizens to pursue permanent relief that only USCIS can grant.

VII. Conclusion

ImEq strongly opposes the Rules which make sweeping changes to the appellate process and remove due process protections fast tracking deportations for applicants with meritorious claims. For the foregoing reasons, ImEq urges the DOJ to rescind the Rules.

Sincerely,

Bridget Crawford

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