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**RE: Opposing Proposed Rule on Motions to Reopen and Reconsider; Effect of
Departure; Stay of Removal (November 27, 2020)
RIN 1125-AB01; EOIR Docket No. 18-0503**

Dear Ms. Reid,

The Michigan Immigrant Rights Center (MIRC) submits this comment vehemently opposing the above-referenced rule proposed (“NPRM”) by the Department of Justice¹ (“DOJ” or “Department”) amending the Executive Office for Immigration Review (“EOIR”) regulations governing motions to reopen and reconsider, effects of departures, and stays of removal.

MIRC is a legal resource center for Michigan’s immigrant communities, employing nearly twenty attorneys and accredited representatives to represent individuals before EOIR and the United States Citizenship and Immigration Services (“USCIS”). We advise over 2,000 new clients per year, including hundreds with cases before EOIR and an increasing number of individuals in detention. Some of these cases are brief advice and service; others include full representation for non-detained and detained respondents. Our attorneys have decades of collective experience representing non-citizens in removal proceedings on the detained and non-detained docket, seeking relief in immigration courts, in appeals and motions to the Board of Immigration Appeals (“BIA”), and in petitions for review in the U.S. Court of Appeals for the Sixth Circuit.

This NPRM is part of a broader pattern of changes that puts a premium on expediting deportations instead of what the EOIR is tasked with doing: administering justice. Despite the legal justifications offered to authorize such changes, the clear underlying logic is an antagonism toward immigrants and a desire to ensure that their rights are as maximally curtailed as the law allows. Under the guise that the last major substantive revisions to how motions to reopen and reconsider occurred with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Department now proposes—on a short timeline no less—several dramatic changes that will severely limit the likelihood that motions to reopen or reconsider, whether filed by the respondent individually or jointly with DHS’ trial attorneys, will ever be granted. This cannot be sustained and the NPRM must be withdrawn.

¹ 85 Fed. Reg. 75,9942 (Nov. 27, 2020)

I. MIRC objects to EOIR's 30-day comment period to respond to this Notice of Proposed Rulemaking (NPRM).

The Department has given the public a mere thirty days to submit comments, without providing any explanation for this deviation from the customary sixty-day comment period. The change is difficult to understand given the generally slow pace of the immigration court system and considerably slower pace dictated by the current public health crisis. Even presuming that these rule changes were necessary, which we do not concede, they are not particularly time-sensitive. It is hard to see a justification for cutting short the process of review and comment, especially given the significant risk that these changes will cause by accelerating the pace of the deportation machine and severely limiting which respondents may return to court to reopen or reconsider their cases based on a variety of intervening factors and events. Stakeholders should be given adequate time to comment on impactful revisions to court procedures that erode this critical due process safety valve in the name of imposing uniform standards when sufficient clarity already exists. This shortened comment period appears to be nothing more than a final attempt by this administration to push through its immigration agenda before leaving office.

The shortened comment period is all the more egregious given that the U.S. remains in the midst of the COVID-19 pandemic with, nationally, over 200,000 new positive cases and 2,000 deaths, daily.² All MIRC staff continue to work from home to the greatest extent possible, often while caring for children and/or for sick family members. None of the MIRC staff members (and we suspect, attorneys across the country) are able to work at their pre-pandemic capacity. Many of our clients are facing even greater difficulties, as they experience layoffs, lost income, evictions, food insecurity, and of course, infection with COVID-19. As low-income immigrants and, in many cases, as people of color, our clients have felt the disparities of COVID-19 and have suffered disproportionately from infections and complications. The work of providing our clients with effective representation has therefore become exponentially harder. We also must expend additional energy to keep up with EOIR's and the Department of Homeland Security's ("DHS") daily operational changes during the pandemic.

Thirty days to comment on such a transformative proposal, under these conditions, is not a fair opportunity. Although we object to DOJ's unreasonable thirty-day timeframe, we submit this comment nonetheless, because we feel compelled to object to the proposed regulations. We are unable to address every item in the NPRM due to the aforementioned constraints, and due the barrage of proposed regulations that have been issued in the twilight of this administration. However, if we did not manage to address a certain aspect of the NPRM that in no way indicates our acceptance or approval; indeed, we oppose the NPRM in its entirety.

II. MIRC disagrees with the imposition of the fugitive disentitlement doctrine being applied to immigration law

² CDC COVID Data Tracker, Centers for Disease Control and Prevention, available at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (accessed on December 22, 2020)

Our office is part of the nonprofit, legal services safety network in Michigan providing critical legal assistance to vulnerable Michiganders. Our priorities focus on both immigration relief and immigrants' rights issues for survivors of domestic violence, victims of crime, unaccompanied children, detained non-citizens in ICE custody, migrant workers, exploited workers, and overall, individuals and families with limited income. With a statewide presence, we see a lot of, for lack of a better term, bad immigration work that we attempt to (and are often successful at) fixing. We hear about bad legal advice, shoddy filings, and ineffective assistance of counsel quite regularly on our telephone hotline. We provide brief advice, at a minimum, to all of these callers. Because of the realities staffing capacity, we, unfortunately, have to limit full representation.

As stated above, clients regularly show up with immigration paperwork evidencing inadequate/incomplete/bad legal assistance, attempted complex legal matters pro se, or discover that they have an underlying removal order (expedited or *in absentia*). We work diligently with many of these clients to resolve these matters. This can be through alternate relief that the client is now eligible for, re-filing the same matter again, or, in many situations, seeking motions to reopen before both USCIS and EOIR.

Imposing proposed 8 C.F.R. § 1003.48(c) on non-citizens with outstanding removal orders will generate terrible externalities. First, it will create a chilling effect on all non-citizens with final orders seeking to reopen (or reconsider) their cases based on changes in circumstance and/or other reasons. With the default to detain, this obligation to inform the immigration judge all but assures that the non-citizen will be detained at the upcoming hearing, should the motion be granted. Second, it provides no humanitarian exception for survivors of domestic violence, victims of severe forms of human trafficking, unaccompanied minors, incompetent persons, or other vulnerable individuals. Third, it exacerbates the criminalization of the immigration system through the transference of criminal procedure doctrine that is inapplicable in a civil setting. Failure to file one's taxes does not prevent an individual from seeking bankruptcy protection. Compliance with an order of supervision, if one exists at all, should have no bearing on the Department's unrelated decision to reopen an unexecuted removal order. Fourth, there should be no equalization or balancing to seek relief against the government's "interests in encouraging voluntary surrenders and avoiding the difficulty of enforcing a judgment against a fugitive."³ A non-citizen's likelihood of success in proceedings is already weighted against him with the government's heavy thumb on the scale favoring itself. And unless a non-citizen is submitting the motion within the removal period, they would be in the United States in violation of the decision from the immigration judge or DHS officer anyway. Presuming that there is a disdain for the law that leads to respondents not showing up for their removal is obnoxious, incorrect, and corrosive to the fair adjudication of proceedings when the statistics indicate substantial compliance otherwise.

As practitioners, should this NPRM become a reality, it would be the rare case where a client would choose to move forward with viable relief through a motion to reopen knowing full

³ 85 Fed. Reg. 75,942, at 75,948 (Nov. 27, 2020) (internal citations and quotations omitted)

well the high likelihood they will be detained. Thus, the intended effect here is to overall reduce the number of motions that are both filed and granted, even if jointly submitted. For these reasons, we oppose this rule and request that it be withdrawn in its entirety.

III. MIRC opposes the “standardization” of factors for determining whether these motions should be granted.

First, MIRC disagrees with the terminology used in this section of the NPRM; specifically, the term “allegations” is demeaning.⁴ A fact is not an allegation. It is a fact. A conclusion of law is not an allegation. It is a legal opinion (facts applied to law forming a conclusion). Using the term allegation in this passive way throughout the rule is the Department’s attempt at throwing shade on the respondent (and/or the respondent’s counsel). Such disdain for immigration counsel is evident throughout this rule. It is unnecessary and hurtful to use this terminology in regard to filings with the Department. Moreover, counsel are fully aware of and subject to the penalties for misleading the court. See, generally 8 C.F.R. § 1003.102.

Second, MIRC disagrees with the Department’s unabashed attempts to severely limit the introduction of evidence in these motions, both by labeling this information as an allegation and through proposed 8 C.F.R. § 1003.48(b)(2)(i) – (v).

Neither the Board nor an immigration judge shall accept factual allegations as true in support of a motion to reopen or motion to reconsider if:

- (i) Those allegations are contradicted by other evidence of record;
- (ii) Those allegations are contradicted by evidence described in § 1208.12(a);
- (iii) Those allegations are conclusory, uncorroborated, or unsupported by other evidence in the record or are otherwise based principally on hearsay;
- (iv) Those allegations are made solely by the respondent regarding individuals who are not presently within the United States; or
- (v) Those allegations are otherwise inherently unbelievable or unreliable.

It would be the rare immigration case that does not have at least one apparent inconsistency or fact. Oftentimes, these are trivial and non-germane. An immigration judge may still find a respondent credible despite minor inconsistencies. However, that same immigration judge would not be able to reopen or reconsider if the record contradicts facts or other evidence being introduced. Such a varying approach to inconsistencies cannot stand and romanette (i) must be eliminated.

For similar reasons, country condition evidence alluded to via 8 C.F.R. § 1208.12(a) that contradicts new facts or evidence being introduced with the motion, as well, must not be elevated to a pedestal so as to deny a respondent the opportunity to have their motion granted. The world is not static. Old reports and now-inconsistent country condition information, by its very nature, must give way to new reports, evidence, and facts, especially in the context of changed circumstances. This romanette cannot stand and must be eliminated, too.

⁴ Proposed 8 C.F.R. § 1003.48(b).

The practice of immigration law—and removal defense, in particular—would be impossible but for the ability to introduce hearsay evidence. Unless the Department is willing to permit witnesses to appear telephonically by video from across the globe, it would be impossible to conduct a viable asylum case without the introduction of evidence that is not hearsay. Declarations, witness statements, client testimony, medical testimony do not fall into hearsay exceptions. *Immigration law is based on hearsay*. Preventing the introduction of hearsay evidence through a motion to reopen or reconsider all but forecloses relief altogether. For this reason alone, romanette (iii) must be eliminated, not to mention the scurrilous framing of other evidence as “conclusory, uncorroborated, or unsupported.” If the Federal Rules of Evidence were to apply, wholesale, in immigration proceedings, that would need to be a statutory change. They cannot be introduced through this NPRM.

For similar reasons to the hearsay argue, *supra*, unless the Department is willing to dramatically expand who can testify from outside the United States, preventing the introduction of evidence, facts, or other materials from abroad is a farce. This is immigration court. Country conditions, reports, witnesses, and other critical evidence all emanate from *outside* the United States. Preventing their inclusion in such a motion makes a mockery of the entire administration of immigration justice. For this reason, romanette (iv) must be eliminated.

What does the term “inherently unbelievable or unreliable” mean? This is an odd phrase that does not have a basis in immigration law. Nor should it be introduced here. It leaves substantial, unreviewable deference to the immigration judge. For this reason, romanette (v) must be eliminated.

This attempt at standardizing how the evidence and conclusions of law are “standardized” must be withdrawn altogether.

IV. MIRC opposes applying this “standardization” to motions to reopen and terminate.

As stated above, MIRC works with vulnerable Michiganders who are survivors of domestic violence, victims of severe forms of human trafficking, unaccompanied children, incompetent individuals, low-income individuals, and overall, vulnerable persons. We have benefited from being able to reopen and terminate proceedings for clients who share these attributes. Eliminating someone’s ability to adjust status because they have an unexecuted removal order from when they were five years old is manifestly unjust and cruel. That is what proposed 8 C.F.R. § 1003.48(g) would do if enacted.

On multiple occasions, we have reopened and terminated both removal and deportation proceedings for survivors of domestic violence who were granted relief under the Violence Against Women Act. This has primarily occurred through joint motions to reopen, but we have been successful when DHS has opposed. Imposing this harsh rule punishes, not helps survivors of domestic violence and other vulnerable non-citizens.

In another case, MIRC learned that a client had an outstanding removal order from twenty years earlier that was associated with a different alien number and very similar name. Despite this in absentia removal order, our client was able to be granted TPS, advance parole, and ultimately, adjust status to permanent resident. It was only at their naturalization interview that USCIS discovered the unexecuted in absentia order despite the client indicating that he was detained twenty years earlier on every application he ever submitted to USCIS. We worked quickly to reopen and terminate this order based on the equities of the case. DHS joined in on the motion. However, if the NPRM were law, that would not be possible and this long-time LPR would have been denied naturalization and sent to removal proceedings. For these reasons based on actual client situations, this NPRM must be withdrawn.

V. MIRC opposes the heightened standard applied to ineffective assistance of counsel claims for reopening and reconsideration.

Despite the Department's claims that it lacks standardized regulations for adjudicating ineffective assistance of counsel claims because these vary by circuit, what the Department has actually proposed is the gutting of a respondent's attempt to be successful with an ineffectiveness claim in the context of a motion to reopen or reconsider.⁵ The Department facetiously alleges that the

proposed rule will protect aliens from incompetent or unscrupulous attorneys, protect attorneys from improper or unfounded allegations of professional misconduct, and protect [sic] the integrity of EOIR's immigration proceedings as a whole.⁶

First, this NPRM will, in no way, protect or assist respondents who have been harmed by incompetent or unscrupulous attorneys. The high standard—reasonability possibility—imposed by this NPRM harms, not hurts respondents. Moreover, the respondent would be required to submit three additional items, most of which a respondent does not have access to. In practicing immigration law for nearly ten years, I have only submitted one *Lozada*-style claim to a local disciplinary board in which the respondent had a copy of the actual retainer agreement *and* could remember the dates on which the mis/representations occurred. This is a very high burden to require for proceeding with such a motion. Imposing this type of requirement protects unscrupulous and incompetent counsel, not respondents.

Second, the Department should not worry about improper or unfounded allegations of professional misconduct as a basis for adjudicating these motions. Each state or bar has a process for reviewing such grievances. Imposing the duty to inform EOIR disciplinary counsel is premature. States and bar associations have substantial resources devoted to monitoring and punishing attorney misconduct. It is unnecessary to involve the Department with an investigation that has been dismissed by the state or local bar association.

⁵ 85 Fed. Reg. 75,942, at 75,951 (Nov. 27, 2020)

⁶ *Id.*

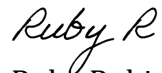
Third, the NPRM states that the goal is to, we assume, “protect” the integrity of the EOIR by limiting ineffectiveness-based motions. Doing so does not protect the integrity or administration of justice unless that is code for limiting workload and ensuring more deportations. Integrity conveys access to equitable opportunities for justice. Integrity does not mean limit justice.

For these reasons, we urge the Department to withdraw this NPRM in its entirety.

VI. Conclusion

EOIR is tasked with administering our nation’s immigration laws with fairness, and the ability of IJs to reopen and/or reconsider cases is paramount to the equitable administration of justice. The harsh and inflexible standards set by this NPRM will ensure that countless immigrants will be deported despite being clearly eligible for the relief; these unachievable standards will only permit the rare (read: unicorn) case to be reopened or reconsidered. For the reasons described in detail above, MIRC vehemently opposes the NPRM in its entirety. It must be withdrawn altogether.

Sincerely,



Ruby Robinson
Managing Attorney