

**DEPARTMENT OF JUSTICE****Executive Office for Immigration Review****8 CFR Parts 1003 and 1240****[Docket No. EOIR 19–0022; Dir. Order No. 05–2021]****RIN 1125–AA96****Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure****AGENCY:** Executive Office for Immigration Review, Department of Justice.**ACTION:** Final rule.

**SUMMARY:** On August 26, 2020, the Department of Justice (“Department”) published a notice of proposed rulemaking (“NPRM” or “proposed rule”) that would amend the regulations of the Executive Office for Immigration Review (“EOIR”) regarding the handling of appeals to the Board of Immigration Appeals (“BIA” or “Board”).

The Department proposed multiple changes to the processing of appeals to ensure the consistency, efficiency, and quality of its adjudications.

The Department also proposed to amend the regulations to make clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases. Finally, the Department proposed to delete inapplicable or unnecessary provisions regarding the forwarding of the record of proceedings on appeal. This final rule responds to comments received in response to the NPRM and adopts the NPRM with minor changes as described below.

**DATES:** This rule is effective on January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305–0289.

**SUPPLEMENTARY INFORMATION:****I. Background***A. Proposed Rule*

On August 26, 2020, the Department published an NPRM that would amend EOIR’s regulations regarding the BIA’s handling of appeals. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020). Through the NPRM, the Department proposed a number of changes to EOIR’s regulations in 8 CFR

parts 1003 and 1240 to ensure that cases heard at the BIA are adjudicated in a consistent and timely manner.

*B. Authority*

The Department issued this final rule pursuant to section 1103(g) of the Immigration and Nationality Act (“INA” or “the Act”), 8 U.S.C. 1103(g).

*C. Final Rule*

Following careful consideration of the public comments received, which are discussed in detail below in section II, the Department has determined to publish the provisions of the proposed rule as final with the following changes as noted below in sections I.C.3, I.C.4, I.C.5, I.C.8, I.C.9, and I.C.11 below.

The Department is also clarifying the generally prospective temporal application of the rule.<sup>1</sup> The provisions of the rule applicable to appellate procedures and internal case processing at the BIA apply only to appeals filed, motions to reopen or reconsider filed, or cases remanded to the Board by a Federal court on or after the effective date of the final rule. The provisions of the rule related to the restrictions on *sua sponte* reopening authority are effective for all cases, regardless of posture, on the effective date. The provisions of the rule related to restrictions on the BIA’s certification authority are effective for all cases in which an immigration judge issues a decision on or after the effective date. The provisions of the rule regarding administrative closure are applicable to all cases initiated by a charging document, reopened, or recalendared after the effective date.

The rationale provided in the background of the proposed rule remains valid. Accordingly, the major provisions of the final rule are as follows:

**1. Briefing Extensions**

The final rule will reduce the maximum allowable time for an extension of the briefing schedule for good cause shown from 90 days to 14 days. 8 CFR 1003.3(c). Consistent with current BIA policy “not to grant second briefing extension requests,” the rule expressly limits the parties to one possible extension. EOIR, *Board of Immigration Appeals Practice Manual*, Ch. 4.7(c) (hereinafter *BIA Practice Manual*) (last updated Oct. 5, 2020).

<sup>1</sup> The Department notes that the NPRM confusingly indicated that some changes would apply “on or after the effective date of publication,” 85 FR at 52498 even though the effective date is 30 days after the date of publication. To correct any confusion from that statement and to provide additional clarity, the Department offers a more delineated explanation of the temporal application of this rule herein.

**2. Simultaneous Briefing**

The rule adopts simultaneous briefing schedules instead of consecutive briefing schedules for all cases. 8 CFR 1003.3(c). Previously, the BIA used consecutive briefing for cases involving aliens who are not in custody. The rule does not affect the BIA’s ability to permit reply briefs in certain cases, but it does establish a 14-day deadline for their submission.

**3. BIA Remands for Identity, Law Enforcement, or Security Investigations or Examinations**

The rule revises 8 CFR 1003.1(d)(6)(ii) to provide that, when a case before the BIA requires completing or updating identity, law enforcement, or security investigations or examinations in order to complete adjudication of the appeal, the exclusive course of action would be for the BIA to place the case on hold while identity, law enforcement, or security investigations or examinations are being completed or updated, unless DHS reports that identity, law enforcement, or security investigations or examinations are no longer necessary or until DHS does not timely report the results of completed or updated identity, law enforcement, or security investigations or examinations.

Additionally, the rule authorizes the BIA to deem an application abandoned when the applicant fails, after being notified by DHS, to comply with the requisite procedures for DHS to complete the identity, law enforcement, or security investigations or examinations within 90 days of the BIA’s notice that the case is being placed on hold for the completion of the identity, law enforcement, or security investigations or examinations. The rule also retains from the NPRM the exception to abandonment when the immigration judge determines that the alien demonstrates good cause for exceeding the 90-day allowance. Upon such a good cause finding, the immigration judge may grant the alien no more than 30 days to comply with the requisite procedures.

Following the review of public comments received,<sup>2</sup> the final rule makes two changes from the proposed rule on this point. First, this rule contains an additional requirement that, if DHS is unable to independently update any required identity, law enforcement, or security investigations, DHS shall provide a notice to the alien with appropriate instructions, as DHS does before the immigration courts under 8 CFR 1003.47(d), and

<sup>2</sup> See section II.C.3.e for a summary and response to the comments received on this topic.

simultaneously serve a copy of the notice with the BIA. Second, while the NPRM would have begun the alien's 90-day timeline for compliance with the biometrics update procedures began at the time the Board provided notice to the alien, the final rule aligns the 90-day time period to begin running at the time DHS submits the instructions notice to the alien, if such notice is applicable. The Department agrees with the commenters' concerns that without these changes, the provisions of the proposed rule could have resulted in situations where the alien may be unable to effectively comply with the biometrics requirements due to possible delays by DHS or lack of sufficient notice.

#### 4. Finality of BIA Decisions and Voluntary Departure Authority

In addition, the rule amends 8 CFR 1003.1(d)(7) to provide further guidance regarding the finality of BIA decisions. To begin with, the rule adds a new paragraph (d)(7)(i) to clarify that the BIA has authority to issue final orders when adjudicating an appeal, including final orders of removal when a finding of removability has been made by an immigration judge and an application for protection or relief from removal has been denied; grants of relief or protection from removal; and, orders to terminate or dismiss proceedings.

The rule further adds new § 1003.1(d)(7)(ii) to provide instructions for the BIA regarding when the BIA may order a remand, rather than issuing a final order, after applying the appropriate standard of review to an immigration judge's decision. For example, the rule requires the BIA to first identify the standard of review that was applied and the specific error made by the immigration judge before remanding the proceeding. 8 CFR 1003.1(d)(7)(ii)(A). The final rule has one update from the same paragraph in the proposed rule to include a cross-reference to 8 CFR 1003.1(d)(6)(iii), which allows for BIA remands regarding information obtained as a result of the identity, law enforcement, or security investigations or examinations. The Department has included this cross-reference to prevent any unintended confusion that the remand procedures and options under 8 CFR 1003.1(d)(7)(ii) are the sole ones for the BIA.

Next, the rule adds new paragraph (d)(7)(iii) to 8 CFR 1003.1 to delegate clear authority to the BIA to consider issues relating to the immigration judge's decision on voluntary departure de novo and, within the scope of the BIA's review authority on appeal, to issue final decisions on requests for

voluntary departure based on the record of proceedings. Additionally, the rule directly states that the BIA may not remand a case to the immigration court solely to consider a request for voluntary departure under section 240B of the Act, 8 U.S.C. 1229c.

The final rule makes three additional changes from the NPRM in response to public comments. First, in recognition of the fact that Board orders are generally served by mail—unlike orders of immigration judges which are frequently served in person—the final rule states that aliens will have 10 business days to post a voluntary departure bond if the Board's order of voluntary departure was served by mail. Further, as the Board is currently transitioning to an electronic filing system and expects to fully deploy that system within the next year, the final rule retains a period of five business days to post a voluntary departure bond if the Board's order is served electronically.

Second, in response to commenters' concerns about cases in which DHS appeals a separate grant of relief or protection, the Department is making edits from the NPRM to clarify the Board's procedure in that situation. Although cases in which an alien made multiple applications for relief or protection (including voluntary departure), an immigration judge granted at least one application but did not address the request for voluntary departure, DHS appealed the immigration judge's decision, the BIA determined that the immigration judge's decision was in error and that the alien's application(s) should be denied, and the BIA found a basis to deny all other applications submitted by the respondent without needing to remand the case, leaving only the request for voluntary departure adjudicated, should be uncommon, the Department nevertheless makes clarifying edits to 8 CFR 1240.26(k)(2) and (3)<sup>3</sup> to indicate that the BIA may grant voluntary departure in cases in which DHS appeals provided that the alien requested voluntary departure from the immigration judge and is otherwise eligible.

Third, in response to at least one commenter's concern regarding the expiration of an alien's travel documents, the Department is making changes to the final rule to make clear that if the record does not contain

<sup>3</sup> The Department also notes that 8 CFR 1240.26(k)(2) and (3) were duplicative in the NPRM and has further edited the provisions to remove the duplication since they apply to both types of voluntary departure under section 240B of the Act, 8 U.S.C. 1229c.

evidence of travel documentation sufficient to assure lawful entry into the country to which the alien is departing—and the alien otherwise has both asserted a request for voluntary departure and established eligibility under the other requirements—the Board may nevertheless grant voluntary for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation. This additional provision is consistent with similar authority already contained in 8 CFR 1240.26(b)(3)(ii).<sup>4</sup>

#### 5. Prohibition on Consideration of New Evidence, Limitations on Motions To Remand, Factfinding by the BIA, and the Standard of Review

The rules make several changes to clarify the BIA's ability to take certain actions in adjudicating an appeal to ensure that appeals are adjudicated in a timely fashion without undue remands and consistent with the applicable law.

First, the rule limits the scope of motions to remand that the BIA may consider. Under new paragraph (d)(7)(v) to 8 CFR 1003.1, the BIA is prohibited from receiving new evidence on appeal, remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal, or considering a motion to remand based on new evidence. Parties who wish to have new evidence considered in other circumstances may file a motion to reopen in accordance with the standard procedures for such motions, *i.e.*, compliance with the substantive requirements for such a motion at 8 CFR 1003.2(c). These prohibitions have three exceptions for new evidence: (1) The result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud; (2) pertaining to a respondent's removability under the provisions of sections 212 and 237 of the Act, 8 U.S.C. 1182 and 1227; and (3) that calls into question an aspect of the jurisdiction of the immigration courts, such as evidence pertaining to alienage<sup>5</sup> or

<sup>4</sup> This provision was, arguably, already incorporated by reference in the NPRM through 8 CFR 1240.26(k)(4) which adopts the provisions of 8 CFR 1240.26(c), (d), (e), (h), and (i) (with one exception) regarding voluntary departure requests before an immigration judge and makes them applicable to requests before the Board. Nevertheless, the Department is specifically incorporating it into the text of the final rule to be applicable to a grant of voluntary departure under either section 240B(a) or 240B(b) of the Act, 8 U.S.C. 1229c(a) or 1229c(b).

<sup>5</sup> For example, EOIR has no jurisdiction over United States citizens with respect to removal proceedings; thus, evidence submitted on appeal

EOIR's authority vis-à-vis DHS regarding an application for immigration benefits.<sup>6</sup>

Second, the rule clearly delineates the circumstances in which the BIA may engage in factfinding on appeal. 8 CFR 1003.1(d)(3)(iv)(A) and (B). Although the rule maintains the general prohibition on factfinding by the BIA, the rule allows the BIA to take administrative notice of facts that are not reasonably subject to dispute, such as current events, the contents of official documents outside the record, or facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed. If the BIA intends to administratively notice any such fact outside the record that would be the basis for overturning a grant of relief or protection issued by an immigration judge, the BIA must give notice to the parties and an opportunity for them to respond.

Third, the rule more clearly delineates the situations in which it is appropriate for the BIA to remand a case for further factfinding. 8 CFR 1003.1(d)(3)(iv)(C) and (D). Specifically, the BIA may not *sua sponte* remand a case for further factfinding unless doing is necessary to determine whether the immigration judge had jurisdiction. *Id.* § 1003.1(d)(3)(iv)(C). Further, the BIA may not grant a motion to remand for further factfinding unless the party seeking the remand preserved the issue and previously attempted to provide such information to the immigration judge, the factfinding would alter the case's outcome and would not be cumulative of other evidence already in the record, and either the immigration judge's factual findings were clearly erroneous or remand to DHS is warranted. *Id.* § 1003.1(d)(3)(iv)(D). Nothing in the rule, however, prohibits the BIA from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including investigations occurring separate from those required by 8 CFR 1003.47.

Following review of public comments and in recognition of possible confusion regarding a situation in which additional factfinding would be a necessary adjunct of a remand due to an

regarding whether a respondent is a United States citizen may be a basis for a remand in appropriate cases. See *Matter of Fuentes-Martinez*, 21 I&N Dec. 893, 898 (BIA 1997).

<sup>6</sup> As the NPRM noted, there are multiple situations in which a question of EOIR or DHS jurisdiction over an application may arise. See 85 FR at 52500.

error of law, the final rule clarifies that, subject to other requirements, the Board may remand a case for additional factfinding in cases in which the immigration judge committed an error of law and that error requires additional factfinding on remand. For example, the Board may order additional factfinding on remand if it determines an immigration judge erred as a matter of law by not sufficiently developing the factual record for an alien proceeding without representation.

The rule also directly allows the BIA to affirm the decision of the immigration judge or DHS on any basis supported by the record, including a basis supported by facts that are not disputed. *Id.* § 1003.1(d)(3)(v).

Finally, the rule makes clear that the BIA cannot remand a case based solely on the "totality of the circumstances" as such a standard of review has never been contemplated by either the Act or the regulations. *Id.* § 1003.1(d)(7)(ii)(B). Nonetheless, in light of the confusion evidenced by commenters regarding that point, the Department in the final rule is making clear that the Board cannot remand a case following a totality of the circumstances standard of review, though an immigration judge's consideration of the totality of the circumstances may be a relevant subject for review under an appropriate standard.

#### 6. Scope of a BIA Remand

The rule provides that the BIA may limit the scope of a remand while simultaneously divesting itself of jurisdiction on remand. *Id.*

§ 1003.1(d)(7)(iii). Thus, a remand for a limited purpose—*e.g.*, the completion of identity, law enforcement, or security investigations or examinations—would be limited solely to that purpose consistent with the BIA's intent, and the immigration judge may not consider any issues beyond the scope of the remand.

#### 7. Immigration Judge Quality Assurance Certification of a BIA Decision

Additionally, to ensure the quality of BIA decision-making, the rule establishes a procedure for an immigration judge to certify BIA decisions reopening or remanding proceedings for further review by the Director in situations in which the immigration judge alleges that the BIA made an error. *Id.* § 1003.1(k).

The certification process is limited only to cases in which the immigration judge believes the BIA erred in the decision by: (1) A typographical or clerical error affecting the outcome of the case; (2) a holding that is clearly contrary to a provision of the INA, any

other immigration law or statute, any applicable regulation, or a published, binding precedent; (3) failing to resolve the basis for appeal, including being vague, ambiguous, internally inconsistent; or, (4) clearly not considering a material factor pertinent to the issue(s) before the immigration judge. *Id.* § 1003.1(k)(1)(i)–(iv). In addition, in order to certify a BIA decision for review, the immigration judge must: (1) Issue the certification order, (a) within 30 days of the BIA decision if the alien is not detained, and (b) within 15 days of the BIA decision if the alien is detained; (2) specify in the order the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and (3) provide notice of the certification to both parties. *Id.* § 1003.1(k)(2)(i)–(iii).

To ensure a neutral arbiter between the immigration judge and the BIA, the Director will review any such certification orders. *Id.* § 1003.1(k)(3). In reviewing such orders, the Director's delegated authority from the Attorney General permits him to dismiss the certification and return the case to the immigration judge or remand the case back to the BIA for further proceedings. The Director may not, however, issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal. *Id.* In response to a concern raised by at least one commenter, the final rule will allow the Director, in his or her discretion, to request briefs or filings from the parties when considering a case under this quality-control certification process.

This quality assurance certification process is a mechanism to ensure that BIA decisions are accurate and precise—not a mechanism solely to express disagreements with BIA decisions or to lodge objections to particular legal interpretations. *Id.* § 1003.1(k)(4).

#### 8. Administrative Closure Authority

The rule amends 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to make clear that those provisions—and similar provisions in 8 CFR part 1240—provide no freestanding authority for immigration judges or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so. For example, the rule amends 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to provide explicitly, for clarity, that the existing references in those paragraphs to "governing standards" refer to the applicable governing standards as set forth in the existing provisions of

§§ 1003.1(d)(1)(i) and 1003.10(d), respectively and do not refer to some more general, free-floating administrative closure authority.

The final rule makes non-substantive change to 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) from the proposed rule by inserting the word “defer” in place of the word “suspend” in both paragraphs and by making conforming stylistic changes to ensure that the language is clear that an administrative closure of a case is a type of deferral of adjudication of that case. The Department has made this change to prevent any unintended confusion regarding whether there is a distinction between cases whose adjudication is deferred and those whose adjudication is suspended and to make clear that an administrative closure is not the only type of deferral of adjudication.<sup>7</sup> The Department intended no distinctions and is clarifying that point by ensuring that the description of administrative closure as a type of deferral of adjudication is consistent throughout the rule.

#### 9. *Sua Sponte* Authority

The rule removes the Attorney General’s previous general delegation of *sua sponte* authority to the BIA and immigration judges to reopen or reconsider cases and instead limit such *sua sponte* reopenings only to correct minor mistakes, such as typographical errors or defects in service. 8 CFR 1003.2(a), 1003.23(b)(1).<sup>8</sup> These changes do not preclude parties from filing joint motions, including in situations in which there has been a relevant change in facts or law. Moreover, nothing in the rule precludes the ability of a respondent to argue, in an appropriate case, that a time limit is inapplicable due to equitable tolling.

In addition, to ensure that aliens whose removability is vitiated *in toto* prior to the execution of the removal order retain a mechanism for reopening their proceedings, the rule amends the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an alien claims that an intervening change in law or fact renders the alien no longer removable at all and the alien has

exercised diligence in pursuing his or her motion.<sup>9</sup> *Id.* §§ 1003.2(c)(3)(v), 1003.23(b)(4)(v). Similarly, the rule amends the regulations to allow the filing of a motion to reopen, notwithstanding the time and number bars, when an individual claims that he or she is a United States citizen or national in recognition that the law provides jurisdiction only in removal proceedings for aliens. *See* INA 240(a)(1), 8 U.S.C. 1229a(a)(1); *see also* 8 CFR 1003.2(c)(3)(vi), 1003.23(b)(4)(v).

Finally, to address the effects of removal of *sua sponte* reopening authority on DHS, the rule clarifies that the filing of a motion to reopen with the BIA by DHS in removal proceedings or in proceedings initiated pursuant to 8 CFR 1208.2(c) is not subject to the time and numerical limits applicable to such motions. 8 CFR 1003.2(c)(3)(vii).

#### 10. Certification Authority

The rule also withdraws the BIA’s delegated authority to review cases by self-certification, *id.* § 1003.1(c), due to concerns over the lack of standards for such certifications, the lack of a consistent application of the “exceptional” situations criteria for purposes of utilizing self-certification, the potential for lack of notice of the BIA’s use of certification authority, the overall potential for inconsistent application and abuse of this authority, and the strong interest in finality,

#### 11. Timeliness of Adjudication of BIA Appeals

The rule makes a variety of changes to ensure the timely adjudication of appeals. For example, the rule amends 8 CFR 1003.1(e)(8)(i) to harmonize the time limits for adjudicating cases so that both the 90- and 180-day deadlines are set from the same starting point—when the record is complete.<sup>10</sup> In addition, the rule established specific time frames for review by the screening panel,

<sup>9</sup>This provision would apply only when the intervening change vitiated the alien’s removability completely—an alien charged with multiple removability grounds would remain subject to the time and number bars unless the intervening change vitiated each removability ground. Additionally, this provision would apply only to grounds of removability. Aliens arguing that an intervening change in law or fact affected their eligibility for relief or protection from removal would remain subject to existing regulatory provisions on such motions.

<sup>10</sup>For appeals, the record is complete upon the earlier of the filing of briefs by both parties or the expiration of the briefing schedule. For motions, the record is complete upon the filing of a response to the motion or the expiration of the response period. For remands, the record is complete upon either the date the remand is received by the BIA or, if the BIA elects to order briefing following the remand, the earlier of the filing of briefs by both parties or the expiration of the briefing schedule.

processing of transcripts, issuance of briefing schedules, and review by a single BIA member to determine whether a single member or a three-member panel should adjudicate the appeal, none of which were previously considered via regulation or tracked effectively to prevent delays. *Id.* § 1003.1(e)(1), (8). It also adds tracking and accountability requirements for the Board Chairman, also known as the Chief Appellate Immigration Judge, in cases where the adjudication of appeals must be delayed to ensure that no appeals are overlooked or lost in the process. *Id.* § 1003.1(e)(8)(v). Similarly, the rule establishes specific time frames for the adjudication of summary dismissals, providing substance to the current requirement at 8 CFR 1003.1(d)(2)(ii) that such cases be identified “promptly” by the screening panel, and for the adjudication of interlocutory appeals, which are not currently addressed in the regulations, except insofar as they may be referred to a three-member panel for review. *Id.* § 1003.1(e)(1).

Additionally, with two exceptions for cases subject to an extension under 8 CFR 1003.1(e)(8)(ii) or a hold under 8 CFR 1003.1(e)(8)(iii), the rule instructs the Board Chairman to refer appeals pending beyond 335 days to the Director for adjudication. *Id.* § 1003.1(e)(8)(v). Following the review of public comments received, including comments about the potential volume of cases subject to referral and the impact of other provisions of the rule, the final rule makes two changes from the NPRM.

First, it adds four further exceptions to 8 CFR 1003.1(e)(8)(v). Cases on hold pursuant to 8 CFR 1003.1(d)(6)(ii) to await the results of identity, law enforcement, or security investigations or examinations will not be subject to referral if the hold causes the appeal to remain pending beyond 335 days. Cases whose adjudication has been deferred by the Director pursuant to 8 CFR 1003.0(b)(1)(ii) will not be subject to referral if the deferral causes the appeal to remain pending beyond 335 days. Cases remanded by the Director under 8 CFR 1003.1(k) will not be subject to referral if the case remains pending beyond 335 days after the referral. Cases that have been administratively closed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action will not be subject to referral if the administrative closure occurred prior to the elapse of 335 days and causes the appeal to remain pending beyond 335 days. These changes, which are incorporated through a stylistic

<sup>7</sup>Administrative closure is not the only procedural mechanism for deferring adjudication of cases. For instance, EOIR deferred all non-detained removal hearings between March 17, 2020, and June 12, 2020, due to the outbreak of COVID-19 but did not administratively close the cases.

<sup>8</sup>The text of 8 CFR 1003.2(a) in the NPRM inadvertently removed the phrase “or reconsider” from the first sentence of that paragraph. This final rule reinserts that phrase to ensure that parties and the BIA are clear that the Board can reconsider a decision *sua sponte* in order to correct a typographical error or defect in service.

restructuring of 8 CFR 1003.1(e)(8)(v) for clarity, recognize additional situations in which a case may appropriately remain pending beyond 335 days without adjudication or when referral back to the Director would be incongruous because the Director had remanded the case in the first instance.

Second, the final rule makes edits to eliminate confusion over the scope of 8 CFR 1003.1(e). As both the title of that paragraph (“Case management system”) and its general introductory language (“The Chairman shall establish a case management system to screen all cases and to manage the Board’s caseload.”) make clear, the provisions of the paragraph apply to “cases.” *Id.* § 1003.1(e) (emphasis added). In turn, “the term *case* means any proceeding arising under any immigration or naturalization law.” *Id.* § 1001.1(g). At the Board, cases may be initiated in one of three ways: (1) The filing of a Notice of Appeal, (2) the filing of a motion directly with the Board (e.g., a motion to reconsider or a motion to reopen), or (3) the receipt of a remand from a Federal court, the Attorney General, or—under this rule—the Director. In other words, the Board adjudicates multiple types of cases, not just appeals. Although the existing language of 8 CFR 1003.1(e) is clear that it applies to all types of cases at the Board, regardless of how they are initiated, the inconsistent, subsequent use of “appeals” throughout that paragraph creates confusion as to its scope since appeals are not the only type of case the Board considers. *See, e.g., id.* § 1003.1(e)(3) (in describing the Board’s merits review process, using “case” in the first sentence, “case” and “appeal” in the second sentence, and “appeal” in the third sentence, all is describing a unitary process). To avoid continued confusion and to ensure that the scope of the other changes in the final rule regarding the Board’s case management process are clear, the final rule makes edits to 8 CFR 1003.1(e) to ensure that it is clearly applicable to all cases before the Board, not solely cases arising through appeals.<sup>11</sup>

## 12. Forwarding the Record on Appeal

The rule revises 8 CFR 1003.5(a) regarding the forwarding of the record of proceedings in an appeal to ensure that the transcription process and the forwarding of records do not cause any unwarranted delays. Specifically, the rule clarifies that the immigration judge

does not need to forward the record of the proceedings to the BIA if the BIA already has access to the record electronically and removes the process for immigration judge review of the transcript. *Id.* § 1003.5(a).

In addition, the rule removes language in 8 CFR 1003.5(b), which describes procedures regarding appeals from DHS decisions that are within the BIA’s appellate jurisdiction, that is not applicable to EOIR’s adjudicators and replaces outdated references to the former Immigration and Naturalization Service. These changes do not substantively affect the BIA’s adjudication of any appeals from DHS officers that are within the BIA’s jurisdiction.

## II. Public Comments on the Proposed Rule

### A. Summary of Public Comments

The comment period for the NPRM ended on September 25, 2020, with 1,284 comments received. The majority of comments were from individual and anonymous commenters, including coordinated campaigns. Other commenters included non-profit organizations, law firms, and members of Congress. While some commenters supported the NPRM, the majority of commenters expressed opposition to the rule, either in whole or part.

Many, if not most, comments opposing the NPRM either misunderstood what it actually provides, proceed from erroneous legal or factual premises—e.g., that the rule applies only to aliens and not DHS or that its changes apply more heavily to aliens than to DHS—are founded in policy disagreements, or simply repeat tendentious or spurious claims about the Department’s motivations in issuing the rule. Further, many commenters opposing the rule failed to engage with the specific reasons and language put forth by the Department in lieu of broad generalizations or hyperbolic, unsupported presumptions. Additionally, many comments appeared rooted in a belief that EOIR’s adjudicators are incompetent or unethical and are either incapable or unwilling to adhere to applicable law. Finally, most, if not all, commenters in opposition to the rule viewed its procedural changes wholly through a results-oriented lens such that a proposal that commenters speculatively believed would cause aliens to “win” fewer cases was deemed objectionable, even without evidence that such a result would follow. In other words, any change perceived to lead to aliens “winning” fewer cases was deemed

unfair, arbitrary and capricious, biased, a violation of due process, or otherwise inappropriate, regardless of the Department’s justification for the change or the relevant law. Such a results-oriented view both misapprehended the procedural nature of the changes and appeared to have been based on a tacit belief that aliens were entitled to specific outcomes in specific cases, notwithstanding the relevant evidence or law applicable to a case, and that the rule inappropriately required adjudicators to maintain partiality in adjudicating cases rather than continuing to provide what commenters viewed as favorable treatment toward aliens.

To the extent that commenters simply disagree as a policy matter that Board cases should be completed in a timely manner, *see id.* 1003.1(d); *cf. INS v. Doherty*, 502 U.S. 314, 323 (1992) (“[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and throughout this final rule.

Similarly, the Department also categorically rejects any comments suggesting that adjudicators should provide favorable treatment to one party over another, e.g., by granting a *sua sponte* motion to reopen contrary to well-established law. The Department expects all of its adjudicators to treat both parties fairly and to maintain impartiality when adjudicating cases. 8 CFR 1003.1(d)(1) (“The Board shall resolve the questions before it in a manner that is timely, *impartial*, and consistent with the Act and regulations.” (emphasis added)); 8 CFR 1003.10(b) (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and *impartial* manner consistent with the Act and regulations.”) (emphasis added); 5 CFR 2635.101(b)(8) (“Employees [of the Federal Government] shall act impartially and not give preferential treatment to any private organization or individual.”); EOIR, *Ethics and Professionalism Guide for Members of the Board of Immigration Appeals* sec. V (May 4, 2011) [hereinafter *BIA Ethics and Professionalism Guide*] (“A Board Member shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”), available at [https://](https://www.eoir.gov/ethics)

<sup>11</sup> For similar reasons, the final rule also makes changes to 8 CFR 1003.1(d)(3)(iv) to clarify that 8 CFR 1003.1(d)(3)(iv)(A) applies to all cases at the Board, whereas 8 CFR 1003.1(d)(3)(iv)(D) applies only to direct appeals of immigration judge decisions.

[www.justice.gov/eoir/page/file/992726/download](http://www.justice.gov/eoir/page/file/992726/download); EOIR, *Ethics and Professionalism Guide for Immigration Judges* sec. V (Jan. 26, 2011) [hereinafter *IJ Ethics and Professionalism Guide*] (“An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. Further, the Department also rejects unsupported and almost ad hominem comments based on a belief that its adjudicators are incompetent or unethical, that they will fail to follow the law, or that they have some results-oriented view that will cause them to adjudicate cases in an inappropriate manner. See *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

In sum, the Department issued the NPRM for the reasons given in order to bring needed clarity to certain areas of law, improve efficiency at the BIA, ensure authority is appropriately exercised, reduce the risk of gamesmanship by parties, and promote impartial and timely adjudications consistent with the law. It did not do so for any nefarious purpose, nor did it intend for its procedural changes to have any substantive bearing on the outcomes of additional cases, which flow from the evidence and the law, not the Department’s process. As discussed herein, nothing in the NPRM singles out specific populations of aliens, including unrepresented aliens,<sup>12</sup> nor do any of its changes fall disproportionately upon such groups in an inappropriate manner. To the extent that commenters did not engage with the NPRM itself, provided unsupported assertions of fact or law, attacked—tacitly or explicitly—the motivations of the Department’s adjudicators, or otherwise put forward suggestions based on their preferred results rather than an impartial process, the Department has nevertheless considered those comments but finds

<sup>12</sup> The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. As discussed below, however, the rule neither singles such aliens out for particular treatment under the Board’s procedures, nor does it restrict or alter any of the many procedural avenues such aliens already have available to them in advancing their cases. Further, nothing in the rule inhibits the availability of pro bono counsel to assist such aliens as appropriate.

them unavailing. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam) (“In determining what points are significant, the ‘arbitrary and capricious’ standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.”). Further, to the extent that commenters provided substantive analysis and raised important issues, the Department has considered all of them; however, on balance, except for changes noted below, it has determined that the policy and operational benefits of the rule expressed above—including consistency, impartiality, and efficiency—outweigh all of the issues raised by commenters. Accordingly, although the Department has reviewed all comments received, the vast majority of them fall into the groupings outlined above, and few of them are persuasive for reasons explained in more detail in Part II.C below.

#### *B. Comments Expressing Support for the Proposed Rule*

*Comment:* Commenters expressed general support for the rule and immigration reform. These commenters supported all aspects of the rule, which they stated would “streamline” BIA processes to help reduce the backlog and the number of frivolous appeals. One commenter stated that the rule “will have a positive impact on immigration, especially limiting the burden placed on the system by pro se immigrants.”

*Response:* The Department appreciates the commenters’ support for the rule.

#### *C. Comments Expressing Opposition to the Proposed Rule*

##### 1. General Opposition

*Comment:* Many Commenters expressed general opposition to the rule.<sup>13</sup> Several commenters asserted that the rule was motivated by politics and would “enable politicized and biased decision-making.” Various commenters raised concerns that the rule would give the EOIR Director “consolidated power

<sup>13</sup> Commenters’ specific concerns regarding different provisions of the rule are discussed separately below in section II.C.3.

over appeals.” Similarly, several commenters voiced concern that the rule would turn the BIA into a “political tool” or that the changes would turn the BIA into a rubber stamp for deportation orders. Others were concerned that the rule would put increased pressure on immigration judges to decide cases quickly.

Some commenters expressed concerns that the rule was an attempt to end legal immigration. Other commenters alleged that the rule was motivated by an attempt to foreclose respondents’ access to relief from removal.

Many commenters were concerned that the rule would eliminate a robust and meaningful appeal process. For example, one commenter stated that “[a]ny individual facing judicial decision making deserves to have a full and fair right to appeal.” The commenter went on to claim that the rule seeks “to erode that right by making it more difficult for individuals to actualize the right to appeal to the BIA.” Another commenter was concerned that the rule would completely strip respondents of “their right to meaningfully contest a poorly reasoned or legally invalidated decision.”

Several commenters expressed concern about the rule’s impact on respondents’ safety and security. One commenter claimed that the rule “would greatly reduce the rights of noncitizens appearing before EOIR and would result in . . . the potential death of asylum seekers who are removed to their home countries to be killed.” Another commenter noted that taking away a respondent’s ability to appeal their case “exposes them to more violence and risk of death if they are deported.” Other commenters were concerned that the rule would lead to permanent family separations.

A number of commenters also made the generalized claim that the rule would entirely reshape the immigration system. Others stated that the rule would create significant administrative burdens. Several other commenters alleged that the rule would lead to an increased case backlog and make EOIR less efficient. Multiple commenters raised concerns regarding the impact of the intersection of the rule with other rules recently promulgated by the Department and by DHS, particularly the Department’s proposed rule to increase fees for motions to reopen and appeals.

*Response:* Commenters are incorrect that the rule is the product of political or biased decision-making or that the rule would turn the BIA into a “political tool.” As noted in the NPRM, the BIA has seen recent significant increases in

its pending caseload. 85 FR at 52492. The number of appeals pending is currently at a record high, with 84,673 case appeals pending as of the end of FY 2020. EOIR, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1248501/download>. Accordingly, the Department has reviewed EOIR's regulations regarding the procedures for BIA appeals to determine what changes can be implemented to promote increased efficiencies and taken steps to address the BIA's growing caseload. In this manner, this rule builds on prior similar procedural reviews and amendments to the BIA's regulations. See, e.g., Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 54878 (Aug. 26, 2002) (final rule that revised the structure and procedures of the BIA, provided for an enhanced case management procedure, and expanded the number of cases referred to a single Board member for disposition).<sup>14</sup>

Similarly, commenters are incorrect that the rule is intended to have an effect on immigration rates or an alien's opportunity to be heard. As part of the Department of Justice, EOIR's mission remains to "to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws." EOIR, *About the Office*, Aug. 14, 2018, available at <https://www.justice.gov/eoir/about-office>. Instead, as part of the Department's intention to increase efficiencies, the Department believes that the rule will have the effect of reducing the time required for the adjudication of appeals by DHS in cases where the immigration judge or the BIA has found the alien merits relief or protection from removal. In short, the changes to the rule should help both meritorious claims be adjudicated more quickly, which will

<sup>14</sup> In addition, the Department notes that it and EOIR have taken numerous steps, both regulatory and sub-regulatory, to increase EOIR's efficiencies and address the pending caseload. See, e.g., Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim final rule expanding the size of the BIA from 21 to 23 members); EOIR, *Policy Memorandum 20-01: Case Processing at the Board of Immigration Appeals* [hereinafter PM 20-01] (Oct. 1, 2019), available at <https://www.justice.gov/eoir/page/file/1206316/download> (explaining various agency initiatives, including an improved BIA case management system, issuance of performance reports, and a reiteration of EOIR's responsibility to timely and efficiently decide cases in serving the national interest); EOIR, *Policy Memorandum 19-11: No Dark Courtrooms* (Mar. 29, 2019), available at <https://www.justice.gov/eoir/file/1149286/download> (memorializing policies to reduce and minimize the impact of unused courtrooms and docket time).

benefit aliens, and meritless claims adjudicated more quickly, which will benefit the public and the government.

Commenters' statements regarding possible effects on aliens who are denied relief or who may be subject to removal are purely speculative. Moreover, such speculative effects exist currently and independently of the rule, as alien appeals may be denied or dismissed under current procedures. Further, nothing in the rule prevents or inhibits case-by-case adjudication by the Board in accordance with the evidence and applicable law for each such case. Accordingly, the Department finds commenters' concerns on this point unpersuasive.

Finally, the Department acknowledges that it has published multiple proposed rules in 2020, including one that would increase the fee for an appeal to the BIA and for certain motions to reopen for the first time in over 30 years. See Executive Office for Immigration Review; Fee Review, 85 FR 11866 (Feb. 28, 2020). The Department also acknowledges that DHS has imposed a \$50 fee for asylum applications, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788, 46791 (Aug. 3, 2020),<sup>15</sup> that would also be applicable in EOIR proceedings, 8 CFR 1103.7(b)(4)(ii), though that rule has been enjoined.<sup>16</sup> *Immigrant Legal Resource Ctr. v. Wolf*, —F.Supp.3d—, 2020 WL 5798269 (N.D. Cal. 2020); *Nw. Immigrants Rights Proj. v. U.S. Citizenship & Immigration Servs.*, No. 19-3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020).

The Department rejects any assertions, however, that it is proposing multiple rules for any sort of nefarious

<sup>15</sup> The DHS rule did not impose a fee for an asylum application filed by a genuine UAC who is in removal proceedings conducted by EOIR. 85 FR 46788 at 46809 ("Notably, unaccompanied alien children in removal proceedings who file an application for asylum with USCIS are exempt from the Form I-589 fee."). Thus, contrary to some commenters' concerns, a genuine UAC who files a motion to reopen based exclusively on an asylum application is not subject to a fee for that motion. 8 CFR 1003.8(a)(2)(ii), 1003.24(b)(2)(i), (ii).

<sup>16</sup> While the injunction of DHS's rule assessing a \$50 fee for asylum applications is in effect, EOIR cannot charge a fee for asylum applications in its proceedings. Relatedly, while that injunction is in effect, it cannot charge a fee for a motion to reopen based exclusively on an asylum application. 8 CFR 1003.8(a)(2)(ii), 1003.24(b)(2)(i), (ii). Because the ultimate resolution of that litigation is unknown—and, thus, there is a possibility that DHS's rule may never take effect—commenters' concerns about the potential relationship between that rule and this final rule are even more speculative. Nevertheless, as discussed, even if all of the relevant rules were in effect, the Department has concluded that the benefits of the final rule outweigh any substantiated costs identified by commenters.

purpose. Each of the Department's rules stands on its own, includes explanations of their basis and purpose, and allows for public comment, as required by the APA. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (explaining that the APA provides the "maximum procedural requirements" that an agency must follow in order to promulgate a rule). Further, the interplay and impact of all of these rules is speculative at the present time due to both ongoing and expected future litigation—which may allow all, some, or none of the rules to ultimately take effect—and the availability of fee waivers, 8 CFR 1103.7(c), which may offset the impact of some of the increases. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented. Moreover, even if all rules were in effect, the Department has concluded that the benefits of the instant rule discussed in the NPRM, e.g., 85 FR at 52509 and herein—as well as the benefits discussed in the other rules, e.g., 85 FR at 11870<sup>17</sup>—ultimately outweigh any combined impact the rules may have on aliens, particularly vis-à-vis fee increases for appeals and motions to reopen.<sup>18</sup>

<sup>17</sup> In issuing its proposed rule regarding fees for applications administered by EOIR, the Department acknowledged the balance between the costs of increased fees and the public benefit associated with such fees, in addition to the need to comply with applicable law and policy in conducting more regular fee reviews. 85 FR at 11870 ("Although EOIR is an appropriated agency, EOIR has determined that it is necessary to update the fees charged for these EOIR forms and motions to more accurately reflect the costs for EOIR's adjudications of these matters. At the same time, however, EOIR recognizes that these applications for relief, appeals, and motions represent statutorily provided relief and important procedural tools that serve the public interest and provide value to those who are parties to the proceedings by ensuring accurate administrative proceedings. . . . As DHS is the party opposite the alien in these proceedings, EOIR's hearings provide value to both aliens seeking relief and the Federal interests that DHS represents. Given that EOIR's cost assessment did not include overhead costs or costs of non-salary benefits (e.g., insurance), recovery of the processing costs reported herein is appropriate to serve the objectives of the IOAA and the public interest. The proposed fees would help the Government recoup some of its costs when possible and would also protect the public policy interests involved. EOIR's calculation of fees accordingly factors in both the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system.")

<sup>18</sup> The Department also reiterates that the availability of fee waivers for appeals and motions to reopen, 8 CFR 1003.8(a)(3) and 8 CFR 1003.24(d), addresses the principal concern raised by

*Comment:* At least one commenter stated that the rule is pretext for restrictions on aliens' access to asylum or related relief. In support, the commenter argued that the rule provides preferential treatment to DHS versus aliens in proceedings and that the Department selectively compares the BIA at times to either Federal courts or other administrative tribunals, whichever best supports the restriction at issue. In addition, the commenter highlighted comments disparaging of immigrants or the immigration system by President Trump and the Attorney General.

*Response:* The rule is not a pretext for any nefarious motive targeting aliens for any reason, and it is appropriately supported by applicable law and examples. As discussed, *supra*, the rule generally applies to aliens and DHS equally and does not provide preferential treatment to either party. To the extent that commenters simply disagree with either the law or the examples provided, commenters did not provide a persuasive justification for why their particular policy preferences are superior to those adopted by the Department in the rule. Moreover, as explained in the NPRM and herein, this rule is just one example of the Department's actions, both recently and in the past, to increase efficiencies before the BIA and address the record pending caseload. The Department reiterates the reasoning set out in the proposed rule for the changes, and the discussion further below regarding commenters' concerns with particular provisions of the rule.

## 2. Violates Due Process

*Comment:* Many commenters expressed broad concerns that the rule would erode aliens' due process rights in immigration court or BIA proceedings. Specifically, several commenters claimed that the rule favored efficiency over fairness. Commenters stated that the rule claimed to promote efficiency, but that its proposed changes "would sacrifice fairness and due process for this increased efficiency." Several commenters noted that due process should be more highly valued than efficiency in removal proceedings. For example, one commenter asserted that the rule "has everything to do with efficiency and nothing to do with due process." A commenter also stated that that rule's "goal should not be to create

commenters regarding the instant rule's asserted impact on filing motions to reopen and the Department's proposed fee increase for motions to reopen.

a more efficient production system for the rapid removal of litigants." Another commenter claimed that, under the rule, the BIA would put efficiency above its duties as an appellate body, which would thereby violate respondents' due process rights.

Furthermore, commenters voiced concern that the rule was attempting to inappropriately speed up and streamline procedures in a way that would negatively affect due process protections. One commenter stated that the streamlining of procedures "will foster further inequities and affect due process for all people involved." A number of commenters pointed out that cases should not be decided quickly and that due process requires that attorneys be given a sufficient amount of time to prepare their clients' cases. Several other commenters raised concerns that the rule was an attempt by the Administration to prioritize deportations over due process protections.

Numerous commenters were also concerned with the possible consequences stemming from what they view as a potential erosion of due process protections. Commenters noted that the level of due process in immigration court proceedings can mean the difference between a respondent living safely in the United States and being returned to danger in another country.

*Response:* To the extent that commenters equate "due process" with an outcome favorable to the alien and an "erosion" of due process with an outcome adverse to the alien—and base their comments accordingly on that view—the Department declines to accept both that view of due process and the comments based on it. The foundation of due process is notice and an opportunity to be heard, and nothing in the rule eliminates either an alien's right to notice or an alien's opportunity to be heard on a case before the Board.<sup>19</sup> See *LaChance v. Erickson*, 522

<sup>19</sup> The Department notes that although the INA statutorily requires proceedings over which an immigration judge must preside to determine an alien's removability in many situations, under sections 240(a)(1) and (3) of the Act, 8 U.S.C. 1229a(a)(1) and (3), and acknowledges that an administrative appeal may be permitted, e.g., INA 101(a)(47)(B) and 208(d)(5)(A)(iv), 8 U.S.C. 1101(a)(47)(B) and 1158(d)(5)(A)(iv), there is no constitutional or statutory right to an administrative appeal to the BIA. See *Albathani v. INS*, 318 F.3d 365, 376 (1st Cir. 2003) ("An alien has no constitutional right to any administrative appeal at all. Such administrative appeal rights as exist are created by regulations promulgated by the Attorney General." (citations omitted)); *Guentchev v. INS*, 77 F.3d 1036, 1037–38 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals. Even litigants in the federal

U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."). The Department does not evaluate due process based on outcomes for either party, and it accordingly declines to adopt comments premised on the intimation that due process occurs only when the outcome of a case is favorable to an alien. Cf. *Pugel v. Bd. of Trs. of Univ. of Ill.*, 378 F.3d 659, 666 (7th Cir. 2004) ("Due process did not entitle [appellant] to a favorable result . . . only to a meaningful opportunity to present [a case].").

As noted above, EOIR's mission is "to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws." These objectives are generally complementary; for example, unnecessary delays in the receipt of relief for meritorious aliens is itself a fairness concern. Moreover, there is nothing inherently unfair in ensuring that a case is adjudicated by the Board within approximately 11 months—i.e., 335 days—of its filing. To the contrary, excessive delay in adjudication, especially when issues of human welfare are at stake, may raise concerns themselves and increase the risk of litigation.<sup>20</sup> See, e.g., *Telecomms. Rsch.*

courts are not constitutionally entitled to multiple layers of review. The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review (a la the Appeals Council of the Social Security Administration, or the Supreme Court exercising its certiorari power.); cf. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 536, 554–55 (Jan. 3, 2013) ("In upholding the BIA's practice of 'affirmance without opinion' of immigration judge decisions, for example, several courts of appeals have recognized that Due Process does not require an agency to provide for administrative appeal of its decisions."). Thus, the Department's administrative appellate process involving the BIA already provides more due process to aliens in removal proceedings than is required by either the INA or the Constitution, and the alteration of the BIA's procedures through regulations promulgated by the Attorney General is fully consonant with the provision of due process. See *Barradas v. Holder*, 582 F.3d 754, 765 (7th Cir. 2009) (stating that immigration proceedings that meet the statutory and regulatory standards governing the conduct of such proceedings generally comport with due process).

<sup>20</sup> The Department recognizes and agrees with the Supreme Court's observation that "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Doherty*, 502 U.S. at 323. Thus, it is aware that many aliens likely prefer substantial delays in the adjudications of their appeals by the BIA and, accordingly, oppose any efforts to increase the efficiency of such adjudications. Nevertheless, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to aliens with meritorious claims—in BIA adjudications.



and *Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining several factors for deciding unreasonable delay claims under the Administrative Procedures Act, including acknowledging “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake”).

Commenters are incorrect that the provisions of this rule impede aliens’ due process rights in the manner alleged. Although the rule refines timing and other procedural requirements, the rule does not affect any party’s fundamental rights to notice or an opportunity to be heard by the BIA. Moreover, the rule does not make proceedings before the BIA “so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted). None of the changes in the rule limit aliens in immigration proceedings before EOIR from filing appeals, briefs, or other evidence such that it prevents aliens from reasonably presenting their appeal. Further, many commenters assessed the rule through only a one-sided lens related to aliens and did not acknowledge that (1) most of the changes apply equally to DHS and (2) some of the changes—e.g., the elimination of simultaneous briefing for non-detained cases—fall much more heavily on DHS than on aliens. In short, as the Department explained in the NPRM and reiterates in the final rule, the changes are designed for the benefit of all parties and the adjudicators and do not affect either party’s entitlement to due process in immigration proceedings.

### 3. Specific Concerns With the NPRM

#### a. BIA Jurisdiction by Certification (8 CFR 1003.1(c))

*Comment:* Numerous commenters expressed concern over the Department’s removal of the BIA’s self-certification authority at 8 CFR 1003.1(c).

At least one commenter expressed dismay as to why the Department would retract the BIA’s self-certification authority rather than retaining the authority but defining “exceptional circumstances,” which the commenter believed would be less costly and more beneficial.

Commenters were concerned that the removal of the BIA’s self-certification authority will negatively impact aliens in proceedings, particularly pro se respondents. For example, a commenter explained that the changes would

disproportionately impact pro se aliens because they are “the parties least likely to have a sophisticated notion of when an appeal to the BIA is worth taking.” Another commenter noted that removal of the self-certification authority would prevent the BIA from addressing defects in an alien’s Notice of Appeal, which may be the result of factors outside the alien’s control, such as mail delays, illness, or language ability.

One commenter characterized the change as removing an important check on immigration judge misconduct.

Taking issue with the Department’s supposed analogy to Federal courts, another commenter claimed that Federal courts were distinct from immigration courts because the “process of filing a notice of appeal in federal court is straightforward, [] the Federal Rules of Civil Procedure provide ample protection for pro se parties who make mistakes, [and] the stakes in most civil suits arising in federal district court are, unlike the stakes in most immigration court cases, not a matter of life and death.”

*Response:* As an initial point, the Department notes that many commenters objected to the limitation of the Board’s certification authority solely because they perceived that authority to be beneficial only to respondents. Those comments, however, support the Department’s concern about the inappropriate and inconsistent usage of that authority and its decision to limit that authority because it may be applied in a manner that benefits one party over the other.

As the Department discussed in the NPRM, the BIA’s use of its self-certification authority has been subject to inconsistent usage, if not abuse, by the BIA in the past. For example, despite clear language that required the BIA to have jurisdiction in order to exercise its self-certification authority, BIA members often inverted that principle and used the self-certification authority to establish jurisdiction. *See, e.g., Matter of Carlos Daniel Jarquin-Burgos*, 2019 WL 5067262, at \*1 n.1 (BIA Aug. 5, 2019) (“On March 29, 2019, we accepted the respondent’s untimely appeal. To further settle any issues of jurisdiction, we accept this matter on appeal pursuant to 8 CFR 1003.1(c).”), *Matter of Daniel Tipantasis-Matzaquiza*, 2016 WL 4976725, at \*1 (BIA Jul. 22, 2016) (“To settle any issues regarding jurisdiction, we will exercise our discretionary authority to accept this appeal on certification. *See* 8 CFR 1003.1(c).”), and *Matter of Rafael Antonio Hanzé Fuentes*, 2011 WL 7071021, at \*1 n.1 (BIA Dec. 29, 2011) (“In order to avoid

any question regarding our jurisdiction over this appeal, we take jurisdiction over this matter by certification pursuant to 8 CFR 1003.1(c).”).

Commenters’ own suggestions that removing this authority would harm alien appellants because the BIA often uses its self-certification authority inappropriately and contrary to existing case law to avoid finding appeals untimely or correct filing defects provide further support for the Department’s decision. *See Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002) (the Board’s certification authority, like its *sua sponte* authority, “is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship” (internal citation and quotation marks omitted)). Further, commenters did not explain how the Board could exercise jurisdiction through certification without determining its jurisdiction in the first instance. *See* 85 FR at 52506. Finally, most commenters did not acknowledge that the withdrawal of certification authority would also impact cases in which it may have been used contrary to precedent to accept appeals in favor of DHS. In other words, as the Department has noted, the impact of this provision is equally applicable to both parties and is not directed at one over the other.

The Department finds that the same risks would continue should the Department provide further definition of “exceptional circumstances” rather than remove the certification authority, as suggested by commenters. Indeed, the existence of a standard for “exceptional circumstances” applicable to BIA self-certification since at least 2002, *see Matter of Jean*, 23 I&N Dec. at 380 n.9, has not precluded the Board members from disregarding that standard as both the NPRM, 85 FR at 52506, and commenters recognize. Accordingly, the Department finds that further attempts to refine that standard would likely be unhelpful, if not futile, especially because there is no effective check on its usage to ensure consistency. Moreover, creating an additional definitional standard for “exceptional circumstances” would also create additional adjudicatory delays and arguments surrounding whether a case genuinely met that standard.

Regarding the possible impact of the rule on pro se aliens, the Department first notes that most aliens—i.e., 86 percent, EOIR, *Current Representation Rates*, Oct. 13, 2020 [hereinafter *Representation Rates*], available at <https://www.justice.gov/eoir/page/file/>

1062991/download—whose cases are considered by the Board have representation. For those who do not, there are multiple avenues they may pursue to obtain representation.<sup>21</sup> For example, the Department maintains a BIA Pro Bono Project in which “EOIR assists in identifying potentially meritorious cases based upon criteria determined by the partnering volunteer groups.” EOIR, *BIA Pro Bono Project*, Oct. 16, 2020, available at <https://www.justice.gov/eoir/bia-pro-bono-project>.<sup>22</sup> Additionally, certain procedural doctrines, such as equitable tolling, may excuse noncompliance with filing deadlines for pro se aliens.<sup>23</sup>

<sup>21</sup> In an appeal to the Board in removal proceedings, “the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” INA 292, 8 U.S.C. 1362. Despite this statutory right to counsel at no expense to the Government in appeals to the BIA in removal proceedings, the Department recognizes that some aliens do not obtain representation before the BIA. The Department understands that some aliens do not secure representation because they do not wish to pay the fee charged by a potential representative. The Department also understands that many representatives, due to ethical or professional responsibility obligations, will not take cases of aliens who are ineligible for any relief or protection from removal (e.g., an alien with an aggravated felony drug trafficking conviction who has no fear of persecution or torture in his or her home country) because they do not wish to charge money for representation when representation will not affect the outcome of the proceeding. These situations illustrate only that some aliens may not ultimately secure counsel for reasons common to issues of representation in all civil cases—i.e., the cost of the representation and the strength of the case—not that aliens are limited or prohibited from obtaining representation. See *United States v. Torres-Sanchez*, 68 F.3d 227, 231 (8th Cir. 1995) (“Although Torres-Sanchez expressed some frustration over his attempt to obtain counsel, that frustration, in our view of the record, stemmed from his realization that he faced the inevitable consequence of deportation, not from a lack of opportunity to retain counsel. In any event, the mere inability to obtain counsel does not constitute a violation of due process.”). As the Department is not involved in discussions between respondents and potential representatives, it cannot definitively state every reason that an alien who seeks representation may not obtain it. Nevertheless, it can state that this rule does not limit or restrict any alien’s ability to obtain representation in accordance with section 292 of the Act, 8 U.S.C. 1362.

<sup>22</sup> In addition, as discussed elsewhere in this rule, the Department emphasizes that EOIR provides numerous resources to assist pro se individuals with self-representation and participation in their proceedings. For example, EOIR’s Office of Policy seeks to increase access to information and raise the level of representation for individuals in hearings before immigration courts and the BIA. See EOIR, *Office of Legal Access Programs* (Feb. 19, 2020), available at <https://www.justice.gov/eoir/office-of-legal-access-programs>. In addition, EOIR has developed a thorough electronic resource for individuals in proceedings. EOIR, *Immigration Court Online Resource*, available at <https://icor.eoir.justice.gov/en/>.

<sup>23</sup> Although the Board has not formally adopted such a rule, by practice, it also construes pro se

Moreover, immigration judges have a duty to develop the record in cases involving pro se aliens which will assist such aliens in pursuing appeals if needed. See *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504 (6th Cir. 2019) (collecting cases). The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. However, the rule neither singles such aliens out for particular treatment under the Board’s procedures, nor does it restrict or alter any of the avenues noted above that may assist pro se aliens.

Ultimately, however, unless a doctrine such as equitable tolling is applicable, BIA procedures are not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. See, e.g., *McNeil v. United States*, 508 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”); *Edwards v. INS*, 59 F.3d 5, 8–9 (2d Cir. 1995) (rejecting a pro se alien litigant’s arguments for being excused from Federal court procedural requirements due to his pro se status). Although the Department appreciates the challenges faced by pro se litigants and recommends that all aliens obtain representation, *but see* note 21, *supra* (explaining why aliens may not obtain representation), it declines to establish two separate procedural tracks for appeals depending on whether an alien has representation. Further, weighing the possibility of abuses of the certification process described above and in the NPRM, 85 FR at 52506–07, the size of the pro se population with cases before the BIA, and the well-established avenues of assistance for pro se aliens, the Department disagrees that it is necessary or appropriate to keep the certification process simply due to the possibility of its use as a means of relieving a party of his or her compliance with particular procedural requirements.

The Department is unsure why a commenter claimed the Department’s underlying logic on this issue relied on an analogy to Federal court, as the entire section describing the changes is silent as to Federal appellate courts. *Id.* at 52506–07. Accordingly, the Department cannot provide an informed response to that comment.

filings liberally. At least one court of appeals has held that the Board is legally required to liberally construe pro se filings. See *Higgs v. Att’y Gen. of the U.S.*, 655 F.3d 333, 339–40 (3d Cir. 2011).

As to removing a necessary procedural check on immigration judges, the Department notes that the regular appeals process to the BIA is unchanged, and parties that believe an immigration judge erred in his or her decision should seek an appeal at the BIA consistent with those procedures. Commenters did not provide an explanation as to why the certification process would provide a check that the regular appeal process would not, nor did they explain why EOIR’s well-established complaint process for immigration judge misconduct would also not be a sufficient check on immigration judge behavior. See EOIR, *Summary of EOIR Procedures for Handling Complaints Concerning EOIR Adjudicators*, Oct. 15, 2018, available at <https://www.justice.gov/eoir/page/file/1100946/download> (last visited Nov. 24, 2020). In short, commenters did not persuasively explain why the BIA self-certification process, which is subject to inconsistent application and potential abuse, is superior to the normal appellate process and EOIR’s immigration judge misconduct complaint process for monitoring immigration judge behavior; accordingly, the Department declines to accept the commenters’ suggestions on that issue.

b. Administrative Closure (8 CFR 1003.1(d)(1)(ii), 1003.10)

*Comment:* Commenters raised concerns with the rule’s general prohibition on administrative closure, explaining that the prohibition would prevent adjudicators from efficiently organizing and prioritizing cases on their dockets, resulting in increased backlogs. For example, commenters stated that immigration judges would not be able to prioritize terrorism suspects over persons who overstayed visas and have apparent eligibility for relief.

Commenters further explained that eliminating administrative closure would result in unfairly harsh consequences for persons who have pending applications with the United States Citizenship and Immigration Services (“USCIS”), such as U visas and applications for Special Immigrant Juvenile Status. Instead of allowing for administrative closure of their removal proceedings while those applications are being processed by USCIS, the commenters explained that persons would likely be required to appeal a removal order or file a motion to reopen once USCIS approves their application, potentially while the person is outside the United States. Moreover, commenters noted that this would

create inefficiencies due to simultaneous adjudications by EOIR and USCIS. Similarly, commenters noted that the rule would also prejudice persons with pending matters in State or Federal courts as well, such as direct appeals of criminal convictions or other post-conviction relief.

Commenters raised multiple concerns about the rule's effects on persons applying for provisional unlawful presence waivers with DHS. Commenters alleged that the rule conflicts with section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v), which provides for an unlawful presence hardship waiver. Commenters explained that the Secretary of Homeland Security implemented regulations at 8 CFR 212.7(e)(4)(iii) interpreting the waiver statute as allowing persons in removal proceedings to apply for a provisional waiver if their removal proceeding is administratively closed. In implementing this rule, the commenter alleges that the Department is implicitly amending the DHS regulation by rendering DHS's administrative closure language superfluous. As a result, commenters believe that the rule infringes on the Secretary's authority to interpret section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v).

Moreover, commenters also stated that, as a practical matter, the rule would act as a bar to persons in removal proceedings from obtaining provisional unlawful presence waivers from DHS in order to consular process because the waiver applicants would no longer be able to receive administrative closure, as required by DHS regulations. One commenter noted that, instead of administrative closure, immigration courts have been recently using status dockets to handle cases that have applications pending with USCIS. However, the commenter noted that status dockets do not allow persons to apply for provisional unlawful presence waivers because their removal cases remain pending.

Relatedly, at least one commenter stated that the administrative closure prohibition will push more aliens into filing applications for cancellation of removal, since they will be unable to administratively close their removal proceedings in order to apply for a provisional unlawful presence waiver. The commenter stated this would raise costs for EOIR since adjudicating cancellation of removal applications costs more than administratively closing proceedings in order for DHS to adjudicate the waiver applications.

As a general matter, commenters alleged that the Department's explanation for the administrative

closure changes were insufficient and incapable of justifying the changes under the APA, including claiming that EOIR relied on flawed and misleading statistics and that the Department's reliance on *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) is misplaced because *Castro-Tum* was wrongly decided. Commenters alleged that the Department's statements that prohibiting administrative closure will improve efficiency is not supported in the proposed rule and that administrative closure actually contributes to shrinking the backlog by allowing respondent to pursue ancillary relief. Moreover, commenters stated that the Department should have consulted with DHS to ensure that adjudications between the two agencies are consistent.

At least one commenter also raised constitutional concerns with the rule's administrative closure changes. The commenter alleged that the rule violates due process by depriving persons in removal proceedings of the right to submit applications for provisional unlawful presence waivers and by depriving United States citizens of the opportunity to live with their non-citizen spouse while the spouse's provisional unlawful presence waiver is being adjudicated by USCIS. The commenter similarly alleged that the rule violates the Equal Protection Clause because persons in removal proceedings will be prevented from applying for a provisional unlawful presence waiver simply because they are in removal proceedings when persons who have been ordered removed are allowed to apply for a waiver.

*Response:* EOIR is tasked with the efficient adjudication of immigration proceedings. See, e.g., 8 CFR 1003.10(b) (explaining that "immigration judges shall seek to resolve the questions before them in a timely and impartial manner"). As such, indefinitely delaying immigration court proceedings in order to allow aliens to pursue speculative relief that may take years to resolve does not comport with EOIR's mission to expeditiously adjudicate cases before it. See, e.g., *Matter of L-A-B-R-*, 27 I&N Dec. 405, 416 (A.G. 2018) (denying a continuance in part because an indefinite request would undermine administrative efficiency). With EOIR's pending caseload reaching record highs, EOIR simply cannot allow indefinite delays that prolong adjudication any longer than necessary for immigration judges to decide the issues squarely before them. See *Hernandez-Serrano v. Barr*, —F.3d—, 2020 WL 6883420, \*3 (6th Cir. Nov. 24, 2020) ("The result of administrative closure, . . . is that immigration cases leave an IJ's active

calendar and, more often than not, never come back. Thus the reality is that, in hundreds of thousands of cases, administrative closure has amounted to a decision not to apply the Nation's immigration laws at all."). Therefore, the Department does not believe that administrative closure is a proper tool<sup>24</sup> for efficiently adjudicating proceedings and, as a result, is using its authority to clarify its own regulations to preclude immigration judges and the BIA from granting administrative closure, with limited exceptions. See INA 103(g)(2), 8 U.S.C. 1103(g)(2) (granting the Attorney General the authority to issue regulations as necessary for carrying out his authority as it relates to EOIR).

Additionally, the Department finds it necessary to provide this clarification to resolve competing interpretations of 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) that have resulted in the inconsistent nationwide application of administrative closure authority. Compare *Matter of Castro-Tum*, 27 I&N Dec. at 271 (holding that neither immigration judges nor the BIA have a general authority to indefinitely suspend immigration proceedings through administrative closure), and *Hernandez-Serrano*, 2020 WL 6883420 at \*4 ("Indeed no one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General's decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results."), with *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (rejecting *Castro-Tum* and holding that immigration judges are not precluded from administratively closing cases), and *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (same). These conflicting decisions, and the possibility of additional such decisions, create uncertainty for immigration judges and the BIA, which this rule seeks to remedy through a consistent nationwide policy. Cf. *Meza Morales*, 973 F.3d at 667 (noting that the Attorney General may amend the regulations through the proper procedures to remove any perceived administrative closure authority).

The Department disagrees with commenters that the agency did not provide sufficient reasons for the change in the NPRM, or that the given reasons were false, erroneous, or relied on incorrect or misleading statistics.

<sup>24</sup> The Department notes that there are other potential tools available to respondents with pending relief or actions outside of EOIR, including requesting a continuance or working with DHS counsel to file a motion to dismiss. See 8 CFR 1003.29, 1239.2(c).

Rather, the Department explained that the general authority to administratively close cases “failed as a policy matter and is unsupported by the law.” See 85 FR at 52504. In the NPRM, the Department noted that, following the expansion of administrative closure in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the backlog of immigration court cases has grown significantly. See also *Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1242166/download>. While the use of administrative closure is not solely responsible for this growth, the need for prompt adjudication of pending cases has only increased. Administrative closure merely delays a decision until an unknown future date, thus allowing the total number of cases at the immigration courts to grow, rather than requiring the immigration judge to adjudicate the issues before them in order to promptly move cases to completion.

The Department also explained in the NPRM that the agency believes the Attorney General’s holding in *Matter of Castro-Tum* is correct that 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) do not provide for general administrative closure authority, citing the Attorney General’s explanations that general administrative closure authority conflicts with the regulatory “timely” requirements, 27 I&N Dec. at 284; that the regulations do not ordinarily include the authority to suspend cases indefinitely, *id.* at 285; and that specific delegations that prior Attorneys General have made would be rendered superfluous, *id.* at 287–88, among others. See also *Hernandez-Serrano*, 2020 WL 6883420 at \*1, \*4 (stating that “[a]s of October 2018, more than 350,000 of those [administratively closed] cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law” and that “[t]he result of administrative closure, . . . is that immigration cases leave an IJ’s active calendar and, more often than not, never come back. Thus the reality is that, in hundreds of thousands of cases, administrative closure has amounted to a decision not to apply the Nation’s immigration laws at all.”).

Further, the Department also explained in the NPRM that the agency believes general administrative closure authority improperly allows immigration judges to determine which immigration cases should be adjudicated and which ones should not. See 85 FR at 52503. Similar to continuances, administrative closure is a tool to delay cases in certain instances.

However, in practice, unlike continuances, administrative closure has at times been used to effectively terminate cases through indefinite delay. Thus, the Department believes that such authority is improper as a policy matter unless expressly provided for by regulation or judicially approved settlement.

Lastly, the Department also explained in the NPRM that existing regulations make clear that authority to defer the adjudication of cases lies with EOIR leadership and not with individual members of the BIA or immigration judges. See 8 CFR 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3).

The Department also disagrees with commenters that this rule conflicts with section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v), as interpreted by DHS in 8 CFR 212.7(e)(4)(iii), which makes a person in removal proceedings ineligible for a provisional unlawful presence hardship waiver unless the proceedings are administratively closed. Regulations solely promulgated by and binding on DHS do not confer independent authority on immigration judges or the Board, and DHS does not have the power to provide immigration judges with the general authority to grant administrative closure or to prohibit EOIR from interpreting its own regulations, so any interpretation of § 212.7(e)(4)(iii) attempting to do so would be erroneous. See INA 103(a)(1), 8 U.S.C. 1103(a)(1) (providing the Attorney General with the authority to make “controlling” determinations of the immigration laws); see also *Castro-Tum*, 27 I&N Dec. at 287 n.9 (“Because only the Attorney General may expand the authority of immigration judges or the Board, that regulation [8 CFR 212.7(e)(4)(iii)] cannot be an independent source of authority for administrative closure.”). The Department has considered the interplay of EOIR and DHS’s regulations regarding provisional unlawful presence waivers and has decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy. See 78 FR at 544 (explaining that DHS chose to limit eligibility to aliens with administratively closed removal proceedings in order to be “consistent with [DHS’s] established enforcement priorities”). DHS may choose to update their regulations as a result of the Department’s amendments regarding administrative closure authority, but any concerns with DHS’s policy decisions are outside the scope of this rule.

Commenters did not identify an explicit conflict between the language of INA 212(a)(9)(B)(v), 8 U.S.C.

1182(a)(9)(B)(v), and the Department is unaware of any. That statutory provision refers to a waiver of inadmissibility based on an alien’s unlawful presence in the United States, and this final rule does not purport to interpret, alter, or even address that provision. Rather, commenters assert that this rule’s restriction on the use of administrative closure presents an undesirable policy choice to the extent that it may limit eligibility for that waiver based on DHS’s current regulatory language. The Department acknowledges commenters’ policy disagreement and has considered it. Nevertheless, the benefits of the final rule far outweigh its alleged costs, even crediting commenters’ speculative assertions.<sup>25</sup> Moreover, regardless of policy preferences, the Attorney General has determined that the expansive version of administrative closure preferred by commenters is incompatible with existing law and does not warrant a delegation of such authority. *Matter of Castro-Tum*, 27 I&N Dec. at 292 (“The current practice of administrative closure lacks a valid legal foundation, and I do not believe it would be appropriate to delegate such authority.”); cf. *Hernandez-Serrano*, 2020 WL 6883420 at \*4 (“Those concessions imply that the permanent closure of some 350,000 immigration cases was largely contrary to law. Indeed no one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General’s decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.”). In short, the Department finds no basis to contradict the Attorney General and adopt commenters’ policy preferences.

The Department believes that any increase in cancellation of removal applications in response to this unrelated rule is purely speculative. Further, even if commenters’ predictions turn out to be accurate, the Department is well-equipped to handle an increase in such applications as its adjudicators have considered them for decade and the relevant law is well-established. Additionally, commenters’ speculation on this point implies that the majority of such applications would

<sup>25</sup> The final rule does not prohibit administrative closure altogether, and commenters did not generally acknowledge or account for those aliens who may still benefit from administrative closure under the rule in their assertions about the rule’s impact.

be meritless; otherwise, the aliens would have already filed such applications because an approved application for cancellation of removal for non-permanent residents provides lawful permanent residence which is a preferable outcome to the limbo-like nature of administrative closure. The Department finds that a potential increase in meritless applications for relief is not a persuasive reason for altering this final rule, and any adjudicatory costs associated with such an increase are outweighed by the benefits of the rule.

The Departments disagree that the administrative closure provisions raise any constitutional concerns. There is no cognizable due process interest in access to or eligibility for a discretionary, provisional unlawful presence waiver of inadmissibility. *See, e.g., Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010) (“To articulate a due process claim, [the individual] must demonstrate that she has a protected liberty or property interest under the Fifth Amendment. Aliens have a Fifth Amendment right to due process in some immigration proceedings, but not in those that are discretionary.”) (citations omitted). Moreover, this rule’s administrative closure changes do not violate the concept of equal protection—in either the Equal Protection Clause of the Fourteenth Amendment or as a component of the Fifth Amendment’s Due Process Clause—as they do not impose any classifications that would invoke the doctrine. To the extent the administrative closure changes would have a disparate impact on persons in removal proceedings as compared to persons not in proceedings, the Departments note that the changes are rationally related to the Department’s interest in efficiently allocating EOIR’s limited adjudicatory capacity in order to decide cases in a timely manner. *Cf. DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1995) (“[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. Under this minimal standard of review, a classification is accorded ‘a strong presumption of validity’ . . . .” (internal citations omitted)).

Overall, as discussed in more detail, *infra*, the Department has weighed the relevant equities of the rule’s administrative closure provision. The Department does not believe that the administrative closure provision will have a significant impact on the public, as most immigration courts—63 out of 67, all but those in Arlington, Baltimore,

Charlotte, and Chicago<sup>26</sup>—currently follow either *Matter of Castro-Tum* itself or an applicable Federal court decision affirming it, *e.g., Hernandez-Serrano*, 2020 WL 6883420 at \*5 (“In summary, therefore, we agree with the Attorney General that §§ 1003.10 and 1003.1(d) do not delegate to IJs or the Board ‘the general authority to suspend indefinitely immigration proceedings by administrative closure.’” (quoting *Matter of Castro-Tum*, 27 I&N Dec. at 272)). Therefore, the effect of this rule simply codifies the existing limitations on immigration judges’ general authority to grant administrative closure.<sup>27</sup> Moreover, to the extent that commenters simply disagree with the decision in *Matter of Castro-Tum* as a policy matter, the Department has explained that the legal and policy issues implicated by the free-floating use of administrative closure and the efficiency that would follow from clearly delineating the circumstances of its usage outweigh the policy arguments advanced by commenters. *See also Hernandez-Serrano*, 2020 WL 6883420 at \*1 (“A regulation delegating to immigration judges authority to take certain actions ‘[i]n deciding the individual cases before them’ does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases

<sup>26</sup> The Department notes that *Matter of Castro-Tum* did not incorporate all of the legal arguments presented in the NPRM regarding whether immigration judges and Board members have free-floating authority to defer adjudication of cases. *E.g.*, 85 FR at 52503 (discussing tension created by interpreting 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to allow free-floating authority to administratively close cases with references in those provisions to the “disposition” of cases and with the provisions of 8 CFR 1003.1(a)(2)(i)(C) and 8 CFR 1003.9(b)(3) which assign authority to defer case adjudications to the Board Chairman and the Chief Immigration Judge rather than to all Board members and all immigration judges); *accord Hernandez-Serrano*, 2020 WL 6883420 at \*4 (“To the contrary, the regulations expressly limit their delegation to actions ‘necessary for the disposition’ of the case. And that more restricted delegation cannot support a decision *not* to decide the case for reasons of administrative ‘convenience’ or the ‘efficient management of the resources of the immigration courts and the BIA.’” (emphases in original)). Thus, circuit court decisions abrogating *Matter of Castro-Tum* did not necessarily address all arguments surrounding administrative closure. Accordingly, independent of *Matter of Castro-Tum*, immigration judges and Board members may still come to the conclusion that they generally lack free-floating authority to administratively close cases.

<sup>27</sup> Although this rule codifies the result of *Matter of Castro-Tum*, its bases are broader than just that decision. *See supra* text accompanying note 26.

administratively—meaning the case was removed from the IJ’s docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law.”).

Further, for those courts that are not bound by *Matter of Castro-Tum*, the Department disagrees that the change will result in unnecessary removal orders, as immigration judges are already tasked with resolving the proceedings before them, including determining removability and issuing removal orders if required. *See, e.g., 8 CFR 1003.10(b)* (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.”). The Department declines to adopt commenters’ speculation as to the counter-factual outcomes of cases that have been administratively closed, and commenters did not support their assertion that only cases in which an alien will be ordered removed are administratively closed.<sup>28</sup> To the contrary, aliens have sought recalendaring of their proceedings in order to apply for relief from removal for which they believe they are eligible, suggesting that in many cases, aliens themselves do not believe that a case that has been administratively closed would necessarily have otherwise resulted in a removal order. *See, e.g., Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017) (“[The respondent] filed a timely application for asylum and related relief and protection, which he seeks to have the Immigration Judge review in removal proceedings. The respondent argues that the administrative closure of his case prevents him from pursuing that relief.”), *overruled by Matter of Castro-Tum*, 27 I&N Dec. at 272.

As the Department asserted, free-floating authority to unilaterally administratively close cases is in significant tension with existing law, including regulations and longstanding Board case law. 85 FR at 52503–05. To the extent that commenters suggested the Department should retain the status quo and its problematic tension with

<sup>28</sup> The Department notes that simply delaying an alien’s removal is not a compelling policy basis for declining to promulgate this rule. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) (“There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permits and prolongs a continuing violation of United States law.” (internal citations and quotation marks omitted)).

existing law, the Department simply disagrees.

The question of unlawful presence waivers was already addressed by *Matter of Castro-Tum*, 27 I&N Dec. at 278 n.3, 287 n.9, and this final rule does not impact such waivers accordingly. Moreover, the regulation identified by commenters, 8 CFR 212.7(e)(4)(iii) has no analogue in chapter V of title 8, and that regulation is not binding on the Department. Additionally, such a waiver is both “provisional” and “discretionary,” 8 CFR 212.7(e)(2)(i); like administrative closure itself, an alien has no right to such a waiver; and, a provisional and discretionary waiver to which an alien lacks any entitlement cannot be seen as necessary to the disposition of the alien’s case in immigration proceedings. See *Gutierrez-Morales v. Homan*, 461 F.3d 605, 610 (5th Cir. 2006) (“We have squarely held that ‘neither relief from removal under discretionary waiver nor eligibility for such discretionary relief is entitled to due process protection.’ Stated differently, an alien has no due process right to a hearing to determine his eligibility for relief that is purely discretionary.” (footnotes omitted, emphasis in original)).

Further, although aliens in removal proceedings (unless administratively closed) and aliens with administratively final orders of removal are barred from obtaining the waiver, 8 CFR 212.7(e)(4)(iii) and (iv), an alien with an administratively final order of voluntary departure is not, and by definition, aliens must voluntarily depart the United States in order to receive the benefit of such a waiver. Thus, the availability of administrative closure has no bearing on an alien’s ability to receive and effectuate an order of voluntary departure, which is a practical prerequisite for obtaining the benefit of the waiver, and commenters did not explain why the restriction on administrative closure would have any impact at all on an alien’s ability to obtain an order of voluntary departure and then a provisional waiver before departing to receive the final waiver abroad. Although the Department has considered the link between such waivers and administrative closure—just as the Attorney General did in *Matter of Castro-Tum*—that link is too attenuated to outweigh the significant legal and policy concerns raised by the Department regarding administrative closure.

Similarly, concerns about putative reliance interests are misplaced. First, as discussed, *infra*, the rule applies, in general, only prospectively, so it does not disturb cases that have already been

administratively closed. Second, and relatedly, all changes in the law may impact matters of attorney strategy in interactions with clients, but that is an insufficient basis to decline to change the law.<sup>29</sup> To find otherwise would effectively preclude any law from ever being changed. Third, nothing in the rule prohibits a practitioner from seeking administrative closure; rather, it more clearly delineates the situations in which administrative closure is legally authorized. Fourth, a representative may not ethically guarantee any result in a particular case; thus, to the extent commenters suggest that the final rule restricts or interferes with an attorney’s ability to guarantee an alien both a grant of administrative closure and the approval of a provisional waiver, the Department finds such a suggestion unavailing. See Model Rules of Prof’l Conduct R. 7.1 cmt. 3 (2020) (“A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case.”); *id.* cmt. 4 (“It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”) (quoting R. 8.4(c)); *id.* R. 8.4(e) (“It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”).

In short, the Department appropriately considered potential alternatives as well as the relevant interests and alleged costs in issuing the final rule regarding administrative closure. On balance, however, commenters’ suggestions would not resolve the issues identified by the Department, and the concerns raised by commenters are far outweighed by both the significant legal and policy issues raised by the Department in the NPRM regarding administrative closure and the increased efficiency that a formal clarification of its use will provide.

With regards to the alleged costs to persons in removal proceedings who allegedly may no longer be eligible to obtain a provisional unlawful presence waiver without administrative closure,

the Department first reiterates that situation is already the status quo in all but four immigration courts and has been so since 2018. As *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers. Consequently, this final rule does not change the status quo regarding the availability of a provisional unlawful presence waiver for the overwhelming majority of aliens currently in removal proceedings, and commenters generally did not distinguish the reality of the status quo in making their speculative projections. Further, the Department believes that the strong interest in the efficient adjudication of cases and the legal and policy issues identified in the NPRM outweigh the potential inability of aliens at 4 out of 67 immigration courts to obtain provisional unlawful presence waivers, something to which they are not entitled to in the first instance. The Department notes that these persons may still apply for an unlawful presence waiver from outside the United States, and that DHS may choose, as a matter of policy, to amend their regulations to remove the administrative closure requirement for persons in removal proceedings applying for a provisional waiver.

The Department also disagrees that the general prohibition on administrative closure does not harmonize with DHS regulations regarding provisional unlawful presence waivers. As a Federal circuit court recently noted, the presence of references to administrative closure in existing regulations “presuppose only the existence of a general practice of administrative closure, not its legality.” *Hernandez-Serrano*, 2020 WL 6883420 at \*4. Thus, assuming counterfactually—but as commenters asserted—that 8 CFR 212.7(e)(4)(iii) controlled the Department and that no aliens would be eligible to have their cases administratively closed after this final rule—and, thus, no aliens in immigration proceedings were eligible for a provisional waiver under 8 CFR 212.7(e)(4)(iii)—those factors, even if factually accurate, would not provide a strong policy basis to overrule the Attorney General’s decision in *Matter of Castro-Tum* for all of the reasons given by the Department in the NPRM and this final rule. See also *Hernandez-Serrano*, 2020 WL 6883420 at \*4 (“neither the IJs nor the Board [nor parties] enjoy a right of adverse possession as to the Attorney General’s

<sup>29</sup> Furthermore, as reiterated herein, because *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

regulations.”). The Department considered the interplay of EOIR and DHS’s regulations and, due to the strong equities in favor of limiting administrative closure, decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy, and DHS may choose to update their more specific regulations accordingly as a result of this rule.

c. Enhanced BIA Factfinding (8 CFR 1003.1(d)(3)(iv))

i. Administrative Notice

*Comment:* As a general matter, many commenters asserted that the provisions regarding administrative notice were biased in favor of DHS, thereby demonstrating the allegedly partisan nature of the BIA and, more broadly, the Department. Similarly, one commenter explained that the administrative notice provisions were “problematic” because, as the commenter alleged, DHS could submit new evidence but the alien was not permitted to submit counter evidence under the new rules.

Commenters expressed concern about the types of items the rule would allow the BIA to administratively notice items “not reasonably subject to dispute.” 8 CFR 1003.1(d)(3)(iv)(A). Overall, commenters predicted disputes at both the BIA and the Federal courts over whether particular facts fit any of the listed exemplary categories of such evidence or otherwise constitute such items. 8 CFR 1003.1(d)(3)(iv)(A)(1)–(4). Such disputes, commenters alleged, would undermine the efficiency goals of the rule. One commenter explained that “[m]ost of this information—especially that contained within government documents—will be adverse to respondents. The rule thus creates a one-sided system in which information favorable to DHS may be considered by the BIA, but information favorable to respondents may not be.” Commenters claimed that the rule’s inclusion of all of these facts was arbitrary and capricious.

Further, commenters specifically alleged that the “the contents of official documents outside the record,” 8 CFR 1003.1(d)(3)(iv)(A)(2), are subject to reasonable dispute because DHS records, including records from CBP and ICE, “routinely contain [ ] egregious errors and coerced statements.” Commenters also stated that current events, 8 CFR 1003.1(d)(3)(iv)(A)(1), could similarly be subject to reasonable dispute. Commenters stated that the contours of the category of facts from

government sources was unclear, despite it being limited to “facts that can be accurately and reliably determined.” 8 CFR 1003.1(d)(3)(iv)(A)(3), because DHS records are unreliable. In addition, at least one commenter stated that the rule did not explain why facts that can be administratively noticed by the BIA may only be sourced from official or universally acclaimed documents.

At least one commenter alleged that the administrative notice provisions would allow the BIA to consider and act upon facts not raised by either party, thereby considering “facts that did not constitute part of the immigration judge’s decision-making.” The commenter alleged that this would allow the BIA to act as prosecutor instead of a neutral arbiter. The commenter explained that because DHS rarely submits a brief on appeal, the administrative notice changes would disproportionately affect pro se individuals.

Several commenters stated that the provisions regarding notice and an opportunity to respond were insufficient because a response may require witnesses and additional clarifying evidence. Commenters explained that witnesses and additional evidence were more appropriately introduced at the immigration court level, given the immigration judge’s unique position to assess facts and determine credibility and the general prohibition against factfinding by the BIA. Commenters also emphasized that the rule failed to consider that the BIA would need to give notice to the parties and an opportunity to respond if the BIA intended to administratively notice a fact that was outside the record and would serve as the basis for overturning a removal order or denial of relief. The commenter explained that the BIA does not appear to be neutral when it must only administratively notice facts that could be used to deny relief that was previously granted.

One commenter explained that the rule’s changes to administrative notice would affect the standard of review for factual findings on appeal at the appellate court level. The commenter explained that the current use of the “substantial evidence” standard would not be justified, given that some factual findings would have been made only by the BIA in the first instance. Thus, the commenter suggested that the “clearly erroneous” standard replace the “substantial evidence” standard in these cases.

*Response:* As an initial point, the Department notes that the Board’s ability to take administrative notice of

certain facts is already well-established in both existing regulations, e.g., 8 CFR 1003.1(d)(3)(iv) (2019) (allowing the Board to take administrative notice of current events and the contents of official documents), and case law, e.g., *Sankoh v. Mukasey*, 539 F.3d 456, 465 (7th Cir. 2008) (“The Board has the authority to take administrative notice of uncontroverted facts, meaning facts that can be characterized as commonly acknowledged.” (internal citation and quotation marks omitted)). Thus, to the extent that commenters assert the Board should not be able to take administrative notice of facts not reasonably subject to dispute, they did not explain why the Department should reverse the Board’s longstanding authority to do so.

Similarly, commenters did not persuasively explain why Federal Rule of Evidence 201(b), which is well-established in Federal jurisprudence and governs judicial notice by appellate courts, *In re Omnicare, Inc. Securities Litigation*, 769 F.3d 455, 466 (6th Cir. 2014) (“[Federal Rule of Evidence 201(b)] applies to appellate courts taking judicial notice of facts supported by documents not included in the record on appeal.” (quoting *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012))), was not an appropriate model for the Board to follow. Without such explanations as to why the Department should overturn these longstanding and well-established principles, the Department finds commenters’ unsupported policy preferences on this point unpersuasive.

Additionally, commenters’ suggestions about the allegedly “one-sided” nature of this change belie both a misunderstanding of the rule and an acknowledgement of its importance to ensure that only meritorious claims are granted. First, contrary to the assertions of many commenters, the rule applies equally to DHS and to respondents. Thus, the Board may take administrative notice of facts both favorable and adverse to either party, as long as those facts are not reasonably subject to dispute. Second, the broad, hyperbolic, and unsupported assertion that official government documents should not be administratively noticed because they contain only information adverse to respondents is both inaccurate factually, e.g., *Dahal v. Barr*, 931 F.3d 15, 19 (1st Cir. 2019) (“Thus, far from undercutting Dahal’s fears, the [Department of State] Country Report on the elections recognizes a remaining threat of Maoist persecution.”), and in tension with well-established Federal practice in which courts may take judicial notice of official government documents, e.g.,

*Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (“Under Federal Rule of Evidence 201, a court may take judicial notice, at ‘any stage of the proceeding,’ of any fact ‘that is not subject to reasonable dispute because’ it ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’ Fed. R. Evid. 201(b)(2), (d). . . . Pursuant to Rule 201, courts have considered newspaper articles, documents publicly filed with the SEC or FINRA, documents filed with a Secretary of State, documents filed with governmental entities and available on their official websites, and information publicly announced on certain non-governmental websites, such as a party’s official website.”); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.1991) (“[A] . . . court may take judicial notice of the contents of relevant public disclosure documents . . . as facts ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” (quoting Fed. R. Evid. 201(b)(2))).

Moreover, this suggestion misapprehends the nature of the rule and—perhaps unintentionally by the commenter—offers further support for maintaining it. The rule allows the Board to take administrative notice of “[f]acts that can be accurately and readily determined from official government sources and whose accuracy is not disputed.” 8 CFR 1003.1(d)(3)(iv)(A)(3). Commenters did not explain why facts whose accuracy is not disputed and that are unfavorable to an alien should not be considered by individuals adjudicating claims made by aliens—except that ignoring such facts would potentially increase the likelihood that non-meritorious claims would be granted, which is an outcome preference tacitly supported by many commenters. The Department finds it vitally important that all undisputed, accurate facts bearing on a claim should be considered in order to reduce adjudication errors and to ensure that meritorious claims are granted in a timely manner while unmeritorious ones are efficiently addressed. In short, the Department disagrees with the implicit suggestion of commenters that the Board should intentionally turn a blind eye to relevant, undisputed facts, regardless of which party those facts allegedly favor.

The rule does not authorize the BIA to rely on facts that did not constitute part of the immigration judge’s decision-making, except when such “facts [] are not reasonably subject to dispute.” 8 CFR 1003.1(d)(3)(iv)(A) (proposed); *see*

*also Matter of J-Y-C.*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (providing that issues not raised before an immigration judge are waived). The BIA must take administrative notice of those facts. 8 CFR 1003.1(d)(3)(iv)(A). Further, if the BIA were to reverse a grant of relief or protection from removal based on such facts, the BIA must give the parties notice and not less than 14 days to respond. 8 CFR 1003.1(d)(3)(iv)(B). Accordingly, contrary to commenters’ assertions, an alien whose grant of relief or protection may be subject to reversal will have an opportunity to respond, including by submitting additional arguments and evidence such as affidavits or declarations.

Furthermore, the administrative notice provisions are not the product of partisanship or favoritism toward DHS, and contrary to an implicit assertion made by most commenters, they apply equally to both parties. The BIA has long been able to take administrative notice of commonly known facts and official government records, and these changes build on this prior practice. Moreover, contrary to the assertion of at least one commenter, the Department intends to ensure that an alien receives notice and an opportunity to respond if the BIA were to rely on a fact outside the record to reverse a grant of relief or protection from removal. If anything, the provision treats respondents more favorably than DHS because it does not require the BIA to provide notice to DHS if it intends to rely on facts outside the record to reverse an immigration judge’s denial of relief or protection, yet many commenters failed to acknowledge this discrepancy or to explain why the Department should not adopt such a provision.

The Department emphasizes that regulations, not statute, determine appellate procedures at the BIA. *See generally* 8 CFR part 1003, subpart A; *see also* 85 FR at 52492. Accordingly, the Department properly exercised its rulemaking authority under section 103(g)(2) of the Act, 8 U.S.C. 1103(g)(2), to promulgate the administrative notice provisions to clarify appellate procedures at the BIA, with the overarching goal of increasing efficiencies and consistency in cases before the BIA.

The Department disagrees with commenters’ suggestions that the regulation’s list of facts that may be administratively noticed include disputable facts, as whether any given fact is “disputable” will depend on the putative fact at issue and the overall circumstances of the case. The Department recognizes that parties may disagree over whether a fact is truly

undisputed, but factual disputes are already a common feature of immigration proceedings and can be resolved under existing law. Moreover, respondents will have at least 14 days to argue otherwise if the Board intends to rely on a fact “not reasonably subject to dispute” outside the record in order to reverse a grant of relief or protection. 8 CFR 1003.1(d)(3)(iv)(B).

Further, the Department rejects any allegation that official documents or government documents contain “egregious errors” and “coerced statements,” or are “unreliable,” as commenters claimed. Government documents, broadly speaking, provide reliable data and cite to reliable sources in support of the ideas presented and are meant to inform the public. Second, the Department disagrees with the commenters’ concerns that all but paragraph (d)(3)(iv)(A)(4) could be disputable. The Department disagrees that administrative notice of any of those facts creates a biased system. Inclusion of these facts is not arbitrary or capricious; both “current events” and “official documents” were carried over from existing regulations. The “official government sources” category provides further clarification and distinction from the “official documents” category. In providing this list, the Department sought to delineate clear categories of facts that were indisputable, and the rule concurrently included the provision requiring notice and an opportunity to respond to ensure that both sides may address administratively noticed facts. Commenters’ concerns regarding prolonged disputes at the BIA and the Federal courts are speculative, as are commenters’ concerns regarding efficiency that stem from those litigation-related concerns. More specifically, all disputes at the BIA may potentially result in Federal litigation, including disputes over the appropriateness of the Board taking administrative notice of undisputed facts. The near-certainty of litigation, which has grown considerably in the immigration field well before the NPRM was published, is an insufficient basis, however, to decline to adopt the rule.

In regard to administratively noticed documents, those listed at 8 CFR 1003.1(d)(3)(iv)(A)(1)–(4) are examples of documents, as indicated by the words “such as” preceding the list provided at paragraphs (d)(3)(iv)(A)(1)–(4), that would generally raise facts not reasonably subject to dispute. The rule did not require that sources be “official” or “universally acclaimed,” as commenters claimed. Rather, the rule required that administratively noticed facts, regardless of their sources, be “not



reasonably subject to dispute.” Although official or universally acclaimed documents typically raise facts that are not in dispute, those are not the exclusive sources from which the BIA may administratively notice facts.

Because facts that may administratively noticed are not reasonably subject to dispute, the BIA does not act as a “prosecutor” when it takes administrative notice of such facts. Further, the regulation requires the BIA to provide parties at least 14 days to respond if it takes administrative notice of facts. 8 CFR 1003.1(d)(3)(iv)(B). Thus, regardless of whether DHS files a brief on appeal and regardless of whether an alien is represented, the alien is afforded an opportunity to respond to administratively-noticed facts outside the record if those facts will be used to overturn a grant or relief or protection. This rule also does not impose any specific limits on such a response, though the Board’s ordinary rules for service and filing would still apply.

Although the Department agrees that immigration courts are generally best-positioned to engage in factfinding, *see generally* 85 FR at 52500–01, there are circumstances—similar to those recognized by Federal courts—in which procedural efficiency counsels in favor of being noticed on appeal in order to avoid remanding a case to address a fact that is undisputed. Thus, the Department has determined that certain facts described in 8 CFR 1003.1(d)(3)(iv)(A)(1)–(4) may appropriately be raised before the BIA. *See id.* at 52501.

Some commenters alleged that the rule permits DHS to submit new evidence and prevents the alien from submitting new evidence to counter DHS’s new evidence. However, the rule does not permit either party to submit new evidence in this regard. To the extent that commenters framed this concern as one regarding exceptions related to factual issues raised by identity, law enforcement, or security investigations or examinations, or other investigations noted in 85 FR at 52500 n.21, that issue is distinct from the issue of administratively noticed facts and, for asylum applications, has a statutory foundation, INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i) (“[A]sylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or

ineligible to apply for or be granted asylum”). For further discussion on issues related to identity, law enforcement, or security investigations or examinations, *see* section II.C.3.e.

Commenters’ concerns regarding use of the clearly erroneous standard in place of the substantial evidence standard is outside the scope of this rulemaking, as this rule does not propose or affect standards of review for factual findings at the appellate court level. The Department does not have the authority to issue a rule that would alter the standard of review employed by a Federal circuit court. This rule does not affect the commenters’ ability to lobby Congress or advise other attorneys in regard to this concern.

#### ii. BIA Factfinding Remands

*Comment:* Commenters opposed the rule’s prohibition on the BIA to remand a case for further factfinding, explaining that oftentimes combining excluded evidence with evidence in the record could determine the outcome of a case. Overall, one commenter explained that the rule “defied logic” by categorically restricting the BIA from exercising discretion to determine whether additional facts must be adduced. The commenter stated that the Department provided no data to support the rule’s changes to the BIA’s long-standing factfinding efforts, nor did the rule explain how restricting the BIA’s factfinding capabilities would increase efficiency and consistency.

Commenters voiced general concern for pro se individuals, alleging that the rule’s removal of the BIA’s ability to remand a case *sua sponte* for further factfinding “appears designed to quickly, and with finality, remove those without representation who would be least likely to understand that they have the ability to seek remand and would therefore most heavily rely on EOIR to protect their rights.” More specifically, especially in the case of pro se individuals, commenters were concerned that respondents who were unaware of what was necessary to meet their burden would also similarly not have attempted to “adduce the additional facts before the immigration judge,” as required by proposed 8 CFR 1003.1(d)(3)(iv)(D)(2) for the BIA to remand a case. One commenter further explained that this provision would “require respondents to predict a future that will be created by actors beyond their control in order to obtain the lawful status that is otherwise statutorily available to them.”

Similarly, commenters opposed proposed 8 CFR 1003.1(d)(3)(iv)(D)(1) requiring that an issue be “preserved”

before the immigration judge because, the commenters explained, the respondent would be unaware of what factfinding the immigration judge had conducted until the decision is issued. Accordingly, commenters alleged that the respondent would have to “interrupt the IJ as the IJ is dictating her ruling. Or, even worse, the [r]espondent wouldn’t even have the opportunity to object because he received his decision by postal mail.” Citing the performance metrics for immigration judges, commenters were concerned that immigration judges would have “little incentive” to take the time to develop the record in cases “where there is no possibility that the case could be remanded for failure to do so.”

Commenters also disagreed with proposed 8 CFR 1003.1(d)(3)(iv)(D)(3), which requires the BIA to first determine whether additional factfinding would “alter the outcome of the case.” Commenters alleged that making such determination constituted factfinding on the part of the BIA, contradicting the general opposition to factfinding by the BIA.

Commenters disagreed with the clearly erroneous standard in proposed 8 CFR 1003.1(d)(3)(iv)(D)(5). Commenters explained that it should not make a difference whether an immigration judge’s findings were erroneous if an alien should have been granted asylum in the first instance. Other commenters voiced general support for the current system, which they explained required the BIA to determine whether an immigration judge made a clearly erroneous factual finding that prejudiced the alien. One commenter alleged that, under the rule, the BIA would be forced to issue “poor decisions based on incomplete facts and conjecture.”

*Response:* Again, as an initial point, the Department notes that the assertions of many commenters reflect either an unsubstantiated, tendentious interpretation of the rule or a fundamental misunderstanding of the procedures of adversarial civil proceedings, including immigration proceedings. Except for issues related to identity, law enforcement, or security investigations or examinations, which are required by other regulations or statutes,<sup>30</sup> the changes in the rule regarding factfinding apply to both

<sup>30</sup> Most applications cannot be granted in immigration proceedings—at the BIA or otherwise—without the completion and clearance of identity, law enforcement, or security investigations or examinations. 8 CFR 1003.47. A similar statutory restriction applies specifically to asylum applications. INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i).

parties equally. Thus, both DHS and an alien must comply with the rule's provisions in order to seek a remand for factfinding.

Because the parties themselves are responsible for meeting any applicable burdens of proof before the immigration judge, 8 CFR 1240.8, and because the Board acts a neutral arbiter between the parties—rather than as an advocate for one party over the other—there is generally no reason for the Board to remand a case on its own for further factfinding unless a question of jurisdiction has arisen that requires such factfinding. To do otherwise, the Board would, in essence, be acting on behalf of a party in order to advance that party's arguments, which is inappropriate. 8 CFR 1003.1(d)(1) (“The Board shall resolve the questions before it in a manner that is timely, *impartial*, and consistent with the Act and regulations.” (emphasis added)); 5 CFR 2635.101(b)(8) (“Employees [of the federal government] shall act impartially and not give preferential treatment to any private organization or individual.”); *BIA Ethics and Professionalism Guide* at sec. V (“A Board Member shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”). In other words, it is not the Board's role to correct deficiencies in a party's case or to provide a second or additional opportunity for a party to do so. It is the Board's role to “review . . . administrative adjudications under the Act . . . [R]esolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations . . . [And] provide clear and uniform guidance to the [DHS], the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.” 8 CFR 1003.1(d)(1). The final rule recognizes the Board's appropriate role, and to the extent that commenters suggest the Board should employ procedures in resolving appeals that favor one party over the other, the Department declines to adopt such a suggestion to avoid compromising the Board's impartiality.

The rule reflects several well-established principles that commenters did not persuasively challenge or address. First, it requires that the party seeking remand for factfinding on an issue to have preserved that issue below. Issues not preserved in front of an immigration judge are generally waived. *See Matter of Edwards*, 20 I&N Dec. 191, 196 n.4 (BIA 1990) (noting that an issue not preserved in front of the immigration judge is waived). Thus,

it is both inefficient and inconsistent with existing case law to remand a case for further factfinding on issue that has already been waived on appeal. Commenters did not explain why EOIR should allow the Board to remand cases for further factfinding on issues that have already been waived, and the Department is unaware of any logical or persuasive basis to do so.

Second, the rule requires the party seeking remand, if it bore the burden of proof below, to have attempted to adduce the additional facts before the immigration judge. There is no logical reason for a party to choose not to attempt to adduce facts sufficient to meet its burden of proof before an immigration judge, and this requirement merely recognizes both the inefficiency and the gamesmanship that would follow if parties were relieved of an obligation to attempt to bring out facts to meet a burden of proof before an immigration judge. Again, commenters did not explain why parties—including both aliens and DHS—should be relieved of that burden, particularly since they, presumably, should already have attempted to meet it. 8 CFR 1240.8.

Third, the rule requires that the additional factfinding alter the outcome or disposition of the case. To do otherwise would be to remand a case for no purpose since the remand would not affect the outcome or disposition of the case. In short, it would be a remand for no reason. The Department is unaware of any need to remand a case for no reason, and commenters did not provide one.

Fourth, and relatedly, the rule requires that the additional factfinding would not be cumulative of the evidence already presented or contained in the record. Again, to do otherwise would largely be purposeless. The Department is unaware of any reason to remand a case for factfinding that is cumulative or already present in the record, and commenters did not advance one.

Fifth, the rule requires, *inter alia*, that the immigration judge's factual findings were clearly erroneous. The Board already reviews immigration judge factual findings under a clearly erroneous standard, and the rule does not change that standard. *Id.*

§ 1003.1(d)(3)(i). Rather, the rule recognizes that additional factfinding in cases in which an immigration judge's factual findings are not clearly erroneous could mean only one of two possibilities. It could mean that a party failed to meet its burden of proof but the Board believes—for some unknown or unstated reason—that the party warrants another chance to meet that burden to

bring out additional facts. Such a decision would effectively convert the Board into an advocate for the party seeking a remand, and in that case, the Board would be abdicating its role as an impartial or neutral arbiter. *See id.* 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V. Commenters did not offer persuasive reasons for the Board to abandon its need for impartiality, and to the extent that commenters alleged multiple reasons for not adopting the rule, the Department finds that the need for the Board to remain an impartial body is more compelling than those reasons.

Alternatively, additional factfinding in cases in which an immigration judge's factual findings are not clearly erroneous could mean that the immigration judge made an error of law which will necessitate additional factfinding on remand. For example, an immigration judge may err as a matter of law in failing to sufficiently develop the record for a pro se respondent, which would inherently require further factfinding. Although that interpretation would be based on a legal determination and the rule does not restrict the Board's ability to remand a case due to a legal error, the Department recognizes that some cases of legal error may require additional factfinding on remand. The Department did not intend the rule to prohibit factfinding on remand when the remand is based on a legal error—subject to other requirements—and the final rule clarifies that point to avoid confusion. 8 CFR 1003.1(d)(3)(iv)(D)(5).

Contrary to commenters' contentions, the rule did not “categorically restrict” the BIA from exercising discretion to determine whether additional facts may be adduced. For example, the BIA may exercise discretion to determine that additional facts not reasonably subject to dispute may be administratively noticed. The rule did, however, clarify the extent to which the BIA may engage in factfinding on appeal and the circumstances in which the BIA may remand for further factfinding, consistent with applicable law and regulations. 85 FR at 52500–01.

The rule cited various data, *see id.* at 52492, to demonstrate the significant increase in cases and related challenges, which the Department believes would be unsustainable under the BIA system pre-dating this rule and thus prompted the Department's decision to review the BIA's regulations in order to address and reduce unwarranted delays in the

appeals process and ensure efficient use of resources.<sup>31</sup>

Contrary to commenters' claims, the Department maintains that it explained in the NPRM how proposed changes to the BIA's factfinding abilities would increase efficiency and consistency. For example, in support of the administrative notice provisions, the Department explained that there was no operational or legal reason to remand a case for factfinding if the record already contained evidence of undisputed facts. *Id.* at 52501. Thus, the Department clarified that the BIA could rely on such facts without remanding the case, thereby reducing an unwarranted delay. Overall, the proposed changes were made "to more clearly delineate the circumstances in which the BIA may engage in factfinding on appeal." *Id.* Clarifying such circumstances inherently facilitates a more efficient and consistent process because adjudicators need not spend time determining, for example, whether factfinding is appropriate or whether previous adjudicators otherwise engaged in factfinding in similar circumstances.

The Department promulgated this rule to reduce unwarranted delays and ensure efficient use of resources, given the significant increase in pending cases in the immigration courts that has led to an increase in appeals. *See id.* at 52492. In no way are these changes intended for the purpose of harming or quickly removing pro se individuals. To the contrary, EOIR's Office of Policy (OP) seeks to increase access to information and raise the level of representation for individuals in hearings before immigration courts and the BIA. In addition, EOIR has developed a thorough electronic resource for individuals in proceedings. EOIR, *Immigration Court Online Resource*, available at <https://icor.eoir.justice.gov/en/> (last visited Nov. 27, 2020); *see also*

*EOIR Launches Resources to Increase Information and Representation*, Oct. 1, 2020, <https://www.justice.gov/eoir/pr/eoir-launches-resources-increase-information-and-representation>. In short, EOIR's OP, the private bar, and other non-governmental organizations all may assist individuals with their immigration proceedings,<sup>32</sup> which include providing information which may assist individuals in preserving issues or attempting to adduce additional facts before the immigration judge.

Regarding the possible impact of the rule on pro se aliens, as noted previously, the Department first reiterates that most aliens—*i.e.*, 86 percent, *Representation Rates, supra*—whose cases are considered by the Board have representation. For those who do not, there are multiple avenues they may pursue to obtain representation. For example, the Department maintains a BIA Pro Bono Project in which "EOIR assists in identifying potentially meritorious cases based upon criteria determined by the partnering volunteer groups." *BIA Pro Bono Project, supra*. Further, immigration judges have a duty to develop the record in cases involving pro se aliens, which will ensure that such aliens attempt to adduce relevant facts to meet their burdens of proof and reduce the likelihood that aliens inadvertently waive an issue.<sup>33</sup> *See Mendoza-Garcia*, 918 F.3d at 504.

To be sure, BIA procedures are not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. *See, e.g., McNeil*, 508 U.S. at 113 ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."); *Edwards*, 59 F.3d at 8–9 (rejecting a pro se alien litigant's arguments for being excused from Federal court procedural requirements due to his pro se status). Moreover, issues not raised below may be deemed waived even for pro se individuals. *See, e.g., Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) ("Pro

se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed. But, issues not raised below are normally deemed waived." (internal citations omitted)). However, those standards have existed for years and exist independently of the rule, and nothing in the rule alters or affects their applicability.

The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with cases before the Board. However, the rule neither singles such aliens out for particular treatment under the Board's procedures, nor does it restrict or alter any of the avenues noted above that may assist pro se aliens. Further, commenters' concerns related to pro se aliens and these provisions are based almost entirely on a speculative, unfounded belief that immigration judges will disregard their duty to develop the record in pro se cases. The Department declines to accept such a view of immigration judges as either incompetent or unethical and declines to accept commenters' suggestions on that basis. *Chem. Found., Inc.*, 272 U.S. at 14–15 ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Finally, weighing the complete lack of necessity—and corresponding inefficiency—of factfinding remands where the facts are either irrelevant to the disposition of the case or cumulative to facts already in the record, the importance of maintaining the Board's impartiality, the duty of immigration judges to develop the record in cases of pro se aliens, the size of the pro se population with cases before the BIA, and the well-established avenues of assistance for pro se aliens, the Department finds, as a matter of policy, that the clarity and efficiency added by factfinding provisions in the rule far outweigh the speculative and unfounded concerns raised by commenters, particularly since many commenters misapprehended that the rule applies to both DHS and respondents.

Although commenters provided examples of challenges individuals would face in complying with the regulatory provisions at proposed 8 CFR 1003.1(d)(3)(iv)(D)(1) and (2), the Department finds the examples unpersuasive or inapposite. The commenters' examples do not demonstrate a bar to preserving issues or adducing additional facts for use on appeal. Indeed, some commenters'

<sup>31</sup> To the extent that commenters asserted that the Department provided no data regarding the BIA's factfinding procedures, the Department notes that granular data on how many BIA remands for factfinding that do not affect the outcome of cases and that are for factfinding that is cumulative to facts already found in the record is not available and is likely untraceable due to the inherently fact-specific nature of each case and the somewhat counter-factual of such data. Moreover, commenters did not suggest that such data was available or could be obtained, nor did they even suggest how to calculate or measure the "inappropriateness" or "incorrectness" of a remand that would be necessary to track such data. As discussed, the remaining parts of the rule follow from well-established legal principles (*e.g.*, waiver, burden of proof, and standard of review for factfinding) and are not intended to turn on data. Overall, the Department reiterates that the rule explained how restricting the BIA's factfinding capabilities would increase efficiency and consistency.

<sup>32</sup> The Department notes that individuals in removal proceedings before an immigration judge and the BIA have the "privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as [the alien] shall choose." INA 292, 8 U.S.C. 1362; *see also* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A); 8 CFR 1240.10(a)(1).

<sup>33</sup> Whether a pro se alien knowingly waived an issue may also be a relevant consideration in appropriate cases. *See Matter of Samai*, 17 I&N Dec. 242 (BIA 1980) (objection to improper notice raised for the first time on appeal by a previously unrepresented respondent could still be considered by the Board).

examples assume that issues can only be preserved or additional facts be adduced for use on appeal during an immigration judge's issuance of a decision, which is inaccurate. Throughout the course of proceedings, individuals may raise evidentiary or factfinding issues as the record is developed. *See generally* 8 CFR 1240.10 (explaining the course of the hearing, during which an alien may, for example, examine and make objections to evidence against him and present evidence on his behalf); *see also* 8 CFR 1240.9 (detailing the contents of the record, including "testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings"). Moreover, if a party objects to an immigration judge's exclusion of evidence from the record, the regulations provide that an affected party may submit a brief. *Id.* 1240.9. Accordingly, numerous avenues exist through which individuals may comply with the proposed provisions at 8 CFR 1003.1(d)(3)(iv)(D)(1) and (2).

The Department reiterates that immigration judges and the BIA will continue to exercise independent judgment and discretion to adjudicate cases before them in accordance with applicable law and regulations. *See Id.* § 1003.1(d)(1)(ii), 1003.10(b), 1240.1(a). Circuit courts have held that under section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), immigration judges have an obligation to develop the record. *See, e.g., Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 130 (1st Cir. 2004); *Mendoza-Garcia*, 918 F.3d at 504. The Department rejects any speculative contention—rooted in a tacit assertion that immigration judges are either unethical or incompetent—that immigration judges would simply shirk their obligation, including developing the record, in favor of completing more cases.

The Department disagrees that the BIA's determination in accordance with proposed 8 CFR 1003.1(d)(3)(iv)(D)(3), constitutes factfinding on the part of the BIA. Whether "additional factfinding would alter the outcome or disposition of the case" is well within the BIA's proper scope of review under 8 CFR 1003.1(d)(3) and inherent in the BIA's responsibility to decide appeals.

Because the BIA generally cannot consider new evidence on appeal or engage in further factfinding, 8 CFR 1003.1(d)(3)(iv), subject to some exceptions, the rule sought to clearly establish limitations on the BIA's ability to remand for further factfinding. As

explained in the NPRM, the INA contains few details in regard to the appeals process; thus, EOIR's regulations govern specific procedural requirements for appeals. 85 FR at 52493. Consequently, in accordance with its statutory authority under section 103(g)(2) of the Act, 8 U.S.C. 1103(g)(2), to promulgate regulations, the Department determined that it would condition remand on a determination that either the immigration judge's factual findings were clearly erroneous or that remand is warranted following *de novo* review.

As the Department explained in the NPRM, the current system for adjudicating appeals does not always operate in an effective and efficient manner. As explained in the NPRM, the Department believed it was necessary to reevaluate its regulations governing the BIA, as it routinely does, *see id.* at 52494. As a result, the Department determined that the current system could be amended in various ways to reduce unwarranted delays and ensure efficient use of resources, given the significant increase in pending cases in the immigration courts that has led to an increase in appeals. *See id.* Moreover, changes made by this rulemaking will best position the Department to address the growing caseload and related challenges. *Id.* at 52492–93.

The Department strongly disagrees with commenters that the rule would force the BIA to issue "poor decisions based on incomplete facts and conjecture." Again, this comment suggests that Board members are incompetent and cannot perform their functions fairly and efficiently, a suggestion the Department categorically rejects. The Department is confident that the BIA will continue to competently resolve issues in a manner that is timely, impartial, and consistent with applicable law and regulations. *See* 8 CFR 1003.1(d)(1). BIA members exercise independent judgment and discretion and "may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." *Id.* § 1003.1(d)(1)(ii).

d. BIA Affirmance on Any Basis Supported by the Record (8 CFR 1003.1(d)(3)(v))

*Comment:* Commenters expressed concerns about new paragraph 8 CFR 1003.1(d)(3)(v) that would enable the BIA to affirm the underlying decision of the immigration judge or DHS on "any basis" supported by the record, including a "basis supported by facts

that are not reasonably subject to dispute" or "undisputed facts."

Commenters argued that this change creates inefficiencies instead of efficiencies for a variety of reasons. For example, commenters expressed a belief that this provision will inevitably require respondents before the BIA to litigate every possible issue that could be raised by the record in order to preserve their arguments for future appeals, regardless of the particular rulings by the IJ. Commenters noted that this in turn creates inefficiencies as opposed to efficiencies in BIA procedures. In addition, commenters stated that this provision will in effect lead to a full second adjudication of every case by the BIA instead of the BIA only analyzing the specific issues posed by the parties. Citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), commenters argued that respondents should not have to guess at what bases the BIA might have for its decisions.

Commenters disputed the Department's citation to *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) in support of the change, explaining that the Supreme Court in that case provided the parties with an opportunity to establish additional facts that would affect the result under the new theory first presented at the Court of Appeals.

Commenters expressed concern that this provision will inevitably lead to the BIA engaging in impermissible factfinding and that the rule is insufficiently clear as to what is a "disputed" or undisputed fact.

Commenters stated that this change is internally inconsistent with other provisions of the rule because it allows the BIA to affirm a decision based on arguments not raised in the proceedings below but prohibits the BIA from similarly remanding based on arguments not raised below.

*Response:* As an initial point, few commenters acknowledged that this standard is analogous to the one employed by Federal appellate courts reviewing Federal trial court decisions and is, thus, a well-established principle of appellate review. *See, e.g., Keyes v. School Dist. No. 1*, 521 F.2d 465, 472–73 (10th Cir. 1975) ("An appellate court will affirm the rulings of the lower court on any ground that finds support in the record, even where the lower court reached its conclusions from a different or even erroneous course of reasoning."). Relatedly, few, if any, commenters offered an explanation or rationale for why that appellate principle would be inappropriate to apply to Board review of immigration judge decisions, particularly since Federal appellate courts handle cases of

pro se litigants and complex records from trial courts below just as the Board does. Further, few, if any, commenters acknowledged that the Board already possesses the authority to base its decision on a review of the record as a whole even if a party has not raised an issue. *See, e.g., Ghassan v. INS*, 972 F.2d 631, 635 (5th Cir. 1992) (“First, he argues that the BIA should not have disregarded the IJ’s finding, because the INS did not challenge that finding in its brief. We disagree. . . . In the instant case, the BIA based its decision upon the administrative record as a whole. There was no procedural impropriety.”). To the extent that commenters failed to engage with a principal foundation for this provision of the rule, the Department finds their comments unpersuasive. *See Home Box Office*, 567 F.2d at 35 n.58 (“Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.”).

As the Department also explained in the proposed rule, 85 FR at 52501 n.23, clarifying that the BIA may affirm the decision of the immigration judge or DHS on any basis supported by the record is consistent with long standing principles of judicial review. *See, e.g., Chenery Corp.*, 318 U.S. at 88 (describing the principle that a reviewing court must affirm the result of the lower court if the result is correct, even if the lower court relied upon a wrong ground or wrong reason as “settled rule”) (citing *Helvering*, 302 U.S. at 245)). Indeed, as the Supreme Court explained, it would be wasteful for an appellate body to have to return a case to the lower court based on grounds already in the record and within the power of the BIA to formulate. *Id.*

The Department emphasizes, however, that the BIA may only affirm a decision on a basis that is supported by the record as developed by the immigration judge or any facts not reasonably subject to dispute and of which the BIA takes administrative notice. 8 CFR 1003.1(d)(3)(iv). Accordingly, despite commenters’ unsupported predictions, the rule would not enable the BIA to engage in de novo factfinding as a way to affirm the underlying immigration judge or DHS decision. *Cf. Chenery Corp.*, 318 U.S. at 88 (“[I]t is also familiar appellate procedure that where the correctness of the lower court’s decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot

take the place of the jury.”). Because the BIA’s review is limited to the record in this manner, the Department disagrees with the commenters’ speculation that the BIA review will be less efficient because it would become an alleged second complete adjudication. Instead—just as in Federal appellate courts—this provision only creates efficiencies by making it clear that the BIA does not have to turn a blind eye to undisputed facts that are clear from the record that relate to the correctness of the underlying decision.

In addition, the Department finds unpersuasive commenters’ concerns that aliens must address all possible issues in their briefing or other arguments or else risk ceding a future argument on appeal to Federal court due to failure to exhaust the issue. The Department already expects an appealing party to address all relevant issues on appeal; otherwise, the party risks summary dismissal of the appeal, 8 CFR 1003.1(d)(2)(i)(A) (authorizing summary dismissal when a party does not specify the reasons for appeal on the Notice of Appeal), waiver of the issue before the Board, *see Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal), and potentially dismissal of a petition for review due to a failure to exhaust an issue before the Board, *see, e.g., Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (“A petitioner’s failure to raise an issue before the BIA generally constitutes a failure to exhaust, thus depriving this court of jurisdiction to consider the issue.”). The rule imposes no additional consequences for a party who fails to raise issues on appeal to the BIA beyond those that already exist, and a party choosing to address some issues but not others on appeal does so at its own risk. Consequently, the Department does not see why a party would choose not to raise an issue on appeal, even under the current regulations, and rejects the assertion that the rule imposes a new requirement in this regard.

As a practical matter, the Department is also unaware of how such a scenario posited by commenters would occur. For example, an alien appealing an adverse decision by an immigration judge regarding an application for relief or protection will have necessarily argued to the immigration judge all of the elements required to grant such an application; otherwise, the alien will have waived issues not argued anyway. Further, even if the immigration judge denied the application on one basis—and did not address others—and even if the Board affirmed the denial on

another basis, the alien will not be deemed to have failed to exhaust the issue even if the alien did not include the issue in the Notice of Appeal. *See, e.g., Abebe v. Gonzales*, 432 F.3d 1037, 1040–41 (9th Cir. 2005) (stating that when the BIA reviews the entire record, considers issues argued before an immigration judge but not raised by an alien in a Notice of Appeal, and issues its decision based on such issues after reviewing the entire record, alien is not barred from raising the issue in a petition for review due to exhaustion). In short, commenters’ concerns are unfounded, and the Department declines to credit them accordingly.

e. Changes to BIA Procedures for Identity, Law Enforcement, or Security Investigations or Examinations (8 CFR 1003.1(d)(6))

*Comment:* Commenters expressed concern regarding the rule’s proposed changes to the BIA procedures for identity, law enforcement, or security investigations or examinations. *See* 8 CFR 1003.1(d)(6)(ii) and (iii); *see also* 82 FR at 52499.

At least one commenter stated that the changes conflict with the Department’s reasoning for the rule’s amendments regarding administrative closure.<sup>34</sup> For example, the commenter stated that the BIA does not have the regulatory authority to place a case on hold indefinitely.

Other commenters expressed due-process related and other concerns about the rule’s procedures for communications between the BIA and DHS and the alien regarding the status of background checks and to allow the BIA to deem an application abandoned if DHS alleges that an alien failed to comply with its biometrics instructions. *See* 8 CFR 1003.1(d)(6)(ii) and (iii). Specifically, one commenter stated the procedures fail to protect respondents’ due process rights because they require the BIA to deem an application abandoned and accordingly deny relief if DHS states that the respondent failed to comply with its instructions but do not provide adequate opportunity for the alien to contest that they did not receive notice from DHS about the requirements or to otherwise establish good cause for failing to comply. To illustrate this risk, the commenter cited a hypothetical that “the BIA could deem an otherwise approvable application abandoned because DHS reports to the BIA that the applicant failed to timely comply with biometrics, but where DHS had inadvertently sent the biometrics

<sup>34</sup> For further discussion of administrative closure, *see* section ILC.3.b above.

instructions to the wrong address.” The commenter also noted that due to recent changes by DHS to the biometrics procedures,<sup>35</sup> new individuals, including children under the age of 14, will be subject to biometrics requirements for the first time, increasing the likelihood of removal orders for respondents who otherwise would qualify for relief from removal. Another commenter expressed concern that although the alien’s deadline to comply begins to run from the date the BIA sends out a notice to the alien that DHS will be providing further information, DHS in turn has no deadline to contact the alien.

Another commenter also raised issues of disparate treatment, stating that, while respondents would be barred from submitting new evidence on appeal that would likely change the result of the case, the Department would be expressly permitted to submit new evidence that is the result of “identity, law enforcement, or security investigations.” See 8 CFR 1003.1(d)(6)(ii).

*Response:* Neither the BIA nor an immigration judge may grant an alien most forms of relief or protection unless DHS has certified that the alien’s identity, law enforcement, or security investigations have been completed and are current. See 8 CFR 1003.1(d)(6)(i), 1003.47(g); see also INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). When the Department first implemented the background check procedures in 2005,<sup>36</sup> the Department provided the BIA with two options in cases where the identity, law enforcement, or security investigations or examinations have not been completed or are no longer current: remand to the immigration judge with instructions or place the case on hold until the investigations or examinations are completed or updated. 8 CFR 1003.1(d)(6)(ii)(A) and (B).

At the time, the Department explained that the expectation was that the BIA and DHS would be able to make greater use of the procedure for holding pending appeals without the need to resort to a remand. 70 FR at 4748. Contrary to this prediction, however, it has become common practice for the BIA to remand cases to the immigration judge rather than holding the case for the completion of or updates to the required investigations and examinations. See, e.g., *Matter of S-A-*

*K- and H-A-H-* 24 I&N Dec. 464, 466 (BIA 2008) (order sustaining appeal and remanding the case to the immigration judge for DHS to complete or update background checks). Because this practice creates unnecessary delays in the resolution of cases given the overburdened resources and size of the caseload at the immigration court level, the Department proposed to remove the option at 8 CFR 1003.1(d)(6)(ii)(A) for the BIA to remand cases for the completion or update of the checks and investigations and proposed procedural changes in those cases that remain subject to BIA holds under the amended 8 CFR 1003.1(d)(6)(ii).

This procedure, which has existed since 2005, does not conflict with the rule’s changes regarding administrative closure. First, when the BIA places a case on hold for the completion of or updates to the required identity, law enforcement, or security investigations or examinations, the hold is not “indefinite.” Instead, the hold is at most 180 days. See 8 CFR 1003.1(d)(6)(iii) (instructing the BIA to remand the case to the immigration judge for further proceedings under 8 CFR 1003.47(h) if DHS fails to report the result of the investigations or examinations within 180 days). Second, even to the extent that the BIA hold process may be erroneously compared to an administrative closure, such practice would be an example of an administrative closure that is authorized by a regulation promulgated by the Department of Justice. See 8 CFR 1003.1(d)(1)(ii); see also *Matter of Castro-Tum*, 27 I&N Dec. at 283 (holding that immigration judges only have the authority to grant administrative closure if a regulation or settlement agreement has expressly conferred such authority).

In addition, the Department disagrees that the instructions in the proposed rule for the BIA regarding when to deem an application abandoned for failure to comply with biometrics requirements violate due process. As the commenter noted, during the respondent’s initial hearing, the immigration judge must “specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements.” 8 CFR 1003.47(d). Accordingly, respondents before the BIA have already been generally informed about the biometrics process and have fulfilled the requirements at least once and understand how to comply with the requirements for any needed identity, law enforcement, or security investigations or examinations. Moreover, the Board’s notice to the alien will also be part of the record so that it

is clear when the alien was served with the notice.

Nevertheless, the Department has included two changes from the proposed rule in this section to account for the commenters’ concerns. First, this rule contains an additional requirement that, if DHS is unable to independently update any required identity, law enforcement, or security investigations, DHS shall provide a notice to the alien with appropriate instructions, as DHS does before the immigration courts under 8 CFR 1003.47(d), and simultaneously serve a copy of the notice with the BIA. Second, while the NPRM would have begun the alien’s 90-day timeline for compliance with the biometrics update procedures at the time the Board provided notice to the alien, the final rule aligns the 90-day time period to begin running at the time DHS submits the notice to the alien in situations in which DHS is unable to independently update any required checks. The Department agrees with the commenters’ concerns that without these changes, the provisions of the proposed rule could have resulted in situations where the alien is unable to effectively comply with the biometrics requirements due to possible delays by DHS or lack of sufficient notice.

Finally, commenters’ concerns about alleged disparate treatment between DHS and aliens are unpersuasive. The rule does not generally allow any party to file a motion to remand based on new evidence pertaining to an issue that was not raised below. Rather, DHS may submit limited evidence solely with respect to information yielded from completed identity, law enforcement, or security investigations or based on the alien’s failure to comply with biometrics requirements, 8 CFR 1003.1(d)(6)(iii), at which time the alien would also have the opportunity to file evidence in response. Accordingly, the alien would not be prejudiced by remands for such issues.

Further, such a requirement is fully consistent with existing law, e.g., 8 CFR 1003.47 and INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). To the extent that commenters disagree with those longstanding and well-established provisions, those concerns are beyond the scope of this rule.

f. BIA Authority To Issue Final Orders (8 CFR 1003.1(d)(7)(i))

*Comment:* One commenter stated that the rule’s focus on the BIA’s ability to issue orders of removal in the first instance without a similar focus on the BIA’s ability to grant relief in the first instance would result in an unfair process that favors DHS over aliens in

<sup>35</sup> Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 FR 56338 (Sept. 11, 2020).

<sup>36</sup> Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 FR 4743 (Jan. 31, 2005).

proceedings. Another commenter speculated that allowing the BIA to issue orders of removal without a remand to the immigration judge would impede respondents' ability to ultimately seek a petition for review in Federal court.

*Response:* First, the commenter who stated that the rule is focused on enabling the BIA to issue a removal order misconstrues the Department's amendment regarding the BIA's authority to issue final orders. The rule amends 8 CFR 1003.1(d)(7)(i) to clarify that the BIA has the authority to issue, *inter alia*, both final orders of removal and orders granting relief from removal. Accordingly, the commenter is incorrect that these amendments favor either party to proceedings before the BIA.

Second, without further explanation, the Department is unable to further respond to the commenter's speculation that the BIA issuing a removal order would impede a respondent's ability to seek a petition for review in Federal court. An alien who receives an order of removal, whether from the BIA or the immigration judge, may file a petition for review subject to the requirements of section 242 of the Act, 8 U.S.C. 1252, and nothing in this rule affects that statutory provision.

g. BIA Remands Changes (1003.1(d)(7)(ii) and (iii))

i. Issues With Respect to Limitations on BIA's Authority To Remand

*Comment:* Numerous commenters expressed concern about limiting the BIA's authority to remand cases. For example, commenters were concerned that the rule would shift more authority to the immigration judge, while tying the hands of BIA members who observed errors and that the rule would provide the BIA with no choice but to affirm an immigration judge's denial despite concerns that the record was not sufficiently developed. Another commenter stated that the BIA is the consummate authority on immigration law and that they have enough expertise and experience to make determinations on their own without being limited by the rule. Some commenters suggested that the BIA should be permitted to remand cases to the immigration court for any purpose.

Commenters stated that the proposed changes have no basis in the law, depart from agency practice, violate the right to present evidence on one's own behalf, and in many cases, would result in orders of removal that were issued notwithstanding meritorious defenses and dispositive collateral challenges in criminal matters. One commenter stated

that prohibiting motions to remand would prejudice respondents with cases that were delayed through no fault of their own.

Commenters objected to the rule on the basis that it would not allow the BIA to remand cases where there has been a change in the law. At least one commenter specifically objected to the BIA's limited remand authority in asylum cases, where, the commenter stated, eligibility rules are in a constant state of flux, and individuals should be permitted to seek remand for cases that were denied based on rules that are under litigation. The commenter further specified that the UNHCR has recommended that appellate bodies look to both facts and law using updated information and take any such new and relevant information into consideration. The commenter listed, as an example, asylum seekers who were denied asylum under the third-country transit bar, which was later vacated by a Federal court, and alleged that such individuals may now be eligible for asylum. *See CAIR Coal. et al. v. Trump*, No. 19–2117, 2020 WL 3542481 (D.D.C. June 30, 2020). The commenter stated that, in this case, the immigration judge may not have fully developed the record below because the third-country bar analysis would not require evaluation of all bases for asylum. The commenter asserted that such records should be remanded to the immigration judge for further fact finding.

At least one commenter stated that the rule does not account for legal issues that arise during the hearing itself, such as the immigration judge conducting the hearing in an unfair manner, which the commenter states, would necessarily not be included in briefing that had been drafted before the hearing.

Commenters alleged that the rule would unfairly disadvantage individuals who are unrepresented, unfamiliar with the law, and non-English speaking.

One commenter objected to the NPRM's statement that a party seeking to introduce new evidence in proceedings should file a motion to reopen. 85 FR at 52500. The commenter stated that a motion to reopen while an appeal is pending at the BIA does not make sense because an order is not final until the BIA resolves the appeal under 8 CFR 1241.1(a).

One commenter suggested that it would be unfair for EOIR to require that the respondent's counsel fully brief every issue before the hearing and not to require the same of DHS's counsel.

*Response:* As noted elsewhere, to the extent that commenters erroneously believe this rule applies only to

respondents and not to DHS, they are mistaken. Further, to the extent that commenters assert the BIA should be allowed unfettered discretion to remand cases for any purpose, such a suggestion is inconsistent with the Board's limited, and regulatorily defined, authority. Additionally, as discussed, *supra*, the rule does not preclude the Board from remanding a case in which the immigration judge committed an error of law by insufficiently developing the record. To the extent that commenters misconstrue the rule or suggest changes to the rule that are inconsistent with the Board's authority, the Department declines to accept those suggestions.

Commenters are incorrect that this rule has no basis in the law, departs from agency practice, violates the right to present evidence on one's own behalf, and could result in orders of removal that were issued notwithstanding meritorious defenses and dispositive collateral challenges in criminal matters. As noted in the NPRM, the Supreme Court has recognized that "the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes." 85 FR at 52492 n.1 (quoting *Doherty*, 502 U.S. at 327). Although there is a reference to the BIA in section 101(a)(47)(B) of the Act, 8 U.S.C. 1101(a)(47)(B), that reference occurs only in the context of establishing the finality of an order of deportation or removal after the BIA has affirmed the order or the time allowed for appeal to the BIA has expired. It does not address the scope of the BIA's authority or its procedures. Accordingly, the Department is well within its authority to limit the scope of remands to the immigration courts, as it doing now in order to improve efficiency.

At the same time, the Department recognizes the BIA's expertise in appellate immigration adjudications. Indeed, one purpose for this rulemaking is to better empower the BIA to make final decisions where possible, as the Department recognizes it is capable of doing. To that end, the Department agrees with commenters who noted the Board's expertise and experience, and it notes that this provision fully effectuates that expertise and experience by allowing the Board to render final decisions in certain circumstances.

Further, nothing in the rule precludes a respondent from submitting evidence on his or her own behalf during the course of removal proceedings before the immigration judge, although the rule does, within its authority, limit the BIA's authority to remand a decision

back to the immigration judge on the basis of new evidence at the administrative-appeals stage. 8 CFR 1003.1(d)(3)(iv)(D), (d)(3)(7)(ii). The Department notes that motions to remand are an administrative, adjudicatorily-created concept, not rooted in statute, which was later codified by the regulations. Further, as the NPRM explained, the BIA has treated new evidence submitted on appeal inconsistently, despite both case law and regulations addressing such situations. 85 FR at 52500–01. The concerns raised by commenters do not outweigh the need for uniform and consistent treatment to ensure that all aliens who obtain allegedly new evidence and wish to submit it after an immigration judge has rendered a decision are treated in a similar fashion.

Moreover, the INA explicitly provides a statutory avenue to address new evidence: A motion to reopen. *See* INA 240(c)(7), 8 U.S.C. 1229a(c)(7).<sup>37</sup> While the changes require that a party comply with the statutory requirements for a motion to reopen in order to submit such evidence, the rule does not impact motions to reopen. To the contrary, the rule recognizes that motions to remand are generally considered analogous to motions to reopen or reconsider and that due to the inconsistent treatment of allegedly new evidence on appeal through the lens of a motion to remand, it is both more efficient and more likely to promote uniformity and consistency—and also more likely to reduce gamesmanship on appeal—to simply rely on the established motion to reopen procedure. Thus, because the sole statutorily created process to consider new evidence is still available, the Department finds that aliens' rights regarding the submission of new evidence, including evidence of criminal-related issues, remain intact. *Cf. Sankoh*, 539 F.3d at 466 (“As we have held many times, however, administrative notice does not violate the alien’s due process rights because an alien can challenge any factual finding through a motion to reopen.” (citing *Kaczmarczyk v. INS*, 933 F.2d 588, 594 (7th Cir. 1991))). Additionally, to the extent that the Board makes an error of law or fact in its decision, the rule does not affect the ability of a party to file a

<sup>37</sup> The Department notes that at least one commenter appears to have misunderstood the procedural posture at which a respondent would file a motion to reopen, expressing concern that it would not be sensible for the alien to file a motion to reopen while removal proceedings were still pending. The Department clarifies that, as contemplated by the statute, an alien would file a motion to reopen to submit new evidence after proceedings have concluded. Otherwise, there is no removal order or proceeding to, in fact, reopen.

motion to reconsider. 8 CFR 1003.2(b). In short, the rule does not alter the availability of established mechanisms for addressing new evidence or new issues; instead, it simply eliminates an inconsistently applied and confusing procedural avenue that is redundant given those clearer, established mechanisms.

For reasons stated, *supra*, the Department rejects the assertion that the rule would have a singular effect on aliens who are unrepresented, unfamiliar with the law, and non-English speaking. These concerns are speculative, unsupported by evidence, and contrary to decades of experience adjudicating appeals in immigration cases. Such aliens already participate in BIA procedures under existing regulations—and have done so for many years—including through the submission of motions to reopen, and nothing in the rule treats them in a categorically different manner. Further, commenters did not explain why such aliens would be able to file a motion to remand but not a motion to reopen nor how such aliens would be able to comprehend the BIA’s confusing and inconsistent standards for new evidence, 85 FR at 52500–01, if they were retained. To the extent that commenters’ concerns are, thus, unfounded or internally inconsistent, the Department declines to incorporate them into this final rule.

With respect to commenter concerns that the BIA would be unable to remand a decision even where presented with superseding or intervening case law, including litigation surrounding regulations or precedential decisions that were the basis for denying relief, the Department rejects such comments because they are based on either a deliberately obtuse or wholly incorrect reading of the rule. Nothing in the rule prohibits the BIA from remanding a case when an immigration judge has made an error of law, a legal question of jurisdiction has arisen, or an alien is no longer removable, subject to other requirements. 8 CFR 1003.1(d)(7)(ii). Thus, to the extent that superseding or intervening law caused the immigration judge to make an error of law, raised a question of jurisdiction, or caused an alien to no longer be removable, the Board can still remand on those bases under this final rule.

If the superseding or intervening legal development did not raise a question of jurisdiction, cause the immigration judge’s decision to be an error of law, or affect an alien’s removability, then the BIA may not remand the case on that basis; however, commenters did not persuasively argue why an irrelevant

change in law should form the basis for a remand. To the extent that commenters focus solely on changes in law related to applications for relief or protection, the Department believes that the majority of superseding intervening law would be relevant to legal arguments that had already been presented below, thus mooted. Commenter concerns for the vast majority of cases.<sup>38</sup> In the rare case in which intervening law categorically established an alien’s eligibility for relief on a basis that the alien did not address below and the intervening law did not state how it should be applied to pending cases,<sup>39</sup> an alien remains eligible to file a motion to reopen to have that claim considered. *See* INA 240(c)(7), 8 U.S.C. 1229a(c)(7).

The Department disagrees that requiring the alien to utilize statutory-based methods for presenting new evidence after an immigration judge has rendered a decision, rather than motions to remand, would lead to delays or conflict with the purpose of the rule. As discussed in the NPRM, the BIA’s treatment of new evidence on appeal is confusing and inconsistently applied. 85 FR at 52500–01. An additional principal concern of the rule is to reduce unnecessary remands and ensure the BIA is able to move forward independently with adjudicating as many appeals as possible. As noted in the NPRM, *id.* at 52501, motions to remand created confusion, inconsistent results, gamesmanship, and an operational burden on the immigration judge, who has already used significant judicial resources during the underlying

<sup>38</sup> The Department also notes that in the asylum context, which appears to be the principal area of concern for commenters, superseding or intervening law that indisputably affects an alien’s claim will likely be rare because each asylum application is adjudicated based on its own facts and evidentiary support. In the asylum context, case law does not establish categorical bases for granting or denying asylum claims. *See, e.g., SER.L. v. Att’y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) (“Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group. . . . Thus, as a matter of logic, it is invalid to assert that proof in one context is proof in all contexts.”). Consequently, intervening case law that categorically renders an alien eligible for relief in the asylum context—but does not affect the alien’s removability—will be rare.

<sup>39</sup> The Department notes that statutory changes providing opportunities for relief typically include provisions regarding application of the changes to existing cases, and those changes would be applicable on their own terms. *See, e.g., EOIR, Policy Memorandum 20–06: Section 7611 of the National Defense Authorization Act of 2020, Public Law 116–92* (Jan. 13, 2020), available at <https://www.justice.gov/eoir/page/file/1234156/download> (explaining the application of the availability of a new statutory form of relief for certain Liberian nationals to cases before EOIR, including cases at the BIA).



proceeding. After reviewing commenters' concerns, weighing alternatives, including retaining the status quo, and assessing the significance of the operational burdens imposed by motions to remand, the availability of more uniform treatment of new evidence than currently exists, and the importance of encouraging the presentation of all available and probative evidence at the trial level, the Department has determined that the burden of potential motions to reopen based on new evidence—which are also already routinely filed independently of the rule and have generally increased in recent years, EOIR, *Adjudication Statistics: Motions*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1060896/download>—is ultimately less than the burden of addressing motions to remand through unclear and inconsistent practices, including practices that create downstream burdens on immigration judges due to improper remands or gamesmanship by aliens who have received unfavorable decisions from immigration judges and merely seek a second bite at the apple with the concomitant delay in the resolution of proceedings that such a request entails.

Commenters are incorrect that BIA members would not have the authority to remand in instances where they observe unjust or incorrect immigration judge decisions. The rule generally authorizes the BIA to remand a case where, applying the appropriate standard of review, it has identified an error of law or fact. 8 CFR 1003.1(d)(7)(ii). The regulation specifies some limitations to this general authority in order to ensure that remands are only ordered where legally appropriate to ensure the fair disposition of the case, but none of these exceptions would prevent the BIA from ordering a remand, in an appropriate case, where the immigration judge has committed reversible error on a dispositive issue in the case.

The first limitation states that the BIA cannot remand a case where it has not first specified the standard of review that it applied and identified the specific error or errors made by the adjudicator below in order to ensure that the BIA's order to remand is based upon the correct legal standards and provides the immigration judge below and the parties with clarity over the basis for a finding of reversible error. See 8 CFR 1003.1(d)(7)(ii)(A). To the extent commenters objected to this provision, they did not persuasively explain why it is inappropriate to require an appellate body to specify the standard of review it employed when

remanding a case, and the Department is unaware of any such reason. Such specification assists the parties, the immigration judge, and potentially a Federal court, and commenters did not persuasively explain why it should not be a part of a BIA remand decision.

The second limitation provides that the BIA cannot remand based upon a “totality of the circumstances” standard, which, as noted in the NPRM, is not a standard authorized by the governing law and regulations. See 8 CFR 1003.1(d)(7)(ii)(B). The Department discusses comments on this provision in more detail, *infra*.

Third, the BIA may not remand a decision based upon a legal argument that was not presented below, unless it pertains to jurisdiction or a material change in fact or law underlying a removability ground that arose after the date of the immigration judge's decision and where substantial evidence indicates that change vitiated all grounds of removability applicable to the alien. See 8 CFR 1003.1(d)(7)(ii)(C). Such a limitation is consistent with long-standing requirements that appealing parties must have preserved the issue for appeal below. *Matter of J–Y–C–*, 24 I&N Dec. at 261 n.1 (“Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal.”); *Matter of Edwards*, 20 I&N Dec. at 196 n.4 (“We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal.”). This is also consistent with other appellate court standards, which are instructive. See *Arsdi v. Holder*, 659 F.3d 925, 928 (9th Cir. 2011) (“As we have often reiterated, it is a well-known axiom of administrative law that if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum.”) (internal quotations omitted). Again, commenters did not explain why the Department should abandon these well-established principles, and the Department is unaware of any persuasive reason for doing so.

Fourth, the BIA may not remand a decision through an exercise of *sua sponte* authority, for reasons discussed below at Part II.C.3.k. See 8 CFR 1003.1(d)(7)(ii)(D).

Fifth, the BIA may not remand a decision solely to consider a request for voluntary departure or failure to issue advisals following a grant of voluntary departure where other parts of this rulemaking authorize the BIA to issue final decisions in such matters. See 8

CFR 1003.1(d)(7)(ii)(E), (d)(7)(iv). The Department further discusses this provision, *infra*.

Sixth, the BIA may generally not remand the case for further factfinding unless the following criteria are met: the party seeking remand preserved the issue below; the party seeking remand, if it bore the initial burden of proof, attempted to adduce the additional facts below, additional factfinding would alter the outcome or disposition of the case, the additional factfinding would not be cumulative of the evidence already presented or contained in the record; and either the immigration judge's factual findings were clearly erroneous or remand to DHS is warranted following de novo review. 8 CFR 1003.1(d)(3)(iv)(D). The Department addresses commenters' concerns on this provision in more detail, *supra*.

The Department disagrees with commenters' concerns that limiting the BIA's authority to order remands to exclude issues that were not raised below, with specified exceptions, would not permit parties to request a remand based on legal issues that arose during a hearing, such as the immigration judge conducting the hearing in an unfair manner. Commenters did not explain why such an example would not be raised on appeal in the normal course, and existing waiver principles independent of this rule would currently preclude its consideration if it were not raised on appeal. In short, if a party believes that the immigration judge's decision should be vacated on the basis that the immigration judge conducted the hearing in an unfair manner, it is unclear why the party would not be able to raise that issue when filing his or her appeal, as the facts upon which the party based his or her decision would have clearly been available to the party at that time. See 8 CFR 1003.3(b) (“The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged.”).

*Comment:* Commenters were opposed to the rule's prohibition on the BIA remanding cases based on the “totality of the circumstances.” 8 CFR 1003.1(d)(7)(ii)(B).

One commenter noted that the “totality of the circumstances” standard inherently includes clearly erroneous findings of fact or prejudicial errors of law. Specifically, the commenter stated,

that on a record where no findings of fact were clearly erroneous, and if no errors of law occurred, then a totality of the circumstances review would never permit remand.

Commenters asserted that the Department did not consider relevant precedential case law from the Supreme Court and Federal courts of appeals which, the commenter claims, impose a “totality of the circumstances” standard in a variety of circumstances, many of which are applicable to immigration removal proceedings. For example, one commenter cites *Jobe v. INS*, which stated that legislative history of that provision of the Act reflected Congress’s concern with fairness and required the Attorney General to “look at the totality of circumstances to determine whether the alien could not reasonably have expected to appear” 212 F.3d 674 (1st Cir. 2000) (quoting H.R. Conf. Rep. 101–955 (1990)) (withdrawn at request of court). The commenter noted that the BIA has previously recognized that the statute’s legislative history requires an adjudicator to evaluate the totality of the circumstances to resolve this issue, citing *Matter of W–F–*, 21 I&N Dec. 503, 509 (BIA 1996). The commenter also stated that the rule was contrary to decades of past precedent, citing, *inter alia*, *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 554 (BIA 2019); *Matter of W–F–*, 21 I&N Dec. at 509; *Jobe*, 212 F.3d 674; and *Alrefae v. Chertoff*, 471 F.3d 353, 360–61 (2d Cir. 2006) (Sotomayor, J.).

At least one commenter noted that the rule mentioned that there is no statutory or regulatory basis for the totality of the circumstances standard but failed to acknowledge that statutes and regulations are not the only types of law applicable in removal proceedings or other proceedings reviewed by the BIA. Accordingly, the commenter stated, the Department’s failure to consider other sources of law, many of which utilize the “totality of the circumstances” standard of review, renders the rule’s allegation—that remands justified by review of a totality of the circumstances are without merit—highly questionable.

Another commenter further stated that the totality of the circumstances standard was particularly important for the BIA’s review of in absentia motions, in order to resolve whether exceptional circumstances exist pursuant to section 240(b)(5)(C)(i) of the Act, 8 U.S.C. 1229a(b)(5)(C)(i). The commenter also disagreed with the Department’s position that there was no statutory or regulatory basis for the “totality of the circumstances” standard.

One commenter criticized the Department for proposing such a rule

change where it did not allege that the “totality of the circumstances” standard had resulted in incorrect or unfair case outcomes. Another commenter stated that the “totality of the circumstances” standard should be maintained because decisions should not be permitted on a single factor or on some factors, without taking into account the totality of the circumstances because it would allow adjudicators to pick the facts that they wish to use to make a decision that could be based upon pre-existing prejudices, which would violate fairness and justice. A commenter stated that, without the totality of the circumstances standard, parties could not provide details that were not apparent in the initial case, either through misinterpretation or misunderstanding, or through recently obtained documents.

*Response:* As an initial point, the Department notes that many, if not all, commenters confused an appellate standard of review with a trial-level determination of “totality of the circumstances.” Neither the INA nor applicable regulations has ever authorized a “totality of the circumstances” standard of review by the BIA. Prior to 2002, the BIA reviewed all aspects of immigration judge decisions de novo. Regulatory changes in 2002 authorized the Board to review immigration judge factual findings for clear error and all other aspects of such decisions de novo. 8 CFR 1003.1(d)(3); *Matter of S–H–*, 23 I&N Dec. 462 (BIA 2002); See 67 FR at 54902. Accordingly, the BIA has never been authorized to review decisions based on the “totality of the circumstances,” and the rule merely codifies that principle.

Further, the Department is unaware of any appellate court—and commenters did not provide an example—employing a “totality of the circumstances” standard of review for questions of law, fact, discretion, judgment or other appellate issues similar to those considered by the BIA. 8 CFR 1003.1(d)(3). The Department agrees that “totality of the circumstances” may be a relevant trial-level consideration in various situations and that an appellate body may review an underlying determination by the trial entity of the “totality of the circumstances”; however, that is not the same as using “totality of the circumstances” as a standard for appellate review. See, e.g., *Cousin v. Sundquist*, 145 F.3d 818, 832 (6th Cir. 1998) (“We therefore undertake *de novo* review of the district court’s analysis of the totality of the circumstances[.]”).

To the commenter’s point about the BIA’s review of in absentia motions and

the totality of the circumstances standard, the Department notes again that the commenter misapprehends a distinction between the legal standard that an adjudicator should apply in making determinations about whether an individual has been properly ordered removed in absentia and the standard for review of an appeal. Although the question of whether “exceptional circumstances” have been established for purposes of considering a motion to reopen an in absentia removal order may involve a consideration of the totality of the circumstances, that question is distinct from the standard of review employed by the BIA in reviewing the immigration judge’s resolution of such a question on appeal. In other words, the BIA should evaluate the immigration judge’s decision under the appropriate standard of review, but that standard is not one of “totality of the circumstances.” More specifically, assuming *arguendo* that an individual seeking remand on the basis that the immigration judge wrongly applied a totality of the circumstances standard, the motion to remand would not be, itself, based on a totality of the circumstances standard, but rather based on the immigration judge’s alleged error of law in applying that standard.<sup>40</sup>

Although the Department recognizes that the BIA may have suggested or intimated that it was using such a standard of review in individual cases in the past, its lack of clarity clearly supports the change in this rule. Whether the Board previously failed to apply a correct or appropriate standard of review when remanding a case based on the totality of the circumstances or whether it merely was unclear about the standard it was actually applying, the rule ensures that all parties are now aware that there is no such standard of review and that the Board will be clearer in the future on this issue. Contrary to commenters’ suggestions, neither the lack of clarity nor the potential to apply an incorrect standard

<sup>40</sup> This distinction is best illustrated by the Board’s decision in *Matter of Miranda-Cordiero*, 27 I&N Dec. at 554 which was cited by at least one commenter. In that decision, the Board noted that “[w]hether proceedings should be reopened sua sponte is a discretionary determination to be made based on the totality of circumstances presented in each case,” but it did not apply or purport to apply such a standard on appellate review. *Matter of Miranda-Cordiero*, 27 I&N Dec. at 554–55. Rather, it appropriately applied a *de novo* standard of review to that question of discretion, consistent with 8 CFR 1003.1(d)(3)(ii). *Id.* at 555 (“*Upon our de novo review*, we find that the respondent’s case does not present an exceptional situation that warrants the exercise of discretion to reopen sua sponte, regardless of the availability of a provisional waiver.” (emphasis added)).

of review are persuasive reasons to continue the Board's occasional prior practice on this issue in perpetuity. Rather, the Department believes it is important to reiterate the BIA's commitment to adhering to regulatory standards in order to ensure consistent adjudication of similarly situated cases.

Commenters' suggestions that, without a "totality of the circumstances" standard of review, adjudicators would specifically select facts that would allow them to deny remands for otherwise meritorious cases is both contrary to the existing regulations—which do not permit such a standard—and unsupported by any evidence. Members of the BIA will consider whether remand for any of the permitted purposes would be appropriate after an impartial examination of the record and applying the correct standard of review, without reference to a regulatory atextual—and almost wholly subjective—totality of the circumstances standard of review. See 8 CFR 1003.1(d)(1) ("The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations."). Indeed, the Department believes that the nebulous and vague "totality of the circumstances" standard that the BIA may have previously applied is itself ripe for exactly the kind of unfair "cherry picking" that the commenter fears.

Regarding commenters' discussion of case law and the totality of the circumstances standard, the Department first notes that the BIA and Federal appellate courts do not necessarily apply parallel standards of review. Compare *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892, 895 (8th Cir. 2005) (applying "deferential substantial evidence standard" to review agency findings of fact), with, e.g., 8 CFR 1003.1(d)(3)(i) (establishing a clear error standard for reviewing immigration judge findings of fact). Nevertheless, as discussed, *supra*, the Department is unaware of any Federal appellate court that uses a "totality of the circumstances" standard of review, and commenters did not provide any such examples.

The Department disagrees with commenter concerns regarding whether the "totality of the circumstances" standard has resulted in incorrect or unfair case outcomes. Regardless of whether this putative standard of review, which is not authorized by statute or regulation, results in "incorrect" or "unfair" case outcomes, which are subjective determinations made by commenters, the Department is issuing this rule to make clear that there

is no existing statutory or regulatory basis for applying this standard of review even though the BIA, arguably, may have utilized it in the past without authority. 85 FR at 52501. In short, the risk of continued confusion over whether the Board applied the correct standard of review—and whether there exists a standard of review outside of the regulatory text that is applied only as the BIA subjectively sees fit in individual cases—significantly outweighs commenters' concerns that it should remain as a nebulous quasi-equitable authority whose provenance is unknown and whose application approaches an *ad hoc* basis. Nonetheless, in light of the confusion evidenced by commenters, the Department in this final rule is making clear that the Board cannot remand a case following a totality of the circumstances standard of review, though an immigration judge's consideration of the totality of the circumstances may be a relevant subject for review under an appropriate standard.

Finally, to the extent that commenters objected to the specific prohibition on the Board's ability to remand cases in the "totality of circumstances" solely because they perceived such remands as being beneficial only to respondents, the Department finds that an unpersuasive basis for declining to issue this rule. Rather, those comments support the Department's concern about the inappropriate use of such a putative standard of review and its decision to codify the inapplicability of such a standard to the extent that it has been applied in a manner that benefits one party over the other and, thus, raises questions regarding the Board's impartiality. See 8 CFR 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

#### *i. Issues With Respect to Limiting Scope of Remand to Immigration Court*

*Comment:* Commenters also raised concerns regarding the Department's proposed changes that would limit the scope of a remand to the immigration court. For example, commenters suggested, the rule would unfairly impact individuals who had been subject to ineffective assistance of counsel before the immigration court but whose cases had been wrongly decided for other reasons. Such individuals, the commenter suggested, should not be limited to their prior, poorly developed record on remand when they might be represented by new counsel. One commenter suggested that limiting the scope of a remand does not improve efficiency because once the

case is back before the immigration judge, he or she may take new evidence and engage in fact finding to resolve issues that may later have to be addressed in a motion to reopen.

Commenters also suggested that an individual should not be bound to the record before the immigration judge where a new avenue of relief had become available in the intervening period of time when he or she was waiting for their new individual hearing. One commenter stated that they opposed what they characterized as the Department's attempt to force immigration judges to improperly issue removal orders for the purposes of eliminating confusion for immigration judges. The commenter suggested that this rule would harm both respondents and immigration judges.

Commenters stated that the rule change arbitrarily precluded the immigration judge from considering new facts or law and would not improve efficiency because it would force litigation of such issues to be contemplated upon a separate motion to reopen, after the conclusion of proceedings, when it could be more efficiently addressed on remand. The commenter also suggested that there would be increased litigation about the constitutionality of the rule which would also decrease efficiency and increase inconsistent outcomes. Another commenter stated that issues that could have previously been resolved with a "simple remand" and straightforward adjudication in immigration court would now require the BIA to produce a transcripts, order briefing, and review briefing by both sides before rendering a decision.

*Response:* The Department disagrees with commenter concerns regarding limiting the scope of remand to the immigration court. The rule is intended to alleviate confusion for immigration judges regarding the scope of a remand. "[E]ven where the [BIA] clearly intends a remand to be for a limited purpose[.]" an immigration judge interpreting the remand as a "general remand" would allow consideration, litigation, or relitigation, of the myriad of issues that had either already been addressed or were unrelated to the initial proceedings. See 85 FR at 52502.

Commenters did not explain why an immigration judge should not be bound by the intent of a Board remand nor why the Board should not adopt the same principle used by Federal appellate courts distinguishing between general and limited remands. See, e.g., *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("Remands, however, can be either general or limited in scope.

Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. General remands, in contrast, give district courts authority to address all matters as long as remaining consistent with the remand.” (internal citations omitted)). As the NPRM explained, all Board remands are currently de facto general remands, even when the intent of the remand is clearly limited. 85 FR at 52496; see *Bermudez-Ariza v. Sessions*, 893 F.3d 685, 688–89 (9th Cir. 2018) (“We think it likely that the BIA limited the scope of remand to a specific purpose in this case by stating that it was remanding ‘for further consideration of the respondent’s claim under the Convention Against Torture.’ That said, the BIA’s remand order nowhere mentioned jurisdiction, much less expressly retained it. Thus, irrespective of whether the BIA qualified or limited the scope of remand, the IJ had jurisdiction to reconsider his earlier decisions under 8 CFR 1003.23.”). However, the Department sees no basis to retain such an anomalous system or to continue to preclude the BIA from exercising its appellate authority to issue limited-scope remands.

Commenters did not explain why such an inefficient limitation—and one that encourages the re-litigation of issues already addressed by an immigration judge and the Board—should be retained. Requiring every remand to constitute a general remand both increases inefficiency—by requiring the parties to potentially re-argue issues previously addressed—and undermines finality by allowing a second chance to argue and appeal issues to the Board that the Board has already ruled upon once.

Additionally, it is not appropriate for the immigration court to, without explicit directive, expand the scope of its decision beyond that which is desired by its reviewing court. Cf. 8 CFR 1003.1(d)(1) (“The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it.”). The Department notes that, should a respondent disagree with the immigration judge’s determinations made on remand, he or she may appeal that determination to the BIA. Thus, the respondent would not be prejudiced by limiting the scope of the remand to issues as directed by the appellate body. To the extent that new relief becomes available in the intervening time while a case is being rescheduled before the immigration court on remand, the

respondent may file a motion to reconsider the scope of the BIA’s remand decision. Alternatively, the respondent may file a motion to reopen or reconsider with the immigration judge after the judge enters a new decision following the remand. The Department further notes that such issues may generally be appealed to the Federal circuit courts of appeals.

Commenters are correct that aliens would submit motions to reopen after the BIA’s adjudications, but the Department disagrees that this procedure would lead to delays or conflict with the purpose of the rule. Instead, one of the main animating purposes of the rule is to reduce unnecessary and inefficient remands and to ensure the BIA is able to move forward independently with as many appeals as possible, and maintaining a general remand rule erodes both of those goals.

The Department disagrees with the commenter’s concerns that limiting the scope of remand would unfairly impact individuals who have been subject to ineffective assistance of counsel. As an initial point, the commenter did not explain how such a claim would arise in either a general or limited remand situation, as claims of ineffective assistance of counsel on direct appeal are relatively rare; nevertheless, such claims could be considered by the Board as with any other appellate argument. Moreover, individuals who have been subjected to ineffective assistance of counsel may pursue reopening of their proceedings pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In short, nothing in this final rule affects an alien’s ability to raise claims of ineffective assistance of counsel through established channels.

The Department agrees with commenters that administrative appellate review is an important part of removal proceedings; however, the Department believes that at least some commenters have mischaracterized the role of administrative appeals as maintaining “court[] checks and balances and separation of powers.” Rather, the BIA exists to review immigration court decisions for accuracy and adherence to the law, as well as providing guidance to adjudicators. See 8 CFR 1003.1(d)(1). This role is unrelated to the concepts of checks and balances and separation of powers as they exist between separate, coequal branches of government.

To the extent that commenters objected to the codification of the Board’s authority to issue limited remands solely because they perceived such remands as being beneficial only to

respondents, the Department finds that an unpersuasive basis for declining to issue this rule. First, to reiterate, the rule applies to both parties, and general remands may benefit or hinder either party. It is just as likely that DHS may acquire additional evidence or submit additional arguments following a general remand as the respondent would. Consequently, the Department focuses on the efficiency aspects of eliminating the current “only general remands” principle, rather than its use to obtain any specific results. Second, to the extent that there is a misperception that the general remand rule aids only aliens, those comments support the Department’s decision to authorize the Board to issue both limited and general remands in order to ensure that the Board remains impartial in its treatment of both parties. See 8 CFR 1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

Overall, after weighing the potential burdens and commenters’ concerns, as well as the Board’s position as an impartial appellate body, the Department has concluded that the benefits of expressly allowing the Board to issue limited remands, including increased efficiency and better alignment with the Board’s status as an appellate authority, outweigh concerns raised by commenters that parties should continue to be able to raise all issues again on remand, even if they have previously been litigated.

h. New Evidence on Appeal (8 CFR 1003.1(d)(7)(v))

*Comment:* Numerous commenters expressed general concerns about the amendments at 8 CFR 1003.1(d)(7)(v) regarding the BIA’s consideration of new evidence on appeal. For example, at least one commenter characterized the change as “banning the submission of new evidence.” Other commenters expressed that the changes were a “blatant power grab” and offensive to the constitution, principles of basic decency, and fundamental fairness. Commenters explained that motions to reopen are inadequate substitutes for motions to remand for consideration of new evidence due to the strict time and number limitations that apply. See INA 240(c)(7)(C)(i), 8 U.S.C. 1229a(c)(7)(C)(i).

Commenters stated that motions to remand on account of new evidence are critical to protecting aliens’ due process rights in immigration proceedings and that, by banning motions to remand for new evidence, the rule would violate aliens’ rights at section 240(b)(4)(B) of the Act, 8 U.S.C. 1229a(b)(4)(B), to present evidence on their behalf. Commenters explained that these

motions to remand allow aliens to account for situations when evidence that is material was formerly unavailable. Commenters noted that new evidence may be necessary for consideration due to intervening changes in the law.

Similarly, commenters disagreed with the Department's characterization of the basis for these changes as gamesmanship by the parties, noting that it frequently takes time for an alien to obtain evidence from other sources. Commenters also noted that the Department did not provide concrete evidence or citations in support of these characterizations. See 85 FR at 52501.

In general, commenters expressed concern that this provision would allow the BIA to remand a case when there is derogatory information about an alien as a result of the identity, law enforcement, or security investigations or examinations but prevent aliens from seeking a remand for new and favorable evidence. This difference, according to commenters, gives "the appearance of impropriety and favoritism toward one party in the beginning." Another commenter alleged that such an appearance "damages the public trust in the neutral adjudication process." Extending the allegations, a commenter claimed that these changes resulted in the decision makers no longer being neutral or unbiased, a constitutional requirement, according to the commenter, that was established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Commenters noted that allowing remands due to information uncovered in the investigations without restrictions conflicts with the Department's efficiency-based justification for the rule.

Commenters similarly stated that the rule favors DHS because all three exceptions to remands for consideration of new evidence at 8 CFR 1003.1(d)(7)(v)(B) relate to types of evidence more likely to benefit DHS's case or arguments than the alien's.

Other commenters warned that this change would increase the backlog at the immigration courts, the BIA, and the circuit courts. For example, at least one commenter argued that the change would lead to unnecessary delays by requiring the BIA to affirm a removal order that would be subsequently reopened since the BIA could not grant a remand to account for new evidence while the case is still pending. Similarly, commenters stated that forcing cases to first have a removal order before evidence could be considered with a motion to reopen unnecessarily starts the removal process and creates complications.

Other commenters voiced concern that pro se aliens who improperly label their motion to the BIA as a motion to remand rather than a motion to reopen will have their motions dismissed and their new evidence would be "foreclosed from consideration."

Another commenter echoed this concern and noted that the government, which will always be represented by counsel, would not be required to meet the same motion formalities as aliens in order for the BIA to remand due to derogatory information.

Concerned about refolement, a commenter stated that the Department should not make it more difficult for asylum seekers, who often have limited access to evidence due to harms from abusers or traffickers or post-traumatic stresses, to submit whatever evidence they are able to procure. Similarly, at least one commenter noted the difficulties faced by children in proceedings.

Commenters described a range of situations when they believe the rule would prevent aliens from submitting new evidence that is relevant or needed. Examples include when an alien has been approved for a U-visa but has not actually received it and when an immigration judge unreasonably limited the record and the alien needs to establish that the immigration judge abused her discretion in a prejudicial manner.

*Response:* The Department has addressed many of these comments regarding the submission of new evidence on appeal, *supra*, and incorporates and reiterates its previous response here. Further, the Department notes that the rule does not ban the submission or consideration of new evidence following the completion of immigration court proceedings. Instead, the changes require that a party comply with the statutory requirements for a motion to reopen to submit such evidence.<sup>41</sup> A motion to remand, which is an administratively created concept<sup>42</sup> that was later codified into the regulations, was never imagined as part of the statutory scheme. However, the statutory scheme of the INA included an avenue to address new evidence—a

motion to reopen—and the NPRM does not impact motions to reopen. Because the sole statutorily created process to consider new evidence is still available, the Department finds that aliens' due process rights regarding the submission of new evidence remain intact.

Commenters mischaracterize the Department's basis for these changes. While the Department noted that the procedures and availability of motions to remand create opportunities for gamesmanship, such possible gamesmanship was not alone the reason for the changes. 85 FR at 52501. Instead, as the Department noted, such motions have resulted in inconsistent applications of the law, particularly given the general prohibition on the BIA's consideration of new evidence on appeal. 85 FR at 52500–01. Further, prohibiting the BIA from considering new evidence on appeal is in keeping with the immigration judge's authority to manage the filing of applications and collection of relevant documents. Under 8 CFR 1003.31(c), a party who fails to file an application or document within the time set by the immigration judge is deemed to have waived the opportunity to file that application or document.

Further, commenters are incorrect that the rule demonstrates bias or particular aid to DHS. The NPRM contains three exceptions: New evidence that (1) is the result of identity, law enforcement, or security investigations or examination; (2) pertains to an alien's removability under the provisions of 8 U.S.C. 1182 and 1227; or (3) calls into question an aspect of the jurisdiction of the immigration courts. These are the three situations in which the Department determined that the need for remand "overrides any other consideration because the new evidence calls into question the availability or scope of proceedings in the first instance." 85 FR at 52501.

Only the first basis applies solely to DHS, and as the Department has discussed, *supra*, that basis is consistent with statutes and regulations that are beyond the scope of this rule. 8 CFR 1003.47; INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). The second and third bases apply equally to both parties and allow, for example, a respondent to submit new evidence of United States citizenship (which would call into question the jurisdiction of the proceedings) or new evidence that suggests the respondent is no longer removable. Both parties have vested interests in ensuring that removal proceedings do not occur in circumstances when a respondent is not amenable to removal, and the Department accordingly disagrees with

<sup>41</sup> The Department recognizes commenters' concerns that motions to reopen are limited by statute to certain time and number requirements. See INA 240(c)(7)(C)(i), 8 U.S.C. 1229a(c)(7)(C)(i). Such limitations are the product of congressional judgment and otherwise outside the Department's authority to set or amend. Nevertheless, the Department also recognizes that equitable tolling, which commenters generally did not acknowledge, may also be available in certain circumstances to ameliorate time limitations.

<sup>42</sup> See *Matter of Coelho*, 20 I&N Dec. 464, 470–71 (BIA 1992).

commenters that these circumstances are in any way one-sided or beneficial solely or primarily to DHS.

Further, it is a mischaracterization to isolate the first exception, remands for evidence that is the result of the alien's identity, law enforcement, or security investigations or examinations, as particular evidence that the provision is biased in favor of the government. As discussed in the NPRM, by statute, no alien may be granted asylum "until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum." INA 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i). As such, the BIA must be able to remand on account of unfavorable findings resulting from identity and security investigations or the BIA would not be complying with the statutory requirements, and aliens would not have an opportunity to present relevant evidence in response.

Commenters are correct that aliens may submit motions to reopen after the BIA's adjudication, but the Department disagrees that this procedure, compared with the submission of new evidence on appeal, would lead to delays or conflict with the purpose of the rule. As discussed in the NPRM, 85 FR at 52500–01, and reiterated, *supra*, the BIA's inconsistent treatment of new evidence submitted on appeal warrants a change in the regulations, and commenters suggestions to the contrary are unpersuasive. After weighing the relevant equities—including the need for clarity and consistency, the availability of alternatives such as motions to reopen, the burden of immigration judges caused by improper consideration of new evidence on appeal, and the importance of encouraging parties to submit all available and probative evidence at the trial level—the Department decided that the benefits of the rule outweigh the concerns raised by commenters, particularly due to the availability of motions to reopen.<sup>43</sup>

As to the commenters' concerns regarding the risk of unrepresented aliens submitting improperly titled motions, the issue is not novel, and the BIA is familiar in handling such

matters.<sup>44</sup> The BIA reviews each submission for its substance. In addition, EOIR provides reference materials to the public regarding procedures before EOIR, which provide pro se aliens with assistance when engaging in self-representation. See generally *BIA Practice Manual*; see also EOIR, *Immigration Court Online Resource*, *supra*; EOIR, *Self-Help Materials* (Aug. 1, 2019), available at <https://www.justice.gov/eoir/self-help-materials>. Thus, the Department does not find that mistitled or mischaracterized motions will be an undue burden on the BIA or present a particular risk that aliens' opportunity to have new evidence considered will be denied due to formalities.

The Department finds that the various scenarios when motions to remand for consideration of new evidence would be used do not compel reconsideration of the rule. The three exceptions provide safeguards that allow for the consideration of evidence when it calls into question the availability or scope of proceedings, and motions to reopen remain the appropriate recourse for aliens with newly discovered or previously unavailable evidence. Similarly, a motion to reopen provides the proper avenue for newly acquired evidence for asylum seekers or others concerned about refoulement; thus, aliens in that situation are not "arbitrarily blocked" from presenting such evidence.

i. BIA Timelines (8 CFR 1003.1(e)(1), (8))

i. Issues With Respect to Screening Panel Deadlines

*Comment:* Commenters expressed concern that the rule's 14-day timeframe for the BIA to conduct its initial screening for summary dismissal and 30-day timeframe for the BIA to issue a decision would lead to erroneous dismissals in light of the number of cases pending before the BIA. Specifically, the commenters stated that BIA staff conducting the initial screening would not know whether the case could be summarily dismissed until after they have screened the case, and that the "mandatory adjudicatory timeframes" would pressure screeners to review cases quickly rather than accurately. Another commenter stated that the "screening panel" consisted of only one BIA member, who would not

have sufficient time to meaningfully review the appeal. Commenters similarly expressed concern that the rule's requirement that a single BIA member decide whether to issue a single-member decision or refer the case for three-member review will cause BIA members to emphasize speed over fairness in reviewing case records, which could result in erroneous denials. The commenters suggested that these timelines were arbitrary. One commenter stated that it supported extending the existing regulatory deadlines, rather than shortening them.

One commenter cited several Ninth Circuit cases that determined that the BIA had erred in its summary dismissal of an appeal. See, e.g., *Vargas-Garcia v. INS*, 287 F.3d 882, 885–86 (9th Cir. 2002) (holding that the BIA Notice of Appeal form was inadequate for an unrepresented respondent given the BIA's standards of specificity and lack of notice in summarily dismissing the appeal); *Casas Chavez v. INS*, 300 F.3d 1088, 1090 & n.2 (9th Cir. 2002) (holding that the notice of the reasons for appeal sought by the summary dismissal regulation can be met either in the Notice of Appeal or in the brief and "there is an underlying assumption in the regulation that both requirements need not be satisfied as long as sufficient notice is conveyed to the BIA" and reasoning that "[i]f this were not true, the constitutionality of the regulation would be called into question on the basis of denial of due process. . . . In the context of deportation proceedings, due process requires that aliens who seek to appeal be given a fair opportunity to present their cases.") (internal citations and quotations omitted);

*Response:* Most, if not all, of the commenters' concerns appear to be based on a tacit assertion that either Board members are incompetent and cannot screen an incoming case within two weeks or Board members are incompetent or unethical and will issue summary dismissal orders for reasons unrelated to the merits or the law. The Department categorically rejects those assertions and any comments based on such presumptions. *Chem. Found., Inc.*, 272 U.S. at 14–15 ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

There is no evidence—and commenters did not provide any—that establishing a 14-day timeframe within which the BIA must conduct its initial screening for summary dismissal and 30-day timeframe for issuing a decision

<sup>43</sup>To the extent commenters are concerned about removal pending a motion to reopen given these changes, the Department notes that aliens may seek stays of removal from DHS or, as appropriate, the BIA. 8 CFR 241.6 and 1241.6.

<sup>44</sup>Nevertheless, the Department reiterates that approximately 86 percent of aliens are represented upon appeal. EOIR Workload and Adjudication Statistics, *Current Representation Rates*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1062991/download>.

will result in erroneous denials. The BIA has already established such internal requirements by policy, *see* PM 20–01 at 2 without any known degradation in the quality of its screening or issuance of summary dismissals.

Contrary to the suggestion of at least one commenter, the screening panel is comprised of multiple Board members, not just one, and the panel consists of a “sufficient number of Board members” to carry out screening functions. 8 CFR 1003.1(e). The rule does not alter the existence or composition of the screening panel. Further, commenters did not provide any evidence—and the Department is unaware of any—that the screening panel is insufficient to carry out its functions under the rule.

As noted in the NPRM, 85 FR at 52507, the regulations currently direct the BIA to screen and “promptly” identify cases subject to summary dismissal, 8 CFR 1003.1(d)(2)(ii), and few commenters acknowledged that promptness requirement nor explained why an undefined promptness requirement is preferable to a clear one set at 30 days. These regulatory timelines will both improve efficiency at the BIA, so that there is more time for BIA members and staff to devote to cases involving more substantive, dispositive issues. They will also benefit the parties by offering more expedient resolution of appeals amenable to summary dismissal allowing more time to be devoted to meritorious cases. The Department believes that 14 and 30 days are ample periods of time to both screen and issue decisions, respectively, on such limited matters, and these timelines will not negatively affect the quality or accuracy of such adjudications.

Finally, the Department notes the commenter’s citation to cases regarding incorrect usage of the BIA’s summary dismissal procedures. The BIA may dismiss an appeal summarily without reaching its merits in the following circumstances: Failure to adequately inform the BIA of the specific reasons for the appeal on either the Notice of Appeal (Form EOIR–26) or any brief or attachment; failure to file a brief if the appealing party has indicated that a brief or statement would be filed; the appeal is based on a finding of fact or conclusion of law that has already been conceded by the appealing party; the appeal is from an order granting the relief requested; the appeal is filed for an improper purpose; the appeal does not fall within the BIA’s jurisdiction; the appeal is untimely; the appeal is barred by an affirmative waiver of the right of appeal; the appeal fails to meet

essential statutory or regulatory requirements; or the appeal is expressly prohibited by statute or regulation. *See* 8 CFR 1003.1(d)(2)(i). The cases identified by commenters, however, are inapposite to this rule, which does not amend the circumstances under 8 CFR 1003.1(d)(2)(i) when the BIA may summarily dismiss a case.

#### ii. Issues With Respect to Other Appeals

*Comment:* One commenter asserted that the changes to the BIA’s timelines were designed to codify an October 2019 EOIR policy memo, but the commenter stated that the Department did not point to any increased efficiency or productivity since those new case-management procedures were implemented. Other commenters similarly criticized the Department for not adequately explaining how its objectives to achieve higher consistency, efficiency, and quality of decisions would be furthered by limiting BIA discretion to manage its own caseload. Commenters likened their concerns with the new timelines to concerns with the BIA’s procedures for affirmances without opinion.

Commenters stated that the rule would lead the BIA to issue rushed, not quality, decisions. For example, commenters stated that BIA decisions would be inconsistent since achieving consistency requires reviewing previous decisions and understanding important distinctions between different cases. Commenters stated that decisions made without sufficient consideration of the facts and law would be more likely to be overturned for errors, which decreases efficiency.

The commenters also stated that this rule would incentivize BIA members to decide and deny cases themselves rather than determine that a case requires three-member review, which is required to reverse an immigration judge’s decision, because it is faster for a single member to affirm an immigration judge’s decision.

Commenters criticized that the Department did not explain why the BIA would benefit from such adjudication timelines when other courts can issue rulings only when they are prepared to do so.

One commenter stated that the time period proposed for EOIR adjudicators is much less than many other administrative tribunals. The commenter listed, as examples, the Board of Veterans Appeals, which the commenter alleged took an average of 247 days to decide an appeal in FY 2017, and the Social Security Administration Appeals Council, which the commenter alleged had an average

processing time for an appeal of 364 days in FY 2016.

*Response:* Again, many, if not all, of the commenters’ concerns appear to be based on a tacit underlying assertion that Board members are either incompetent or unethical and, thus, cannot or will not perform their duties properly in a timely manner, notwithstanding the longstanding regulatory directive for them to “resolve the questions before [them] in a manner that is timely, impartial, and consistent with the Act and regulations.” 8 CFR 1003.1(d)(1). The Department categorically rejects those assertions and any comments based on such presumptions. *Chem. Found., Inc.*, 272 U.S. at 14–15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

Although aspects of PM 20–01 informed this rule, it was not the sole consideration nor the basis of authority for the rulemaking. The Attorney General is statutorily authorized to issue regulations to carry out his authority in the INA. INA 103(g)(2), 8 U.S.C. 1101(g)(2). Further, the Director exercises delegated authority from the Attorney General to ensure the “efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases.” 8 CFR 1003.0(b)(1)(i). Additionally, the Director may “[e]valuate the performance of the Board of Immigration Appeals . . . and take corrective action where needed[.]” *Id.* § 1003.0(a)(1)(iv).

The Department notes that this rulemaking, and other recent rulemakings, designed to improve efficiencies at the BIA, in addition to the measures outlined in the policy memorandum, to the extent that they are not included in the rulemaking will work in conjunction to improve efficiencies at the BIA. *See, e.g.,* Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019); 85 FR 18105. The Department also notes that the Board has already demonstrated improved efficiency by completing over 40,000 cases in the first full fiscal year (FY) after PM 20–01 was issued, which was its highest completion total since FY 2008. EOIR, *Adjudication Statistics: All Appeals Filed, Completed, and Pending*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1248506/download>.

Contrary to commenters’ assertions, this rule does not encourage any

particular result of an appellate adjudication; rather, the outcome of an appeal remains wholly dependent on the merits of the appeal and the applicable law. This rule does not encourage the denial of appeals or the issuance of legally deficient decisions, and the Department again rejects the insinuation that its adjudicators would abdicate their duties or are too incompetent to perform them correctly. Further, this provision regarding the BIA's timelines are intended to improve efficiency and encourage the timeliness of appeals, not to affect the disposition of appeals. The NPRM clearly states that "this delegation of authority to the Director does not change the applicable law that the Board or the Director must apply in deciding each appeal[.]" 85 FR at 52508. BIA members are directed by regulation to "exercise independent judgment and discretion in considering and determining the cases coming before the [BIA.]" 8 CFR 1003.1(d)(1)(ii). Such determinations must be made in accordance with applicable statutes, regulations, and binding case law. Additionally, BIA members receive "comprehensive, continuing training," administered by the Director, in order to promote adjudicative quality. *Id.* § 1003.0(b)(1)(vi), (vii). Furthermore, BIA members, who are adjudicators within EOIR, were hired to serve EOIR's mission to adjudicate cases in a fair, expeditious, and uniform manner. See EOIR, *About the Office*, Aug. 14, 2018, available at <https://www.justice.gov/eoir/about-office>. The Department rejects commenters' insinuations that BIA members would act outside of that mission by affirming an immigration judge's decision solely to dispose of an appeal more expeditiously due to the timelines.<sup>45</sup> The Department disagrees

<sup>45</sup> Because an alien may appeal a BIA decision to Federal court, this asserted behavior would not be efficient or rational—and, thus, would be unlikely to occur, contrary to commenters' allegations—because improper adjudications will simply lead to more cases being remanded from Federal court. Moreover, although commenters did not acknowledge it, the Department is cognizant that DHS cannot petition a Federal court for review of a BIA decision. Thus, if BIA adjudicators were to ignore their ethical obligations, disregard the law and evidence in each case, and adjudicate cases based solely on regulatory timelines in the manner alleged by commenters, they would actually have an incentive to rule in favor of aliens—contrary to the assertions of commenters—because there is little likelihood of a subsequent reversal. Thus, if commenters were correct about an asserted relationship between efficiency and outcomes, then that relationship would logically favor aliens, which is, paradoxically, a result favored by most commenters opposing the rule. Nevertheless, the Department reiterates that the improved efficiency created by the rule is outcome-neutral, and it expects that all Board members will carry out their duties in an impartial and professional manner consistent with the regulations. See 8 CFR

with commenters' concerns that, given the number of cases pending before the BIA, it would not be possible for BIA members to adjudicate appeals within the given timeframes or other allegations that the 335-day time period is insufficient. As noted in the NPRM, most appeals are already decided within the given parameters. 85 FR at 52508. Accordingly, commenters' comparisons to other courts or administrative bodies with different processing timelines and averages are inapposite, though the Department notes that the BIA's timeline falls between the two examples given, which actually supports the rule.

For such cases that are atypical, and for which it would be appropriate for the BIA to devote additional time to completing adjudication, the regulations provide for an extension of the adjudication time period. 8 CFR 1003.1(e)(8)(ii) ("[I]n exigent circumstances . . . in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice Chairman for final decision within 14 days or shall refer the case to the Director for decision."); 1003.1(d)(6)(ii)(B) (allowing BIA to place a case on hold while it awaits the completion or updating of all identity, law enforcement, or security investigations or examinations); 1003.1(e)(8)(iii) (permitting BIA Chief Appellate Immigration Judge to hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a BIA *en banc* decision, or in anticipation of an amendment to the regulations). Therefore, as noted in the NPRM, the Department expects few, if any, appeals to not be resolved within the regulatory time frames. 85 FR at 52508. In short, commenters simply did not persuasively explain why it would be neither feasible nor desirable for the BIA to adjudicate cases within 11 months, subject to certain exceptions contained in the rule.

### iii. Issues With Respect to Referral to the Director

*Comment:* Commenters also expressed a range of disagreements with the rule's procedures for the referral of appeals that have been pending for more than 335 days<sup>46</sup> to the Director. The

1003.1(d)(1); 5 CFR 2635.101(b)(8); *BIA Ethics and Professionalism Guide* at sec. V.

<sup>46</sup> Numerous comments refer to a 355 day deadline which appears to be a typographical error, as the time period set forth in the NPRM was 335 days, and there is no discussion of a 355 day time period in the NPRM. See 8 CFR 1003.1(e)(8)(v) (proposed). The Department has reviewed and

commenters asserted that this would promote the denial of appeals. The commenters also expressed concerns that this would consolidate final decision-making authority with one allegedly politically appointed person, the Director, whom, the commenters alleged, would not have the necessary information or knowledge of the case to issue a decision. Commenters alleged that the Director's decision in referred cases would be made based on the rules, without taking the appropriate time to evaluate the case.

Further, commenters objected that the rule would undermine the perception of neutrality, politicize the appellate process and violate substantive Due Process by allowing the Director, a political appointee, rather than a career adjudicator to adjudicate hundreds or thousands of cases. One commenter asserted that it is not the role of the Director to adjudicate decisions, and that the position is a non-adjudicatory position that is meant to run EOIR operations and does not have expertise, training, or impartiality necessary to decide cases. The commenter stated that, as an executive position, the Director would make decisions based on the priorities of the executive branch rather than the requirements of the law.

Numerous commenters opposed the 335-day period before referrals because it is not much longer than the 323-day median case appeal time period.

One commenter criticized the rulemaking because the Department did not address how the Director would have time to personally write decisions or, alternatively, who would write them under the Director's name. The commenter further criticized that the NPRM did not discuss what kind of training and oversight such individuals would receive or what metrics they would use.

Some commenters offered anecdotal evidence about appeals that were pending for more than 335 days and noted that such delays have become even increasingly common in light of the COVID-19 epidemic. One commenter stated that every non-detained BIA appeal filed under the current administration had been pending for well over 335 days, and that, accordingly, the rule would result in the Director issuing decisions for every respondent.

One commenter asserted that referring decisions to the Director would undermine rule's efficiency purpose because it would introduce a third level

addressed such comments for substance as if they had correctly stated that there was a 335 day deadline.



of administrative review. Instead, commenters asserted that it would be more efficient to allow the BIA member or BIA panel that has already reviewed the case and the record to make the ultimate disposition in the case.

At least one commenter alleged that the rule would result in increased appeals to the Federal courts.

Commenters asserted that it would not be possible for the BIA to adequately review the number of pending BIA cases in the given timeframe to avoid referrals to the EOIR Director. For example, commenters stated, based on DOJ statistics, that there were over 70,000 cases pending before the BIA at the end of FY 2019, and that for a 23-member BIA, each BIA member would have to complete 3,043 cases per year to comply with the 335-day deadline.

Commenters also raised concerns with imposing quotas on judicial processes, and stated that the same concerns apply to both BIA adjudicators and immigration judges.

*Response:* As an initial point, the Director is not a political appointee. A political appointee is a full-time, non-career presidential or vice-presidential appointee, a non-career Senior Executive Service (“SES”) (or other similar system) appointee, or an appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policy-making character (Schedule C and other positions excepted under comparable criteria) in an executive agency. *See, e.g.,* E.O. 13770, sec. 2(b) (Jan. 28, 2017) (“Ethics Commitments by Executive Branch Appointees”); *see also* Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Public Law 114–136, sec. 4(a)(4), (5), Mar. 18, 2016, 130 Stat. 301. No employee currently at EOIR, including the Director, falls within these categories. *See* Organization of the Executive Office for Immigration Review, 85 FR 69465, 69467 (Nov. 3, 2020) (“In short, all of EOIR’s federal employees, including the Director and the Assistant Director for Policy, are career employees chosen through merit-based processes, and none of EOIR’s employees are political appointees.”).

EOIR has no Schedule C positions or positions requiring appointment by the President or Vice President. The Director is a career appointee within the SES. SES positions are specifically designed to “provide for an executive system which is guided by the public interest and free from improper political interference.” 5 U.S.C. 3131(13). Although the Director and Deputy Director are general SES positions, they

have traditionally been filled only by career appointees, and the incumbent Director serves through a career appointment. In short, all of EOIR’s Federal employees, including the Director, are career employees chosen through merit-based processes, and contrary to commenters’ assertions, none of EOIR’s employees, including the Director, are political appointees.<sup>47</sup>

Similarly, some commenters objected to the NPRM by asserting that the Director is merely an administrator with no adjudicatory role and no subject matter expertise regarding immigration law. Longstanding regulations make clear, however, that the Director must have significant subject matter expertise in order to issue instructions and policy, including regarding the implementation of new legal authorities. *See* 8 CFR 1003.0(b)(1)(i). The position of Director requires a significant amount of subject-matter expertise regarding immigration laws. The Director is charged with, *inter alia*, directing and supervising each EOIR component in the execution of its duties under the Act, which include adjudicating cases; evaluating the performance of the adjudicatory components and taking corrective action as necessary; providing for performance appraisals for adjudicators, including a process for reporting adjudications that reflect poor decisional quality; “[a]dminister[ing] an examination for newly appointed immigration judges and Board members with respect to their familiarity with key principles of immigration law before they begin to adjudicate matters, and evaluat[ing] the temperament and skills of each new immigration judge or Board member within 2 years of appointment”; and,

<sup>47</sup> Most, if not all, of the comments opposing the NPRM because the Director is an alleged political appointee assume that any employee appointed to an agency position by an agency head, such as the Attorney General, is necessarily a political appointee. By statute, regulation, policy, or to comply with the Appointments Clause of the Constitution, approximately 545 positions at EOIR currently require appointment by the Attorney General, including Board members, immigration judges, and administrative law judges. The fact that the Attorney General, who is a political appointee, appoints an individual to a position does not convert that position to a political position. Moreover, even if the Director position were filled by a political appointment, that fact alone would not render the individual a biased adjudicator incapable of adjudicating cases under the regulations. *Cf. Matter of L-E-A*, 27 I&N Dec. at 585 (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case). After all, the functions of EOIR are vested in the Attorney General, who is a political appointee, and the INA specifically provides that determinations in immigration proceedings are subject to the Attorney General’s review. 28 U.S.C. 503, 509, 510; INA 103(g), 8 U.S.C. 1103(g).

“[p]rovid[ing] for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications.” *Id.* § 1003.0(b)(1). Each of these responsibilities necessarily requires some manner of subject-matter expertise to carry out effectively.

Moreover, the Director was given explicit adjudicatory review authority involving recognition and accreditation (“R&A”) cases in January 2017, well before the NPRM was promulgated. *See* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 FR 92346, 92357 (Dec. 19, 2016) (“Additionally, the final rule provides that organizations whose requests for reconsideration are denied may seek administrative review by the Director of EOIR. *See* final rule at 8 CFR 1292.18. This provision responds to concerns that [the Office of Legal Access Programs (“OLAP”)] would be the sole decision-maker regarding recognition and accreditation and that another entity should be able to review OLAP’s decisions.”). In short, existing regulations already require some level of subject-matter knowledge by the Director and provide for the Director to have an adjudicatory role in addition to administrative duties. *See, e.g., Matter of Bay Area Legal Services*, 27 I&N Dec. 837 (Dir. 2020) (decision by the Director in R&A proceedings). Accordingly, to the extent that commenters’ objections to this provision are based on an inaccurate understanding of the Director position, the Department finds those objections unsupported and unpersuasive.

Further, the Director, like members of the BIA, exercises independent judgment and discretion in accordance with the statutes and regulations to decide any case before him for a final decision pursuant to 8 CFR 1003.1(e)(8)(v) due to the BIA’s failure in that case to meet the established timelines. *See* 8 CFR 1003.0(c) (“When acting under authority [to adjudicate cases], the Director shall exercise independent judgment and discretion in considering and determining the cases and may take any action consistent with the Director’s authority as is appropriate and necessary for the disposition of the case.”); *cf.* 8 CFR 1003.1(d)(1)(ii) (“Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]”). Further, the Director’s decisions are subject to review by the Attorney General, either at the Director’s or Attorney General’s request. *Id.* § 1003.1(e)(8)(v). And as the final

agency decision, such decisions would be subject to further review in Federal court. INA 242, 8 U.S.C. 1252. Thus, the Director's authority on such cases would not necessarily be "final" to any extent greater than BIA's authority is "final."

Regarding the commenters' concerns about the lack of information in the rule regarding the particular support staff or other internal procedures that the EOIR Director would utilize for issuing decisions referred under the rule, the Department notes that such details regarding internal staffing models are not generally the topic of regulations. Nevertheless, the regulations do make clear that the Director may employ sufficient staff as needed to carry out EOIR's functions, 8 CFR 1003.0(a) ("EOIR shall include . . . such . . . staff as the Attorney General or the Director may provide."); 28 CFR 0.115(a) (same), just as they make clear that the Director is integral to ensuring the Board itself has sufficient staff, 8 CFR 1003.1(a)(6) ("There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.").

The Department further notes that it is not uncommon for someone other than the adjudicator to prepare a decision draft for the adjudicator's review and signature and that EOIR has, for many years, hired judicial law clerks to assist with drafting decisions. See Dept. of Justice, *Honors Program Participating Components*, Aug. 25, 2020, available at <https://www.justice.gov/legal-careers/honors-program-participating-components> ("EOIR Honors Program hires serve 2 year judicial clerkships . . ."). It is a common practice for both BIA and immigration court adjudicators to have supporting staff prepare decision drafts. Such decisions are still ultimately issued by the adjudicator, which in the case of untimely adjudications that have been referred is the Director—not the staff who prepared the draft. Moreover, the Department notes that the Director has the power to "[p]rovide for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications[,]” including adjudications that are referred to him. See 8 CFR 1003.0(b)(1)(vii).

Contrary to the commenters' concerns, the proposed changes would not undermine due process. The essence of due process in an immigration proceeding is notice and an opportunity to be heard. *LaChance*, 522 U.S. at 266

("The core of due process is the right to notice and a meaningful opportunity to be heard."). Nothing in the rule eliminates notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38. Further, although due process requires a fair tribunal, *In re Murchison*, 349 U.S. 133, 136 (1955), generalized, ad hominem allegations of bias or impropriety are insufficient to "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Commenters identified no reason—other than ad hominem dislike, crude suppositions, and unfounded, tendentious accusations of bias—why it would be inappropriate for a career, non-political SES official with no pecuniary or personal interest in the outcome of immigration proceedings and with both subject-matter expertise and adjudicatory experience, such as the Director, to adjudicate appeals in limited, specific circumstances. Cf. *Matter of L-E-A-*, 27 I&N Dec. 581, 585 (A.G. 2019) (rejecting arguments that the Attorney General is a biased adjudicator of immigration cases in the absence of any personal interest in the case or public statements about the case).

Additionally, the Department notes that the Attorney General oversees EOIR and has statutory authority to, among other responsibilities, review administrative determinations in immigration proceedings; delegate authority; and perform other actions necessary to carry out the Attorney General's authority over EOIR. INA 103(g), 8 U.S.C. 1103(g). Over time, the Attorney General has promulgated regulations pursuant to this statutory authority that reflect the full range of his authority and oversight in section 103(g) of the Act, 8 U.S.C. 1103(g). Among many examples, in 8 CFR 1003.1(h), the Attorney General codified the authority to review BIA decisions, and in 8 CFR 1003.0(a), the Attorney General delegated authority to the Director to head EOIR. Despite this delegated authority, EOIR remains subject to the Attorney General's oversight, and it is reasonable and proper that the Attorney General continue to exercise that oversight by way of such delegations of administrative review.

In accordance with 8 CFR 1003.0(a), the Director, who is appointed by the Attorney General, exercises delegated authority from the Attorney General related to oversight and supervision of EOIR. See also INA 103(g)(1), 8 U.S.C.

1103(g)(1); 28 CFR 0.115(a). The Director may only act in accordance with the statutes and regulations and within the authority delegated to him by the Attorney General; put differently, the statute and regulations provide the Attorney General with the authority to act, and the Attorney General, in turn, determines the extent of the Director's authority. The Attorney General, by regulation, provides a list of the Director's authority and responsibilities at 8 CFR 1003.0(b), which includes the authority to "[e]xercise such other authorities as the Attorney General may provide." 8 CFR 1003.0(b)(1)(ix). Such delegation supersedes the restrictions related to adjudication outlined in 8 CFR 1003.0(c) due to that paragraph's deference to 8 CFR 1003.0(b).

The Director's authority provided in the rule to adjudicate BIA cases that have otherwise not been timely adjudicated constitutes "such other authorities" provided to the Director by the Attorney General, based on the powers to delegate and conduct administrative review under section 103(g) of the Act, 8 U.S.C. 1103(g). See 8 CFR 1003.0(c), 1003.1(e)(8). To reiterate, the Attorney General's authority to review administrative determinations does not violate due process; thus, the proper delegation of that authority to the Director pursuant to statute and pre-existing regulations does not violate due process—specifically in light of the fact that those decisions ultimately remain subject to the Attorney General's review under 8 CFR 1003.1(e)(8). To the extent that commenters are concerned about such an appearance, the Department emphasizes the clear, direct intent of Congress in statutorily authorizing such delegations, and the Attorney General is acting within the bounds of his statutory authority by issuing the rule. INA 103(g)(2), 8 U.S.C. 1103(g)(2); see also *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). In issuing the rule, the Attorney General properly delegates adjudicatory authority to the Director to review certain administrative decisions that are otherwise untimely. 8 CFR 1003.1(e)(8). This delegation aligns with the Attorney General's longstanding authority to issue regulations and delegate that authority, in line with principles of due process.

The Department disagrees that these procedures would introduce inefficiency or a third level of review. Under this rulemaking, the Director would not review appeals that the BIA had adjudicated in a timely fashion. Rather, the Director will, acting with the same authority as a BIA adjudicator would have, issue decisions on appeals

that have been pending for longer than the prescribed regulatory period. *Id.* § 1003.1(e).

Commenters are also incorrect that the referral of appeals that have not been timely decided could be characterized as an improper consolidation of power under one individual. Cases would be referred to the Director only where the BIA has taken more than 335 days to adjudicate an appeal, in order to ensure timely disposition of a case. As noted by the NPRM, “absent a regulatory basis for delay, there is no reason for a typical appeal to take more than 335 days to adjudicate—including time for transcription, briefing, and adherence to the exiting 90- or 180- day time frames for decision.” 85 FR at 52508. Moreover, commenters did not explain why aliens with meritorious appeals should have to wait more than 335 days for a decision, and the Department is unaware of any reason for doing so. To the contrary, allowing the Director to adjudicate appeals which have languished for almost a year without adjudication will help ensure that aliens with meritorious claims receive the decision they warrant in a timely manner.

Additionally, for such cases that are atypical, and for which it would be appropriate for the BIA to devote additional time to completing adjudication, the regulations provide for an extension of the adjudication time period. 8 CFR 1003.1(e)(8)(ii) (“[I]n exigent circumstances . . . in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice Chairman for final decision within 14 days or shall refer the case to the Director for decision.”); 1003.1(d)(6)(ii)(B) (allowing BIA to place a case on hold while it awaits the completion or updating of all identity, law enforcement, or security investigations or examinations); 1003.1(e)(8)(iii) (permitting BIA Chairman to hold a case pending a decision by the U.S. Supreme Court or a U.S. Court of Appeals, in anticipation of a BIA *en banc* decision, or in anticipation of an amendment to the regulations). The Attorney General has delegated decision-making authority to the Director pursuant to 8 CFR 1003.1(e)(8)(ii), subject to possible further review by the Attorney General. The Director may only adjudicate cases that have surpassed the articulated deadlines, and the rule is clear that the Director’s scope of review is limited to only a narrow subset of EOIR cases.

Nevertheless, the Department recognizes commenters’ concerns

regarding the potential volume of cases that could conceivably be subject to referral, as well as the interaction between the referral procedures and other changes to the rule. To that end, the final rule adds four further exceptions to 8 CFR 1003.1(e)(8)(v) in which cases would not be referred. Cases on hold pursuant to 8 CFR 1003.1(d)(6)(ii) to await the results of identity, law enforcement, or security investigations or examinations will not be subject to referral if the hold causes the appeal to remain pending beyond 335 days. Cases whose adjudication has been deferred by the Director pursuant to 8 CFR 1003.0(b)(1)(ii) will not be subject to referral if the deferral causes the appeal to remain pending beyond 335 days. Cases remanded by the Director under 8 CFR 1003.1(k) will not be subject to referral if the case remains pending beyond 335 days after the referral. Cases that have been administratively closed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action will not be subject to referral if the administrative closure occurred prior to the elapse of 335 days and causes the appeal to remain pending beyond 335 days.

These changes, which are incorporated through a stylistic restructuring of 8 CFR 1003.1(e)(8)(v) for clarity, recognize additional situations in which a case may appropriately remain pending beyond 335 days without adjudication or when referral back to the Director would be incongruent because the Director had remanded the case immediately prior to the referral. They also recognize, in response to commenters’ concerns, that the Director may defer adjudication of BIA cases, consistent with authority under 8 CFR 1003.0(b)(1)(ii), in order to avoid needing to have those cases referred to himself. In short, although most commenters’ concerns are inaccurate, unfounded, or hyperbolic, the Department recognizes that the BIA should exercise default appellate adjudicatory authority in immigration cases and that referral of cases to the Director should be the exception, rather than the rule.

Finally, in response to comments about the clarity and scope of the NPRM’s changes to the BIA’s case management procedures, the final rule also makes edits to eliminate confusion over the scope of 8 CFR 1003.1(e). As both the title of that paragraph (“Case management system”) and its general introductory language (“The Chairman shall establish a case management

system to screen all *cases* and to manage the Board’s caseload.”) make clear, the provisions of the paragraph apply to “cases.” 8 CFR 1003.1(e) (emphasis added). In turn, “the term *case* means any proceeding arising under any immigration or naturalization law.” 8 CFR 1001.1(g). At the Board, cases may be initiated in one of three ways: the filing of a Notice of Appeal, the filing of a motion directly with the Board (e.g., a motion to reconsider or a motion to reopen), or the receipt of a remand from a Federal court, the Attorney General, or—under this rule—the Director. In other words, the Board adjudicates multiple types of cases, not just appeals. Although the existing language of 8 CFR 1003.1(e) is clear that it applies to all types of cases at the Board, regardless of how they are initiated, the inconsistent, subsequent use of “appeals” throughout that paragraph creates confusion as to its scope since appeals are not the only type of case the Board considers. *See, e.g.*, 8 CFR 1003.1(e)(3) (in describing the Board’s merits review process, using “case” in the first sentence, “case” and “appeal” in the second sentence, and “appeal” in the third sentence, all is describing a unitary process). To avoid continued confusion and to ensure that the scope of the other changes in the final rule regarding the Board’s case management process are clear, the final rule makes edits to 8 CFR 1003.1(e) to ensure that it is clearly applicable to all cases before the Board, not solely cases arising through appeals.<sup>48</sup>

#### iv. Other Issues

*Comment:* One commenter objected to the rule’s limitation of the Board Chairman’s authority to hold a decision in anticipation of a pending decision by a U.S. Court of Appeals or an amendment to the regulations. The commenter stated that such a change was not necessary and irrational because the Board Chairman’s existing authority to place cases on hold is permissive. The commenter stated that the proposed change would eliminate the Board Chairman’s discretion to hold cases when changes to the case law or regulations would benefit immigrants. The commenter stated that making the Board Chairman’s determination to hold a case subject to the concurrence by the Director was intended to enhance the Director’s influence over appellate

<sup>48</sup> For similar reasons, the final rule also makes changes to 8 CFR 1003.1(d)(3)(iv) to clarify that 8 CFR 1003.1(d)(3)(iv)(A) applies to all cases at the Board, whereas 8 CFR 1003.1(d)(3)(iv)(D) applies only to direct appeals of immigration judge decisions. None of these changes effect any substantive alteration of the applicable regulations governing the BIA’s functioning.

decision making and ensure that cases are held only when it would further the administration's political agenda, and not in the administration of justice.

*Response:* The Department disagrees with this comment and finds it unpersuasive for several reasons. First, the regulatory process is unpredictable, and both the timing and final substance of any given regulation cannot be predicted with sufficient accuracy to warrant holding adjudications for future regulations. Similarly, there is no reliable method of predicting how long an adjudication at a circuit court of appeals will take or when, precisely, a circuit court will render a decision.<sup>49</sup> Moreover, the proliferation of immigration litigation in recent years has increased the likelihood both that a circuit court panel's decision may not be the last word on the issue—due to the possibility of rehearing *en banc* or a petition for certiorari filed with the Supreme Court—and that multiple circuits may reach different conclusions. Thus, there is little reason to place cases on hold to await an individual circuit court decision since the timing of that decision is unknown, it may not be the final decision, and it may conflict with other circuit courts causing the Board to pause some cases but not others even though the cases raise the same issues.

Additionally, requiring the Director to concur with the BIA Chairman about whether to hold cases is not irregular, and the Department rejects the insinuation that the concurrence process would be used for nefarious, political, or otherwise inappropriate ends. The Chairman is, by regulation, generally subject to the supervision of the Director. 8 CFR 1003.1(a)(2); 28 CFR 0.115(a). As explained above, the Director is not a political appointee, and the Director's decisions regarding EOIR procedures, including whether an appeal is of such a nature so as to warrant further delay in adjudication, will be made in accordance with his general supervisory authority. Moreover, both the Director and the Board Chairman already possess longstanding authority to defer adjudication of Board cases, 8 CFR 1003.0(b)(1)(ii) and 1003.1(a)(2)(i)(C), and there is no evidence either has used that authority inappropriately. Accordingly, there is no basis to expect that they would apply the hold authority in 8 CFR 1003.1(e)(8)(iii) inappropriately.

*Comment:* One commenter asserted that the NPRM improperly characterized the BIA's decreased efficiency as paradoxical. Rather, the commenter asserted, this resulted from "massive changes that the current administration has wrought in immigration proceedings." The commenter stated that there have been constant and repeated changes to the law, as well as national, regional, and local injunctions of such changes, making it difficult to keep track of the current law and causing appeals adjudications to take longer as adjudicators research the current state of the law. Another commenter offered as a specific example, the Attorney General's decision in *Matter of Castro-Tum*, 27 I&N Dec. 271, which, the commenter alleged, added 330,211 previously completed cases back on to the pending caseload.

One commenter asserted, without providing further detail, that the Department's claim about the length of time that it takes to adjudicate most appeals is "patently false" and a factual misrepresentation.

Commenters also raised concerns with imposing quotas on judicial processes, and stated that the same concerns apply to both BIA adjudicators and immigration judges.

At least one commenter asserted that the Department had failed to consider other alternatives to improving efficiencies and offered alternative suggestions to the timeline-related changes. For example, at least one commenter suggested the preparation of reports concerning longstanding cases, akin to the reports submitted to Congress concerning district court motions and cases that have been pending adjudication for a long time. This alternative, the commenter suggested, would explain why specific cases required longer-than-usual adjudication times. The commenter also proposed, as another alternative, recommended timelines that required brief explanations when such timelines were exceeded. The commenter proposed a third alternative where, as part of the initial screening, the BIA could subcategorize cases assigned to single BIA members or three-member panels based upon their apparent complexity, with different timelines assigned to each subcategory.

At least one commenter expressed support for the 30-day interlocutory appeal timeline but asserted that the rule would be meaningless without an enforcement method. The commenter suggested that the Department consider adding a privately enforceable cause of action against the BIA if it failed to

adjudicate appeals in the timespan proposed in the rule. The commenter stated that, if expediency of adjudications was the administration's priority, subjecting adjudicators to such lawsuits would give adjudicators the extra incentive to meet applicable deadlines.

Commenters suggested that survivors of gender-based violence, children, and detained individuals without representation might be particularly negatively impacted by the rule's timelines.

One commenter compared criticism from the BIA's practice of issuing affirmances without opinion ("AWOs") to the NPRM because "[e]ncouraging even quicker and more opaque decision-making from an overworked, under-resourced, and now highly politicized appellate body" was both arbitrary and capricious and result in legally erroneous, and possibly biased, decision making.

*Response:* With respect to criticism of the rule pertaining to the Department setting new regulatory case-management procedures, the Department maintains that it has acted with the appropriate authority do so. Case management procedures have been in place regarding Board adjudications for many years, including 90-day and 180-day timelines for the adjudication of appeals, and the Department's authority to maintain such procedures is not seriously subject to question. As discussed in the NPRM, 85 FR at 52493, the case-management procedures also respond to concerns raised by the Department's Office of the Inspector General ("OIG") regarding how EOIR manages the timely adjudication of cases at the BIA.

Nor were the Department's decisions about the timelines arbitrary. Rather, they were based on experience and consideration of the average amount of time that it has taken the BIA to adjudicate appeals. See 85 FR at 52508 n.38. Moreover, as noted *supra*, commenters have not seriously questioned why it is impossible or improper to expect the BIA to be able to complete a case within 11 months. To the contrary, the cases of delayed adjudication cited by commenters provide support for the rule's timeline, and the Department agrees that the provisions of this final rule will respond to commenters' concerns about any excessive delays in case adjudications.

The Department shares a commenter's concern regarding the Board's decreased efficiency. To the extent that the Board's efficiency decreased even as its number of adjudicators increased or held steady prior to FY 2020, the Department does find that paradoxical. Nevertheless,

<sup>49</sup> In contrast, the term of the Supreme Court is well-established, and decisions for a particular term are ordinarily expected by the end of June.

regardless of the precise basis for the Board's decreased efficiency, the Department believes it must be addressed and that the NPRM sets forth well-supported ways of doing so.

Regarding the commenter who asserted that the decision in *Matter of Castro-Tum* added 330,211 previously completed cases back to the pending caseload, the Department notes first that an administratively closed case is not a completed case. Thus, the assertion that the cases mentioned were "completed" is erroneous. See *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990) ("[A]dministrative closing is merely an administrative convenience. . . . However, it does not result in a final order."); *Hernandez-Serrano*, 2020 WL 6883420 at \*3 ("Administrative closure typically is not an action taken '[i]n deciding' a case before an IJ; instead, as shown above, it is typically a decision not to decide the case. Nor is administrative closure typically an action 'necessary for the disposition' of an immigration case. Administrative closure is not itself a 'disposition' of a case, as *Hernandez-Serrano* concedes in this appeal."). Second, the Department notes that cases that have been administratively closed remain pending even while they are closed; thus, those cases never went away and, accordingly, were not added by *Matter of Castro-Tum*.

The Department is unable to respond to the commenter who alleged that the median time to complete an appeal represented by the Department was false without providing further detail. The Department maintains that its calculation was accurate. Further, most commenters, who have experience practicing before the Board and are familiar with its timelines, did not dispute the idea that, on average, the Board takes, roughly, just over 10 months to adjudicate cases.

The rule does not impose any "quotas" on Board members, nor does it establish any type of case completion goal for BIA members. To the extent that commenters believe that the 90-day and 180-day timelines establish a quota, those timeframes have existed for many years, and the rule does not alter them, though it harmonizes when they begin in response to criticism and confusion over the years, including by the Department's OIG, 85 FR at 52493.

Regarding proposed alternatives, the Department finds that preparing a report would not address issues with the Board's efficiency. To the contrary the regulations already require the Board Chairman to prepare a report "assessing the timeliness of the disposition of cases by each Board member on an annual

basis," 8 CFR 1003.1(e)(8)(v), and that existing requirement, which does not appear to have been followed with any diligence prior to 2019, has not aided the Board's efficiency. Similarly, explanations for why timelines have been exceeded are useful for understanding why cases may move at different speeds, and the regulations already contemplate situations in which case processing may be delayed due to specific explanations. See *id.* § 1003.1(e)(8)(i)–(iii). Explanations themselves, however, do not ensure that cases are processed in a timely and fair manner, which is the Board's goal. Finally, the commenter's suggestion of subcategorization is already built into the screening process and the differential timelines for single-member versus panel decisions. Although the Department appreciates the commenter's suggestions and has fully considered them, it believes they are either already contemplated by the regulations or would not otherwise improve the efficiency of the Board's adjudications.

The Department appreciates one commenter's support for a 30-day interlocutory appeal timeline but notes that it does not possess the legal authority to establish a cause of action in Federal court to ensure that timeline is met.

Although commenters suggested that survivors of gender-based violence, children, and detained individuals without representation might be particularly negatively impacted by the rule's timelines, they did not explain how or why that would be the case. The timelines are not case-specific and do not depend on the facts of any particular case. The Department has explained, *supra*, that the rule would not have a deleterious impact on individuals without representation, and there is no basis to believe that the rule will apply differently to children or survivors of violence. To the extent that commenters are concerned about cases of detained aliens, existing regulations already prioritize such cases, 8 CFR 1003.1(e) (prioritizing "cases or custody appeals involving detained aliens"), and the Department maintains a longstanding goal developed pursuant to the Government Performance and Results Act, Public Law 103–62, Aug. 3, 1993, 107 Stat. 285, of completing 90 percent of detained appeals within 150 days of filing. PM 20–01 at 6. In short, the rule has no impact on the efficiency of adjudicating appeals of detained aliens, as such cases are already adjudicated expeditiously in the normal course under existing principles.

Commenter criticisms of AWOs, comparison with other agency adjudication timelines, which involve completely different factors for consideration, and concerns over "flooding" the circuit courts of appeals, are outside of the scope of this rulemaking, although the Department reiterates that it does not believe that this rulemaking would encourage speed over quality of decisions, but rather believes that it strikes an appropriate balance. The Department acknowledges commenter anecdotes about appeals that have been pending for longer than the 335-day regulatory period for various stated reasons and notes that stating a median, by definition, will include cases that have been pending for longer. Nevertheless, the Department acknowledges that these anecdotes further support the Department's efforts to resolve cases more expeditiously through this rule.

#### j. Immigration Judge Quality Assurance Certification (8 CFR 1003.1(k))

*Comment:* Some commenters expressed concern regarding the establishment of new quality assurance procedures that allow immigration judges to certify cases, in certain limited circumstances, to the Director. 8 CFR 1003.1(k).

Commenters opined the quality assurance procedures would undermine the BIA in a variety of manners. For example, at least one commenter stated that quality assurance certifications undermine the BIA's integrity by dispossessing it of its full appellate authority. Other commenters stated that the procedures will erode a fundamental purpose of the BIA: National consistency. Commenters further opined that the NPRM would undermine the adversarial nature of BIA proceedings. Others claimed that the procedures would remove discretion from the BIA, which the commenter likened to other changes by the Department that the commenter felt have removed discretion from immigration judges. Commenters further alleged that the rule would have a chilling effect on the BIA as it would heighten their concerns about job security over fairness and impartiality.

At least one commenter expressed a belief that quality assurance certifications are not needed because every opinion the commenter received from the BIA was "highly professional [and] based on the Board members' evaluation of the law and the facts of the particular case." Another commenter opined that there were easier ways to change a typographical error.

According to commenters, the bases for the quality assurance certifications

are so broad that an immigration judge who simply disagrees with the BIA's decision—or the decision's impact on the immigration judge's performance metrics—can certify the case to the Director. *See id.* § 1003.1(k)(1)(i)–(iv).

Commenters expressed concerns regarding the appropriateness of the Director receiving such quality assurance certifications and the Director's ability to appropriately respond to and manage the certifications he would receive. For example, commenters predicted that the Director could receive thousands of cases from the BIA due to other changes in the rule as well as the cases certified from immigration judges. Due to the caseload, a commenter claimed that the Director would simply “rubber stamp denials.” Commenters described the position of the Director as managerial and non-adjudicatory and accordingly opined that the individual appointed to it does not necessarily possess the “expertise, training, or impartiality necessary to decide cases.” Others expressed concern about the Director's role reviewing and responding to quality assurance certifications due to the commenters' perception that the Director is a political appointee or otherwise is politically motivated. Some commenters alleged that the Director is not subject to the same the ethics and professionalism guidelines applicable to BIA members and the decisions of the Director cannot be remedied through EOIR's procedure for addressing complaints against EOIR adjudicators.

Other commenters requested that the neutral arbiter be other experts in immigration law or another body.

Other commenters worried that regardless of the Director's decision, it would be unreviewable by any adjudicator, while another commenter claimed that appeals would flood the circuit courts.

Commenters claimed that the Department mischaracterized HALLEX I-3-6-10. For example, one commenter stated that the cited section allows for clarity but not for Administrative Law Judges to “protest” or question decisions on their cases in the same manner immigration judges would be allowed to do for BIA decisions.

Other commenters were concerned with procedural issues. Some commenters claimed that the parties and the BIA should receive notice that the immigration judge certified a case. Commenters requested that parties be allowed to object to certification and file briefs accordingly and noted that the non-moving party has a chance to respond in the current scheme to address BIA errors. At least one

commenter expressed concern about the implications on the immigration judge's posture in the proceedings and claimed that immigration judges who issue certifications would have to recuse themselves in case of remand because the certification is in effect an appeal by the judge that equates the judges to an advocate in the proceedings.

Other commenters expressed concern that the certification procedures curtail aliens' due process rights.

Commenters opined that the quality assurance certifications, when combined with the restriction on the BIA considering new evidence, will result in numerous certifications because the BIA will fail to consider a material factor pertinent to the issue(s) before the immigration judge.

Some commenters claimed that the rule would increase inefficiency because, in order for the case to be resolved, the Director must refer the case to a different adjudicator.

*Response:* As an initial point, the Department notes that many of the same commenters who criticized other parts of this final rule because it would allegedly allow the BIA to deny meritorious appeals for inappropriate reasons also criticized this provision by claiming it would undermine the professionalism and expertise of the BIA in deciding cases. To the extent that commenters inconsistently asserted that the BIA is both unprofessional and professional—depending solely on which view allowed the commenter to oppose a particular provision of this final rule—the Department finds such tendentious criticism insufficient to warrant changes to the final rule.

Further, any implication that these quality assurance certifications divests the BIA of its appellate jurisdiction and role in the immigration system is incorrect. The new procedures at 8 CFR 1003.1(k) do not create a higher secondary appellate review body. Rather, they provide a quality control measure to ensure that the BIA's decisions consistently provide appropriate and sufficient direction to immigration judges. The distinction is evident in the certification process and the actions available to the Director. Cases may only be certified to the Director if they fall within limited, and specifically delineated, circumstances: (1) The BIA decision contains a typographical or clerical error affecting the outcome of the case; (2) the BIA decision is clearly contrary to a provision of the INA, any other immigration law or statute, any applicable regulation, or a published, binding decision; (3) the BIA decision is vague, ambiguous, internally

inconsistent, or otherwise did not resolve the basis for the appeal; or (4) a material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the BIA decision. 8 CFR 1003.1(k)(1)(i)–(iv). These narrow situations are all tailored to quality control—not to express disagreement with the BIA's well-founded legal analysis, which is how another layer of appellate review would function.

Further, the Director only has a limited number of options available upon certification. The Director may: (1) Dismiss the certification and return the case to the immigration judge; (2) remand the case back to the BIA for further proceedings; (3) refer the case to the Attorney General; (4) or issue a precedent decision that does not include an order of removal, a request for voluntary departure, or the grant or denial of an application for relief or protection from removal. *Id.* § 1003.1(k)(3). Thus, the quality assurance procedures do not vest the Director with any final adjudicatory power of cases that have been certified, and the Director must return the case to either the BIA or the immigration judge in order for the case to be resolved. Accordingly, commenters are incorrect that the rule creates an additional level of appellate review.

The Department appreciates the commenter's compliments that the decisions that they have received from the BIA have been faithful to the law and highly professional, though it notes that other commenters insinuated that the BIA's decisions are not always faithful to the law. Regardless, the Department cannot rely on anecdotal evidence to maintain quality control in all cases in the context of the ever-growing BIA with a mounting caseload, *see* 85 FR at 52492; EOIR, *Adjudication Statistics: Case Appeals Filed, Completed, and Pending*, Oct. 23, 2019, available at <https://www.justice.gov/eoir/page/file/1198906/download>, and the Department is aware of examples from immigration judges raising questions about the quality or accuracy of BIA decisions. The Department believes that the rule creates a clear and efficient mechanism to ensure that the commenter's remarks that the BIA's decisions are accurate and dispositive are, and remain, true. The Department does not believe that a quality control process that is aimed toward full and accurate decisions would have any other substantial impact that to cause increased attention to the accuracy and completeness of decisions. Overall, the Department finds that the certification process as laid out in the rule will, in

a timely manner, ensure that BIA decisions are accurate and dispositive, which is the purpose of the changes.

In regards to commenters' allegations that immigration judges could simply certify cases with which they disagree, particularly for political or other personal reasons, the Department specifically reiterates that merely disagreeing with decisions or objecting to specific legal interpretations is not a basis for certification. 85 FR at 52503. Some commenters worried that the bases for certification are so broad that an immigration judge could solely object to a particular legal interpretation and still certify the case by sweeping it into one of the four criteria, specifically that the decision is "vague." To this, the Department notes that vagueness is included in the criteria in order to address a specific problem: Immigration judges receiving orders that are confusing and need additional clarification or explanation. See 85 FR at 52496. "Vagueness" is not so broad as to contain within it a myriad of legal objections to specific legal interpretations; certainly, it cannot be stretched to contain personal or political objections to such legal interpretations.

Moreover, although few commenters acknowledged it, immigration judges already possess the authority to certify a case to the BIA following a remand and the issuance of another decision, 8 CFR 1003.7, and some immigration judges have used that procedure in order to seek clarification of the BIA's decision. That indirect process, however, is both burdensome to the parties, who must wait until the immigration judge issues another decision (even if the immigration judge considers the Board's decision unclear or vague), and inefficient in that it results in a case being sent back to the same body which remanded it in the first instance without further clarification. The Department's quality assurance process will ensure clearer and more timely resolution of disagreements, within four narrow categories, between immigration judges and the BIA by a neutral third-party who supervises each.

As far as the authority of the Director, the Attorney General is authorized to decide the Director's authority. INA 103(g)(1), 8 U.S.C. 1103(g)(1); 28 CFR 0.115(a). Reviewing certified cases falls within the "such other authorities" provided to the Director by the Attorney General, based on the powers to delegate and conduct administrative review under INA 103(g) (8 U.S.C. 1103(g)). See 8 CFR 1003.0(b)(1)(ix) and (c), 1003.1(e)(8)(ii). This delegation supersedes the restrictions related to

adjudication outlined in 8 CFR 1003.0(c) due to that paragraph's deference to 8 CFR 1003.0(b).

Moreover, the Director is responsible for the supervision of the immigration judges and the BIA members and already possesses the authority to ensure that adjudications are conducted in a timely manner. See *id.* § 1003.0(b)(1)(ii). Accordingly, the Director is in a well-positioned to address errors made by the BIA and to remedy them in a timely manner. The Director is also in a direct position to implement changes to address repeat errors. Because the delegation of authority is proper, the process requires notice, and the process involves a neutral decisionmaker who lacks authority to issue a final order, it does not violate due process.

In response to commenters concerns that the delegation of authority, even if proper, will appear improper, the Department responds that Congress' intent is clear and explicit in statutorily authorizing such delegations, and the Attorney General is acting within the bounds of his statutory authority when by issuing the rule. INA 103(g)(2), 8 U.S.C. 1103(g)(2); see also *Chevron*, 467 U.S. at 842. In issuing the rule, the Attorney General properly delegates the Director the authority to review certified cases from the immigration judges. This delegation aligns with the Attorney General's longstanding authority to issue regulations and delegate that authority, in line with principles of due process.

Regarding commenters concerns about perceived political influence or politicization of the Director position, the Department reiterates its response to similar concerns raised and discussed, *supra*. The Department again notes that the Director is a career appointee, who is selected based on merit, independent of any political influence, and a member of the SES. The position requires a significant amount of subject-matter expertise regarding immigration laws as demonstrated by various duties of the Director: "[a]dminister an examination for newly-appointed immigration judges and Board members with respect to their familiarity with key principles of immigration law before they begin to adjudicate matters, . . . [p]rovide for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff, and [i]mplement a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators." 8 CFR 1003.0(b)(1)(vi)–(viii). Additionally, reviewing certified cases would require no more expertise than administratively

reviewing certain types of decisions in recognition and accreditation cases, which the Director has been tasked with the authority to do since 2017 with no noted objection at that time. See *id.* § 1292.18(a). Further, the Director is held to the same professionalism and ethical standards as all Department employees. In short, commenters' concerns appear to be rooted in either a personal dislike for the incumbent Director or disagreement with the overall policies of the Department, rather than any specific or genuine concern about the Director position itself.

In response to commenters' concerns over the workload for the Director that quality assurance certifications may cause, the Director may utilize all appropriate support staff to assist with his responsibility. Nevertheless, because of the narrow scope of issues subject to certification and the procedural requirements which will dissuade filing frivolous or meritless certifications—particularly because immigration judges already have generally full dockets of cases to adjudicate—the Department expects that these procedures will be employed infrequently. Accordingly, although the Department appreciates commenters' concerns about the Director's workload, the rule already anticipates and limits the number of cases expected to be subject to this process.

In regards to the reviewability of the Director's decision, the Department notes first that the Director's decision is not final and that, regardless of what action the Director does take, the ultimate, underlying final EOIR administrative decision may be appealed to the circuit court. See INA 242, 8 U.S.C. 1252.

Regarding commenters' accusations of the mischaracterization of HALLEX I-3-6-10, the Department notes that it referenced Social Security's protest criteria for decisions by administrative law judges or its administrative appeals body, the Appeals Council, in the context of explaining the narrow set of criteria for certification set out in the rule. 85 FR at 52502 ("These criteria are used in similar circumstances at other adjudicatory agencies.") The Department was not attempting to claim that the two processes exactly mirror one another, nor was it attempting to claim that it structured the certification procedure to directly mimic the Social Security Administration. The Department believes although the two procedures are not identical, the degree of similarity—as well as the underlying purpose, *i.e.*, to ensure correct, quality

decisions by adjudicators—is enough to warrant analogy.

Regarding commenters' requests that the various parties should receive notice at the time of certification, the Department notes that the rule, in fact, requires the immigration judge to provide notice of certification to both parties. 8 CFR 1003.1(k)(2)(iii). However, the Department disagrees with commenters' argument that the parties should have opportunities for objections and additional briefing at the time of certification, particularly because the case was likely already briefed to the Board prior to the certification to the Director. The certification procedures allow immigration judges to quickly determine a potential error by the BIA and to timely seek a remedy to that error, all without placing an additional burden on the parties. The Department determined that the current incomplete and piecemeal system of various parties filing various motions or appeals was cumbersome, time consuming, and may not fully address the error. 85 FR at 52502. Adding time for objections and briefs, as suggested by some commenters, would morph the process in the rule into a portion of what it was created to avoid: A cumbersome and time consuming process. Moreover, regardless of whether the Director returns the case to the immigration judge or to the Board, the parties will have an opportunity to raise appropriate arguments or issues before a final decision is rendered. Nevertheless, the Department recognizes that in discrete cases, additional briefing or filings may be helpful to the Director in reviewing a certified case. Accordingly, the final rule provides that the Director, in his or her discretion, may request additional briefs or filings from the parties when reviewing a certified case through the quality-control process.

Additionally, the Department rejects any claim that the immigration judges are acting as advocates and would thus have to recuse themselves. Again, this assertion suggests that immigration judges will behave unethically or partially in violation of regulations and their code of conduct. 8 CFR 1003.10 ("In all cases, immigration judges shall seek to resolve the questions before them in a timely and *impartial* manner consistent with the Act and regulations.") (emphasis added); 5 CFR 2635.101(b)(8) ("Employees [of the federal government] shall act impartially and not give preferential treatment to any private organization or individual."); *IJ Ethics and Professionalism Guide* at sec. V ("An Immigration Judge shall act impartially and shall not give preferential treatment

to any organization or individual when adjudicating the merits of a particular case."); see also *Chem. Found., Inc.*, 272 U.S. at 14–15 ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). The Department categorically rejects this suggestion.

In the context of the quality assurance process, the immigration judge is flagging an issue and relaying it to the Director for examination. While the immigration judge is required to "specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis," this is necessary to relay the immigration judge's determination of error by the BIA to the Director in order to both qualify for certification and to expedite the process. Moreover, this process is substantively similar to the existing certification process utilized by immigration judges for many years, 8 CFR 1003.7. Commenters did not provide any evidence that this existing process has raised questions about immigration judges becoming advocates, and the Department is unaware of any.

Regarding commenters' concerns about the Department not supporting the rule with data, the Department notes that such quality assurance issues are not subject to tracking or amenable to particular data points. For instance, commenters did not indicate how the Department would measure the "correctness" of Board remand decisions in order to calculate the data they sought, and the Department is unaware of any metric for measuring the "correctness" or "appropriateness" of remand decisions by an appellate court.<sup>50</sup> Further, since no quality assurance system is currently in place, there is no baseline for data to provide. Moreover, even without specific further data, the Department is still well within its authority to create a certification process that ensures the quality of BIA decisions. 8 CFR 1003.0(b)(1)(ii).

<sup>50</sup> Whether the result of a case is "correct"—*e.g.*, whether an application or appeal should have been granted or denied—is often solely based on the narrative seeking to be advanced by the evaluator, and there is no accepted way of determining whether an adjudicator's decision is normatively "correct." See Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 Emory L.J. On. 1035, 1046 (2019) ("Given a sample of . . . court cases, no researcher could practically determine what the courts got 'right' and what they got 'wrong.' There is no reliable method of coding how cases "should" have been decided and, thus, no reliable way of assessing whether the [decision] rate is 'too high' using observational data.")

Commenters are incorrect that the quality assurance certification procedures are incompatible with the restriction on the BIA's consideration of new evidence. In order for a case to be certified, the BIA decision must have clearly not considered "a material factor pertinent to the issue(s) before the immigration judge." *Id.*

§ 1003.1(k)(1)(iv). The only such material factors would be those that were already before the judge and, accordingly, not new evidence before the BIA only at the appeal. Thus, no new evidence that the BIA was barred from considering based on the regulations would amount to a "material factor" before an immigration judge.

As to a commenter's assertion that there must be an easier way to correct typographical errors, the Department notes that the certification process involves more than just typographical errors. The quality assurance provisions are designed to address wider examples of quality concerns at the BIA level, of which typographical errors are just one kind.<sup>51</sup>

Further, while the Department appreciates commenters suggestions for other methods to meet the Department's quality assurance goals, such as suggestions that the Department make BIA decisions public,<sup>52</sup> increase three-member panel decisions, or increase the number of detailed and reasoned precedential decisions, the Department finds that they would not provide an efficient and accurate process to ensure that BIA decisions are dispositive and accurate. Instead, such suggestions represent a continuation of the status quo rather than the real introduction of new procedures for immigration judges to bring issues to the forefront for consideration. Moreover, commenters did not explain how increased three-member panel decisions or an increased number of precedential decisions, both actions by the BIA, would improve quality in each individual BIA adjudication or how such actions

<sup>51</sup> Further to the commenter's point, the Department notes that because the BIA retains  *sua sponte* authority to reconsider a decision to correct a typographical error under this rule, 8 CFR 1003.2, situations in which an immigration judge may use this quality assurance process on that basis alone should be extremely rare.

<sup>52</sup> The Department notes that this suggestion suffers from an additional infirmity. Due to privacy restrictions and confidentiality regulations, *e.g.*, 8 CFR 1208.6, the Department cannot simply make all BIA decisions public without redactions, and the requirement for redactions would necessarily inhibit the ability to determine whether those decisions were of appropriate quality. Further, the Department notes that many BIA decisions are already available through commercial databases, but that availability has not ensured that the Board issues a quality or correct decision in every case.



address immigration judge concerns about the quality of BIA decisions.

Finally, to the extent that most, if not all, commenters focused on how this process would affect cases of aliens, the Department reiterates that it would affect both parties equally. Moreover, many commenters appear to not have recognized that the process is primarily designed for EOIR's adjudicators and to improve quality decisionmaking at both the trial and appellate levels, rather than being a process designed to favor one party over another.

k. Removal of *Sua Sponte* Motion To Reopen Authority (8 CFR 1003.2(a), 1003.23(b)(1))

i. Due Process Concerns

*Comment:* Commenters opposed the rule's removal of the BIA and immigration judge's authority to *sua sponte* reopen proceedings. Commenters alleged that the Department failed to consider due process and explained that *sua sponte* authority was a "vital tool" for "curing errors and injustices" that may have occurred during removal proceedings. Further, commenters explained that even if a BIA member saw good reason to reopen a case, such as in the case of an untimely or number-barred motion to reopen, the member would be unable to do so without the *sua sponte* authority.

*Response:* As an initial point, the Department notes that several courts have acknowledged that *sua sponte* reopening (or the lack thereof) cannot implicate due process rights because it is entirely discretionary, so there is no liberty interest in it that would implicate any of an alien's rights in proceedings. *See, e.g., Mejia v. Whitaker*, 913 F.3d 482, 490 (5th Cir. 2019); *Gyamfi v. Whitaker*, 913 F.3d 168 (1st Cir. 2019); *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013); *see also Matter of G-D-*, 22 I&N Dec. 1132, 1137 (BIA 1999) ("We see no procedural due process concerns arising from our discretionary decision declining to exercise our independent reopening powers on behalf of the respondent. The respondent's right to a full and fair hearing on his asylum claim has not been compromised.").

As explained in the NPRM, *sua sponte* authority is entirely a creature of regulation based on a delegation of authority from the Attorney General. 8 CFR 1003.2(a), 1003.23(b)(1); *see also* 85 FR at 52504. It is also not the only tool available to address possible errors in immigration proceedings; thus, removal of *sua sponte* authority, in and of itself, does not constitute a violation of due process.

In addition, commenters confuse *sua sponte* authority with motions to reopen. Filing a motion to reopen, regardless of whether it is time or number-barred as commenters describe, does not invite the BIA to exercise *sua sponte* authority; it requests the BIA to reopen a proceeding in response to the motion. *See Malukas v. Barr*, 940 F.3d 968, 969 (7th Cir. 2019) ("Reopening in response to a motion is not *sua sponte*; it is a response to the motion and thus subject to the time-and-number limits."). Thus the rule's removal of *sua sponte* authority does not itself preclude the BIA from reopening a case in accordance with applicable law. *See, e.g.*, 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv). Rather, it ensures that reopening occurs in meritorious situations authorized by statute or regulation, rather than through the BIA's subjective and largely unchecked view of what constitutes an exceptional circumstance. Accordingly, contrary to commenters' assertions, the rule promotes fairness due to "the lack of a meaningful standard to guide a decision whether to order reopening or reconsideration of cases through the use of *sua sponte* authority, the lack of a definition of 'exceptional situations' for purposes of exercising *sua sponte* authority, the resulting potential for inconsistent application or even abuse of this authority, the inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request, and the strong interest in finality" by withdrawing an authority subject to inconsistent and potentially abusive usage. 85 FR at 52505.

Further, as discussed in the NPRM, the Department recognizes that the BIA has, in the past, exercised what it termed "*sua sponte* authority" in response to a motion and, arguably, contrary to law. 85 FR at 52504 n.31 ("Despite this case law to the contrary, the Board has sometimes granted motions using what it erroneously labels as '*sua sponte*' authority."). To the extent that the commenters oppose the change in this practice—particularly based on the perception that it favors aliens—the Department has acknowledged that the rule would no longer provide an avenue for the Board to use its *sua sponte* authority to grant a motion to use such authority. Indeed, one of the reasons stated for the rule was "the inherent problems in exercising *sua sponte* authority based on a procedurally improper motion or request." *Id.* at 52505. The rule seeks to end the practice of the Board taking allegedly *sua sponte* action in response to a motion and to thereby reduce the

incentive for filing such procedurally improper motions. *Id.*

In short, the rule returns the focus on motions to reopen to the merits of the motions themselves and the applicable law, rather than the BIA's subjective and inconsistent invocation of its *sua sponte* authority. Finally, as discussed, *supra*, and noted in the NPRM, the Supreme Court has recognized that "the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes." *Id.* at 52492 n.1 (quoting *Doherty*, 502 U.S. at 327 (1992)). Accordingly, to the extent that the Attorney General can delegate authority to the BIA, he can also unquestionably remove that delegation. The removal of such authority, which is solely the Attorney General's to delegate, does not violate due process.

*Comment:* Similarly, commenters were concerned that the rule would foreclose reopening the cases of respondents who later became eligible for relief, providing some of the following examples: An approved immediate immigrant relative petition, an approved application for SIJ status, an approved application for U visa status, or derivative asylum status through a spouse or parent. Commenters noted that these applications typically take years to adjudicate. Commenters were also concerned that the rule would deny protection to the most vulnerable populations in immigration proceedings, such as by foreclosing reopening the cases of respondents who were victims of fraud or ineffective assistance of counsel, non-English speakers or others with language barriers, and children who failed to appear for their hearings by no fault of their own. One commenter further described the effects on unaccompanied alien children ("UAC") generally, explaining that *sua sponte* authority was an important safeguard to protect children because critical details and information in children's cases typically emerge over time.

At least one commenter alleged that the Department purposefully promulgated these provisions as an "attack" on asylum seekers and migrants.

As with other provisions of the rule, commenters explained that the Department should not remove the *sua sponte* authority because "fairness is more important than finality" or quick removals.

*Response:* As an initial point, the Department notes that many of its responses to comments regarding the withdrawal of the BIA's certification authority discussed, *supra*, are equally

applicable to comments regarding the withdrawal of *sua sponte* reopening authority. On balance, the inconsistent application of such authority, even with a well-established standard, and the existence of equally functional alternatives, particularly as equitable tolling has advanced as a doctrine to extend filing deadlines for motions to reopen, militate in favor of removing the Attorney General's delegation of such authority.

The Department did not promulgate this rule as an attack on anyone. As discussed herein, the rule applies equally to DHS and respondents, it applies to all types of cases (not just asylum cases), and it addresses significant issues of inconsistent adjudications and efficiency, among others. Commenters' generalized policy disagreements with the rule do not effectively engage with its provisions and, thus, do not provide a useful basis for the Department to respond.

In general, commenters' concerns that respondents will be unable to reopen their cases without the BIA's *sua sponte* authority are based on an erroneous understanding or assumption that respondents are entitled to such a reopening. The Department emphasizes that the vehicle by which such respondents should seek reopening is a motion to reopen. *See Malukas*, 940 F.3d at 969 ("Reopening in response to a motion is not *sua sponte*; it is a response to the motion and thus subject to the time-and-number limits."). The Attorney General has already determined that *sua sponte* authority may not be used to circumvent timing and numerical limits, *see Doherty*, 502 U.S. at 323; *INS v. Abudu*, 485 U.S. 94, 107 (1988). Further, Congress included such limitations to promote finality in proceedings. *Matter of Monges-Garcia*, 25 I&N Dec. 246, 250 (BIA 2010) (explaining that, by requiring the Department to promulgate motion time and number limits by regulation as part of the Immigration Act of 1990, "Congress clearly intended that the time and number limitations on motions would further the statute's purpose of bringing finality to immigration proceedings").

Nevertheless, aliens who reach agreement with DHS regarding the validity of their changed claim may jointly file a motion to reopen with DHS regardless of the amount of time that has passed since the underlying final order. 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv). The rule does not affect that pre-existing exception to the time and number limitations on motions to reopen. In addition, the deadline for filing a motion to reopen by aliens who have

been the victim of fraud, ineffective assistance of counsel, and other harms may be subject to equitable tolling. *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (stating that the deadline for filing a motion to reopen is subject to equitable tolling).

Regarding commenters' concerns for UAC, the Department has considered whether there would be any specific impacts of the rule on UAC in particular—as distinguished from other categories of aliens—but has identified none. As discussed, *supra*, there is no right to a motion to reopen *sua sponte* for any classification of aliens, many aliens (not just UAC) are subject to remote visa priority dates, and many aliens (not just UAC) may become putatively eligible for relief well after their immigration proceedings have concluded. Commenters also did not identify any specific impacts on UAC that would not also fall on the general population of aliens in immigration proceedings. Moreover, even if the rule did have particular impacts on UAC, the Department finds that those impacts are far outweighed by the benefits provided the rule, namely more consistent application of the law, more efficient adjudication of cases, and a more appropriate emphasis on the importance of finality in immigration proceedings.

The Department further emphasizes that safeguards for UAC seeking asylum remain in place under provisions on motions to reopen that are premised on changed country conditions, *see INA 240(c)(7)(C)(ii)*, 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i). Further, nothing in the rule singles out UAC for adverse treatment, and available avenues for untimely motions to reopen—*e.g.*, joint motions and motions based on equitable tolling—continue to exist independent of the rule. The law does not guarantee UAC a right to *sua sponte* reopening, just as it does not guarantee any particular alien such a right for the reasons stated in this rule, and commenters did not point to any provision claiming such a right. For similar reasons, commenters' allegation that the generally applicable provision is specifically targeted at asylum-seekers, is without merit. The withdrawal of *sua sponte* authority applies to all cases and all parties, and it is well within the Attorney General's authority to withdraw a delegation of authority that he alone has provided.

Underlying many of the comments on this provision is a tacit claim that an alien who establishes eligibility for relief long after immigration proceedings have concluded—*e.g.*, aliens whose visa numbers become

current or who obtain the potential for derivative status—should be granted reopening *sua sponte* as a matter of right and that, accordingly, the rule will deprive such aliens of a "right" to reopen their cases and obtain relief from removal. This view, however, is unsupported by law in multiple ways and, thus, unpersuasive.

First, as discussed, *supra*, there is no right to reopening of a removal proceeding, and the Board may even deny a motion to reopen when the alien establishes a prima facie claim for relief. 8 CFR 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."). Second, as also discussed, *supra*, a motion to reopen *sua sponte* is an "oxymoron" and represents an improper filing that should ordinarily be rejected. Third, Board case law makes clear that untimely motions to reopen to pursue adjustment of status should ordinarily be denied, indicating that it ordinarily would not exercise *sua sponte* reopening authority in such situations either. *See Matter of Yauri*, 25 I&N Dec. 103, 105 (BIA 2009) ("We emphasize that untimely motions to reopen to pursue an application for adjustment of status, even for cases that do not involve an 'arriving alien,' do not fall within any of the statutory or regulatory exceptions to the time limits for motions to reopen before the Board and will ordinarily be denied." (emphasis added)); *cf. Vithlani v. Att'y Gen.*, 823 F. App'x 104, 105–06 (11th Cir. Aug. 10, 2020) ("The BIA denied the motion [to reopen based on asserted eligibility for adjustment of status], finding that it was untimely and number-barred, and that it did not demonstrate an exceptional situation warranting sua sponte reopening. The BIA later also denied her motion to reconsider, stating that becoming eligible for adjustment of status was not an exceptional situation warranting the grant of an untimely motion to reopen. In 2019, Vithlani . . . sought sua sponte reopening, again seeking to apply for adjustment of status. . . . The IJ denied Vithlani's motion to reopen . . . stat[ing] that becoming eligible to adjust status was not uncommon. . . . [and finding] that the motion did not demonstrate an exceptional situation to warrant sua sponte reopening.").

The Department emphasizes that, as stated throughout this final rule, the changes to Board procedures are intended to promote consistency and efficiency in proceedings. To the extent that commenters assert as a policy matter that the Board should retain *sua sponte* authority solely as a vehicle for aliens to file motions seeking to evade

the usual time and number limitations and possibly delay removal, *cf. Doherty*, 502 U.S. at 323 (“[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”), or that the Department should not seek to correct the inconsistent and potentially inappropriate usage of that authority, the Department finds such policy arguments unpersuasive for the reasons given in the NPRM and this final rule.

Further, commenters are incorrect that the respondents whom they alleged would be unable to reopen their cases if the BIA can no longer exercise *sua sponte* authority. As discussed in the NPRM, 85 FR at 52504–05 and *supra*, those respondents are not truly requesting that the BIA exercise *sua sponte* authority; in actuality, they seek a response to their filed motion. *See Salazar-Marroquin v. Barr*, 969 F.3d 814, 816 n.1 (7th Cir. 2020) (“Describing the motion as seeking a ‘*sua sponte*’ reopening is a common but unfortunate misnomer and even an oxymoron. Board action on a motion would not be *sua sponte*.”). Nothing in the rule prohibits the BIA from adjudicating motions to reopen filed by aliens in accordance with well-established principles of law.

Further, the Attorney General has already determined that *sua sponte* authority may not be used to circumvent timing and numerical limits. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Thus, to the extent that commenters assert *sua sponte* authority has been used to circumvent those limits previously, the BIA’s prior failure to follow the law in individual cases is not a compelling or persuasive reason to retain such authority. To the contrary, it would further reinforce the Department’s decision to remove the delegation of such authority. Additionally, contrary to commenters’ concerns, regulations at 8 CFR 1003.2(c)(3), 1003.23(b)(4)(iv), 214.11(d)(9)(ii), and 214.14(c)(5)(i)—in addition to the ability to file a joint motion to reopen, 8 CFR 1003.2(c)(3)(iii)—would continue to provide exceptions to the time and numerical limits in appropriate cases, and none of those are affected by this rulemaking. Similarly, the availability of equitable tolling in particular cases, which many commenters did not acknowledge, would also allow aliens the ability to evade strict adherence to statutory time limitations.

Other than highlighting its incorrect usage to evade time and number limitations contrary to *Matter of J-J-*, commenters did not explain how the withdrawal of *sua sponte* authority would affect any discrete populations,

particularly when those populations could not file a putative motion to reopen *sua sponte* in the first instance. As a delegation of procedural authority, *sua sponte* reopening authority does not apply differently to different types of cases; accordingly, its withdrawal will not affect any specific populations.

Finally, to the extent commenters alleged that the withdrawal of *sua sponte* authority would impact aliens with in absentia removal orders, the Department notes there is already no time limit on such motions if they are based on a lack of notice. INA 240(b)(5)(C)(ii), 8 U.S.C. 1229a(b)(5)(C)(ii). Thus, the withdrawal of *sua sponte* authority would not affect the ability of an alien to file a motion to reopen an in absentia removal order based on a lack of notice. Similarly, an alien who fails to appear due to exceptional circumstances may file a motion to reopen any resulting in absentia removal order within 180 days. INA 240(b)(5)(C)(i), 8 U.S.C. 1229a(b)(5)(C)(i). Commenters did not explain why an alien who failed to appear due to exceptional circumstances would wait longer than 180 days to file such a motion, and the Department declines to speculate as to such reasons. Nevertheless, the Department notes that even in that unlikely situation, an alien may seek to have the 180-day deadline equitably tolled. In short, the withdrawal of *sua sponte* reopening authority has no impact on existing and well-established avenues for aliens to reopen in absentia removal orders.

#### ii. Limited Current Use and Abuse of Authority

*Comment:* Commenters generally opposed the Department’s removal of *sua sponte* authority, stating that the Department did not provide any specific examples of abuse in the rule and that immigration judges or BIA members do not need much time to consider requests to reopen.

Commenters explained that immigration judges and BIA members currently use *sua sponte* authority sparingly and only for the most compelling cases. Accordingly, the commenter believes that the authority is neither abused by adjudicators nor evidence of finality issues as the rule suggested.

Commenters stated further that there was no reason to believe that adjudicators could not properly apply the appropriate standards for *sua sponte* reopening.

*Response:* As the Departments explained in the NPRM, use of *sua sponte* authority facilitates inconsistent

application and possible abuse, due to the lack of a meaningful standard to evaluate the use of *sua sponte* authority, *see* 85 FR at 52505 (collecting cases); the lack of a definition for “exceptional circumstances” required to exercise such authority; and, the problems resulting from a procedurally improper motion or request. Contrary to commenters’ assertions, the Department did provide examples of cases in which *sua sponte* authority appears to have been improperly used. *Id.* Considering all of those reasons together, the Department determined that use of *sua sponte* authority severely undermines finality in immigration proceedings, *see* 85 FR at 52493, in which there lies a strong public interest in bringing litigation to a close, consistent with providing a fair opportunity to the parties to develop and present their cases. *See Abudu*, 485 U.S. at 107.

*Comment:* Commenters alleged that immigration judges and the BIA “frequently have unfettered discretion in deciding when to order removal proceedings.” Accordingly, the commenters explained that removing *sua sponte* authority due to concerns of abuse of such authority was “laughable.”

The commenters further explained that removing such authority would exacerbate the backlog because BIA members would be unable to remand a case to further develop the facts, which another commenter asserted would conflict with Congress and the Attorney General’s trust in the BIA and immigration judges “to intervene in cases where fundamental fairness and the interests of justice so warrant.” Similarly, commenters alleged that the Department failed to explain in the rule why speed in this context was not favored, given that *sua sponte* action would be faster than waiting for a motion to reopen. Commenters explained that removing such authority would increase the number of appeals and the BIA’s workload.

*Response:* The Department does not have “unfettered discretion” in regard to removal proceedings. As an initial matter, EOIR’s jurisdiction in proceedings is bound by the INA and the regulations. *See, e.g.,* INA 240, 8 U.S.C. 1229a. Second, immigration judges exercise independent judgement and discretion in applying applicable law and regulations. *See* 8 CFR 1003.10(b), 1240.1(a). Likewise, BIA members resolve issues before them in a manner that is timely, impartial, and consistent with applicable law and regulations, in an exercise of their independent judgment and discretion. *See* 8 CFR 1003.1(d)(1) introductory

text, (d)(1)(ii). Nevertheless, the authority of immigration judges and Board members to reopen cases is circumscribed by law, and neither class of adjudicator possesses free-floating authority to reopen cases in contravention of established law or in the absence of clear legal authority.

The Department's decision to withdraw *sua sponte* authority would not exacerbate the backlog, and the Department finds this particular comment somewhat illogical. By definition, *sua sponte* authority to reopen a case would apply only to cases that are already administratively final and, thus, not part of the pending caseload. In fact, also by definition, the continued use of *sua sponte* authority would necessarily increase the pending caseload because it would allow the Board to reopen proceedings even in cases in which there was otherwise no legal basis to do so. Similarly, there is no basis to believe that withdrawing *sua sponte* reopening authority would increase the number of appeals to the Board because, again, that authority would only be used for a case that is already final and, thus, not subject to further appeal.

The commenter's concern about speed is also misplaced. The Department's withdrawal of *sua sponte* authority does not indicate that the Department favored speed in this context. Rather, the Department explained the multitude of reasons, considered together, that prompted its decision. *See generally* 85 FR at 52505–06. These reasons invoke concerns over finality and consistency, which are distinct from speed. Further, regardless of whether *sua sponte* reopening or a motion to reopen is “faster” to adjudicate in the abstract—a question for which the Department does not believe an appropriate metric exists—the need to manage the inappropriate and inconsistent use of *sua sponte* reopening authority would outweigh whatever marginal “speed” benefits may be obtained from its usage. In other words, the expediency of the usage of *sua sponte* authority does not outweigh the need to ensure its correct and consistent application.

### iii. Standard of Review

*Comment:* Commenters disagreed with the rule's assertion that Federal circuit courts had no meaningful standard of review with which to review an exercise of *sua sponte* authority. Rather, the commenters, citing *Lenis v. United States*, 525 F.3d 1291, 1292 (11th Cir. 2008), explained that the Federal circuit courts declined to review because they lacked jurisdiction.

Commenters nevertheless disagreed that the Department was unable to check inconsistencies or abuses that may result from the exercise of *sua sponte* because they asserted that the Attorney General could review BIA decisions regarding whether to exercise *sua sponte* authority instead.

*Response:* The Department agrees with the commenters that the court in *Lenis* declined to review for lack of jurisdiction; however, that court explained that it lacked such jurisdiction under 5 U.S.C. 701(a)(2), which prohibits judicial review of decisions “committed to agency discretion.” *Lenis*, 525 F.3d at 1293. The court explained this exception was extremely narrow, applicable only where “statutes are drawn in such broad terms that in a given case there is no law to apply.” *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). The court explained that:

[n]either the statute nor the regulation at issue today provides any “meaningful standard against which to judge the agency's exercise of discretion.” Indeed, no statute expressly authorizes the BIA to reopen cases *sua sponte*; rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context.

*Id.* Accordingly, that case supports the Department's position that no meaningful standard exists, which prompted, in part, the Department's decision to withdraw this authority.

Further, as discussed, *supra*, regarding the Board's certification authority, precedential decisions, including by the Attorney General, *e.g.*, *Matter of J-J-*, 21 I&N Dec. at 984, have been ineffective at checking inconsistent or abusive usages of *sua sponte* authority. Thus, the Department finds that further Attorney General review of such authority would not necessarily address the concerns regarding its use. Moreover, the current—and comparatively inefficient—case-by-case nature of determining “exceptional circumstances,” the inconsistent application of that standard and its consideration through an open-ended and largely subjective lens by Board members and immigration judges, and the lack of an effective and efficient corrective measure for addressing improper reopenings under that authority (*e.g.*, in response to a motion or to cure filing defects or circumvent regulations), all make the subject of *sua sponte* reopening authority both ripe for rulemaking and, ultimately, withdrawal

of such authority. *See Lopez v. Davis*, 531 U.S. 230, 244 (2001) (observing that “a single rulemaking proceeding” may allow an agency to more “fairly and efficiently” address an issue than would “case-by-case decisionmaking”); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) (“An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.”).

*Comment:* Commenters explained that, under *Ekimian v. INS*, 303 F.3d 1153, 1158 (9th Cir. 2002), *sua sponte* decisions are not reviewable simply as a result of their discretionary nature, which the commenter alleged was not a reasonable or sufficient justification to retract the authority since other discretionary matters were not so scrutinized.

*Response:* *Sua sponte* authority is distinct from other discretionary forms of relief. As aptly explained in *Lenis*, *sua sponte* authority is subject to an exception prohibiting judicial review, 5 U.S.C. 701(a)(2), because the statute from which it derives is “drawn in such broad terms that in a given case there is no law to apply.” 525 F.3d at 1293 (quoting *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 410). Other forms of discretionary relief, such as asylum, do not meet this exception. Accordingly, the commenters' comparison of *sua sponte* authority to any other discretionary form of relief is incorrect; moreover, the Department did not justify withdrawing *sua sponte* authority based solely on its discretionary nature, though that nature has contributed to inconsistent application.

*Comment:* Commenters explained that the Department's citations to circuit court decisions upholding the denial of a request for *sua sponte* reopening does not support the Department's concern that the *sua sponte* authority is being abused; instead, the commenters contend that those cases demonstrate that immigration judges and the BIA are applying the BIA's precedents limiting the use of that authority to truly exceptional situations. Commenters further explained that courts have only limited jurisdiction to review the BIA's decision not to use its *sua sponte* authority to reopen a case based on legal or constitutional errors. Accordingly, the commenters asserted that the BIA's decision on *sua sponte* authority is generally final and thus does not contribute to inefficiencies in the immigration courts or the BIA.

*Response:* The Department's reference to circuit court decisions in the NPRM, 85 FR at 52505, was not meant to

demonstrate abuse of the authority. Instead, the Department collected cases to underscore the fact that, generally, “no meaningful standards exist to evaluate the BIA’s decision not to reopen or reconsider a case based on *sua sponte* authority.” *Id.* Moreover, commenters did not acknowledge that DHS lacks authority to appeal BIA decisions to Federal court; accordingly, there necessarily will be few circuit court decisions holding that the BIA abused its *sua sponte* authority in reopening a case in which reopening inured to the benefit of the alien.<sup>53</sup>

Commenters are correct that some courts have held that there is jurisdiction to review the BIA’s denial of a motion to reopen *sua sponte* for constitutional or legal error. However, the Department’s finality and consistency concerns still stand—absent the rule, *sua sponte* authority may still be exercised by either immigration judges or the BIA in an inconsistent or inappropriate manner, which undermines the importance of decisional finality. Moreover, the acknowledged lack of meaningful standards invites inconsistent application which is at odds with both decisional finality and principle of treating similar cases in a similar manner. Given all of these issues and understanding commenters’ concerns, the Department maintains that withdrawing *sua sponte* authority, on balance, represents an appropriate course of action.

#### iv. Obligations Under International and Domestic Law and Treaties

*Comment:* Various commenters stated that removing *sua sponte* authority violated the United States’ obligations under international law, specifically the American Declaration, to “protect and preserve the rights of individuals (both U.S. citizens and noncitizens) to establish a family.” Commenters explained that “refugee law” provides for a “‘refugee sur place,’ meaning that something has changed to create a fear

of return to the country of origin.” Commenters stated that *sua sponte* authority allowed for reopening such cases and other related circumstances. Commenters explained that *sua sponte* authority facilitates compliance with the UN Protocol and Convention Relating to the Status of Refugees, the UN Convention Against Torture (CAT), and the TVPRA because adjudicators may reopen cases in which newly discovered or previously unavailable material evidence relevant to a persecution claim is discovered more than 90 days after a decision becomes administratively final. Accordingly, the commenters alleged that refolement would increasingly occur. Commenters also explained that removing *sua sponte* authority conflicted with UNHCR guidelines that provide that an applicant should “not be prohibited from presented new evidence at the appeals stage.” Commenters reasoned that *sua sponte* authority may be an alien’s only way to present new evidence on appeal, thus, removal of such authority would conflict with the UNHCR guidelines.

*Response:* As an initial point, as discussed, *supra*, an alien has no right to file a “motion to reopen *sua sponte*,” and such a motion is an “oxymoron.” See *Malukas*, 940 F.3d at 970. To the extent that commenters assert that the withdrawal of *sua sponte* authority infringes upon such a right, they are simply mistaken as a matter of law. Further, no domestic law or international convention enshrines a right to *sua sponte* reopening, and the withdrawal of such authority, which exists solely through a delegation from the Attorney General, does not contravene any binding body of law.

Further, because the rule does not foreclose other mechanisms that may be used as exceptions to time and number limits, as discussed, *supra*, withdrawal of *sua sponte* authority does not constitute denial of protection for particular populations, nor does it contradict the United States’ obligations under international and domestic law and various treaties. The United States continues to fulfill its obligations under international and domestic law, including the 1967 Protocol, the CAT, the TVPRA, and any other applicable treaties. This rulemaking does not violate those obligations. Moreover, this rule does not affect the ability of aliens to file a motion to reopen to apply for asylum or statutory withholding of removal based on changed country conditions and supported with new, material evidence. INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii). Further, the Department continues to provide all aliens, including refugees and children,

a meaningful opportunity to resolve their claims, in accordance with applicable law, regulations, and obligations under international law. In short, this rule does nothing to restrict an alien’s ability to seek asylum, statutory withholding of removal, or other protections as permitted by statute and regulation.

#### v. Alternatives to *Sua Sponte* Authority

*Comment:* Commenters disagreed with the rule’s assertion that a joint motion to reopen was a viable alternative to *sua sponte* authority because, as commenters explained, DHS and immigrants are “rarely in agreement” in regard to motions to reopen. The commenters explained that the joint motion process places ultimate authority to reopen or reconsider a case on DHS, which is not the case with *sua sponte* requests; thus, the joint motion was not an equitable alternative.

Commenters explained that removing *sua sponte* reopening while at the same time removing the BIA’s ability to remand a case for consideration of new evidence presented by the respondent, instead instructing the respondent to file a motion to reopen, was particularly “harsh.” Further, commenters averred that the Department could not claim there were “sufficient avenues available” to present claims for relief when the Department had both restricted the BIA’s ability to remand a case and had eliminated *sua sponte* reopening.

Commenters explained that although the rule mentions the ability to toll the time and number limitations on motions to reopen, equitable tolling and the Department’s procedures for motions to reopen are difficult for lawyers, much less pro se parties, to understand. Accordingly, commenters claimed that equitable tolling and motions to reopen were not viable avenues for relief.

Commenters suggested that instead of removing *sua sponte* authority, the Department should define “exceptional circumstances.” The commenters explained that this would preserve the flexibility associated with *sua sponte* action while also providing the circuit courts with a meaningful standard of review to review *sua sponte* reopening or reconsideration. Commenters explained that although exercising *sua sponte* authority should be rare, it was “worthy of consideration,” especially in cases where DHS does not oppose the motion to reopen. Commenters suggested that the BIA and the immigration judges could reject “improper invitations” to invoke *sua sponte* authority, rather than remove the authority altogether. One commenter

<sup>53</sup> Consistent with the general tenor of comments focusing only on the rule’s alleged impact on aliens, commenters also failed to acknowledge that the Board has exercised *sua sponte* authority in response to motions filed by DHS. See, e.g., *Chehazeh v. Att’y Gen.*, 666 F.3d 118, 124 (3d Cir. 2012). In such circumstances at least one circuit court has questioned whether the Board’s decision to exercise *sua sponte* authority was an abuse of that authority. *Id.* at 140 (“The BIA has plainly stated that its *sua sponte* authority is not designed to ‘circumvent the regulations.’ *Matter of J-J-*, 21 I&N Dec. at 984. That authority may, of course, have the effect of circumventing the regulations when an exceptional situation calls for it, but wherever the line between an unexceptional situation and an exceptional situation lies, we wonder whether—on this record—this case is near it.”).

explained that the rule's failure to consider these alternatives renders the rule arbitrary and capricious in violation of the APA.

*Response:* The Department maintains that the rule does not disturb various viable alternatives to *sua sponte* authority. Indeed, the Department reiterates that respondents have no right to an adjudicator's *sua sponte* exercise of authority and that a motion to reopen *sua sponte* is an "oxymoron." See *Malukas*, 940 F.3d at 970. Although the contours of such alternatives may differ to some extent from *sua sponte* authority, the alternatives noted remain viable alternatives for aliens, both with and without representation. 85 FR at 52505–06. Aliens may seek a motion to reopen under well-established statutory and regulatory procedures, including to submit a new application for relief or protection. They may seek a joint motion with DHS. They may seek equitable tolling of time limitations, as appropriate, based on case law. The rule itself codifies new exceptions to time and number limitations for motions to reopen. 8 CFR 1003.1(c)(3)(v). Thus, there remain multiple, significant avenues for an alien to have his or her case reopened as appropriate.

Regarding commenters' assertion that removing *sua sponte* reopening while at the same time removing the BIA's ability to remand a case for consideration of new evidence presented by the respondent, instead instructing the respondent to file a motion to reopen, was particularly "harsh," the Department again reiterates both that an alien has no right to *sua sponte* reopening and that the concept of a motion to reopen *sua sponte* is an oxymoron. Thus, the withdrawal of the delegation of the BIA's *sua sponte* reopening authority is not "harsh"—regardless of any other changes—because there is no right to the exercise of such authority in the first instance. Moreover, as discussed, *supra*, multiple avenues remain for an alien to have his or her case reopened as appropriate. Further, an alien who wished to submit additional evidence during the pendency of an appeal would presumably be able to submit that evidence with a motion to reopen within the applicable time period for such a motion and, thus, would have no need to avail himself of the BIA's *sua sponte* authority. In short, the Department disagrees with commenters that it changes are "harsh" and further notes that any alleged "harshness" is outweighed by the benefits provided by the rule discussed herein.

The rule does not affect the alien's ability to argue for equitable tolling of

a time limit or to seek a joint motion with DHS. The alleged difficulty of arguments for equitable tolling is belied by the frequency with which it has been argued before the BIA and Federal courts, and every Federal court to have considered the issue has found it to be applicable to deadlines for motions to reopen. See, e.g., *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam) (collecting cases). Furthermore, one commenter's suggestion that *sua sponte* authority should be used when DHS does not oppose a motion to reopen—though, as noted, *supra*, *sua sponte* authority is not exercised in response to a motion—actually suggests that a joint motion with DHS would be a viable alternative, at least in the case identified by the commenter.

The Department also considered the alternatives advanced by commenters. As discussed elsewhere, a standard for "exceptional circumstances" has existed since 1997, *Matter of J-J*, 21 I&N Dec. at 984, but that standard has not prevented inconsistent or improper usage of *sua sponte* authority. Thus, the Department does not believe that further elaboration of that standard would address the concern. Because *sua sponte* authority is not properly exercised in response to a motion or "invitation," 85 FR at 52504–05, the Department does not see how limiting the use of such authority to only "proper" invitations would be appropriate, even if it could devise a workable and consistently applied distinction between "proper" and "improper" invitations. Similarly, situations in which DHS does not oppose a motion to reopen are not appropriate for the exercise of *sua sponte* authority because such authority is not exercised in response to a motion. *Id.* Rather, such situations appear amenable to a joint motion which the rule does not alter. 8 CFR 1003.2(c)(3)(iii). In short, the Department has considered commenters' concerns about the available alternatives to the exercise of *sua sponte* authority, but finds them unpersuasive or legally inapposite for the reasons given.

Finally, to the extent that commenters' concerns are based on a belief that *sua sponte* authority should be retained because it allows aliens to file motions to reopen *sua sponte* in order to circumvent time and number bars to motions to reopen, the Department reiterates that the exercise of *sua sponte* authority is not proper in response to a motion and that its use to circumvent regulatory or statutory deadlines contravenes established case law and, accordingly, supports the

Department's decision to withdraw that authority.

#### vi. Other Concerns

*Comment:* Commenters alleged that although the Department addressed the use of *sua sponte* authority in precedential decisions, the Department failed to address whether the BIA's use of *sua sponte* authority in non-precedential decisions forms the vast majority of its docket. The commenters claimed that EOIR was in the "better position" to address this issue but that it failed to analyze the issue.

*Response:* The extent to which *sua sponte* authority is used in non-precedential decisions did not and would not affect the Department's conclusion that such authority is no longer appropriate. As described in the NPRM, the Department withdrew *sua sponte* authority for several reasons: "the exceptional nature of a situation required to invoke *sua sponte* authority in the first instance, the general lack of use of genuine *sua sponte* authority since 2002, and the availability of multiple other avenues to reopen or reconsider cases and to alleviate the hardships imposed by time and number deadlines." 85 FR at 52506. Although the Department noted the extremely limited use of *sua sponte* authority in precedential decisions, the Department did not withdraw *sua sponte* authority based on that consideration alone. The Department's conclusion, was multi-faceted, and regardless of the nature of cases in which *sua sponte* authority is exercised, the Department has determined that it is appropriate to withdraw *sua sponte* authority because, *inter alia*, there are multiple viable alternatives for both parties, its use undermines efficiency by encouraging improper motions, and its potentially inconsistent and borderline *ad hoc* usage is both inappropriate and inefficient to the extent that it is used to reopen cases contrary to law.

*Comment:* Without further explanation, one commenter alleged that removing *sua sponte* authority would violate principles of "equal protection under the law for all." Also without further explanation, a commenter stated that limiting *sua sponte* motions to reopen would continue the family separation policy. One commenter disagreed with the rule, stating that its fixation on the phrase *sua sponte* "converts an important issue of fairness and justice into a debate over semantics." Commenters explained that removing *sua sponte* authority violated the APA because Congress did not enact limits on such authority, thereby

infringing on congressional authority to create laws.

*Response:* The Department disagrees with commenters that these provisions generally violate equal protection. The Department continues to equally apply applicable law and regulations to all aliens in proceedings before the agency. In addition, the Department rejects allegations, which contained no further explanation, that the rule furthers any family separation “policy.” To the extent the commenter was referring to the prosecution of criminal aliens along the southwest border in late spring 2018 which involved the separation of alien criminal defendants from their families while those defendants were being prosecuted—consistent with the treatment of most criminal defendants subject to arrest in the United States—there is no identifiable linkage between this rule and that situation.

As previously explained, *sua sponte* authority is a product of regulation; Congress has not statutorily established this authority. Accordingly, withdrawing this authority does not violate the APA or infringe on congressional authority. To the contrary, preventing the Attorney General from withdrawing authority that is his alone to delegate in the first instance would infringe upon his statutory authority. INA 103(g), 8 U.S.C. 1103(g). Further, courts afford broad deference to an agency’s policy changes. “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motor Cars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomm. Assn. v. Brand X internet Services*, 545 U.S. 967, 981–982 (2005)). The Department provided an extensive discussion in the NPRM, supplemented by this final rule, to explain its reasoning for withdrawing *sua sponte* authority. 85 FR at 52504–06. This discussion did not “fixate” on semantics or any one reason to justify withdrawing *sua sponte* authority. Rather, the Department provided a fulsome discussion, supplemented by this final rule, of the many reasons that, considered together, prompted withdrawal of *sua sponte* authority.<sup>54</sup>

<sup>54</sup> The text of 8 CFR 1003.2(a) in the NPRM inadvertently removed the phrase “or reconsider” from the first sentence of that paragraph. This final rule reinstates that phrase to ensure that parties and the BIA are clear that the Board can reconsider a decision *sua sponte* in order to correct a typographical error or defect in service.

I. DHS Motions To Reopen Time and Number Limitations (8 CFR 1003.2(c)(3)(vii))

*Comment:* Commenters expressed concern that the NPRM’s proposed changes regarding the time and number limitation for DHS motions to reopen before the BIA are unfair and would create different rules for the government and for aliens in proceedings, noting that both aliens and the government at times have good cause to file motions to reopen that exceed the normal time and number limitations. Commenters were concerned that the change would give DHS favorable or preferential treatment. Commenters noted that allowing DHS to file motions to reopen without regard to any time or number limitations would prevent aliens who have been in proceedings from ever feeling confident that the decision in their case is final. At least one commenter stated the Department should restrict DHS’s ability to file motions to reopen before the BIA and create parity between the parties rather than have the same unequal procedures before both the immigration courts and the BIA.

*Response:* In 1996, Congress amended the INA and provided specific restrictions regarding motions to reopen filed by aliens in proceedings. See INA 240(c)(7), 8 U.S.C. 1229a(c)(7). The INA restricts aliens to file one motion to reopen proceedings within 90 days of the date of the entry of a final order of removal, subject to time and number exceptions based on lack of notice and when the motion to reopen is premised on changed country conditions in support of an application for asylum. *Id.* Notably, however, Congress did not provide any similar restriction on motions to reopen filed by the government. Accordingly, the Department previously removed the time and number limitation on motions to reopen filed by the government as part of the regulatory changes implemented following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Public Law 104–208, Sept. 30, 1996, 108 Stat. 1796. See *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 10312, 10321 (Mar. 6, 1997) (explaining, in response to public comments that the same limitations on motions to reopen should apply to all parties, that “IIRIRA specifically mandates that ‘[a]n alien may only file one motion to reopen’ in removal proceedings. Congress has imposed limits on motions to reopen, where none existed by statute before,

and specifically imposed those limits on the alien only.”).<sup>55</sup>

Here, the rule’s amendment to 8 CFR 1003.2(c)(3)(vii) regarding motions to reopen filed by DHS similarly aligns the BIA’s regulations with the INA’s limitation only on alien-filed motions to reopen. By ensuring that EOIR’s regulations provide clarity for the public regarding the requirements and restrictions set out by Congress in the INA, commenters are incorrect that the Department is providing DHS with any favorable or preferential treatment.

To the extent that commenters are concerned that aliens will be unable to have confidence that their cases will be subject to an infinite number of motions to reopen for an indefinite amount of time, the Department first emphasizes that any motion to reopen filed by DHS is not automatically granted by the BIA. Instead, like all motions to reopen, DHS must “state the new facts that will be proven at a hearing to be held if the motion is granted,” support the motion with “affidavits or other evidentiary material,” and demonstrate that the “evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.” 8 CFR 1003.2(c)(1). As with all motions and appeals, the BIA considers the merits of each motion to reopen individually. Moreover, DHS has possessed the authority to file motions to reopen at the immigration court level without being subject to the general time and number bars since 1997, and there is no evidence that it has engaged in a practice of filing infinite motions over an indefinite period. Accordingly, the Department finds that commenters’ concerns are overstated, if not wholly unfounded, in light of the applicable regulatory requirements and DHS’s practice before the immigration courts.

Finally, apart from being statutorily atextual and ahistorical regarding DHS practice, commenters’ suggestion that the rule provides DHS with preferable treatment fails to acknowledge the various exceptions to time and number limitations afforded motions to reopen filed by aliens. First, there is not a limitation when the motion to reopen is

<sup>55</sup> Notably, although the regulatory changes in 1997 only explicitly codified the exception to the time and number limitations filed by the government in removal proceedings before the immigration court, commenters at the time understood the changes to apply to motions to reopen filed by the government before the BIA and the immigration courts. See 62 FR at 10321 (“A number of commenters pointed out that §§ 3.2(d) and 3.23(b) subject all parties to time and numerical limits for motions to reopen in deportation and exclusion proceedings, but apply those limits only to aliens in removal proceedings.”).

for the purpose of applying or reapplying for asylum or withholding of removal based on changed country conditions “if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.” 8 CFR 1003.2(c)(3)(ii). Second, as discussed, *supra*, aliens may rely on equitable tolling in certain circumstances to avoid a strict application of the time deadlines for motions to reopen. Third, the rule itself provides a new avenue for aliens to file a motion to reopen when a “material change in fact or law . . . vitiates all grounds of removability applicable to the alien.” 8 CFR 1003.2(c)(3)(v). In short, the rule retains significant options for aliens to file motions to reopen which offset the unsupported allegations of allegedly favorable treatment, even if such treatment were not rooted in statutory text.

m. Briefing Schedule Changes (8 CFR 1003.3(c))

i. General Concerns

*Comment:* Commenters raised concerns with the rule’s changes to the briefing schedule process, claiming that the changes favor speed over fairness and that the limited time savings does not sufficiently outweigh the disadvantages to the parties.

*Response:* The Department expects the Board to adjudicate cases fairly and efficiently, 8 CFR 1003.1(d)(1) (noting that Board members will resolve cases in both a “timely” and “impartial” manner (emphasis added)), and does not view “speed” and “fairness” as mutually exclusive objectives. Consequently, the rule not favor one goal over the other, and commenters’ suggestion amounts to a false dichotomy that cases cannot be handled both fairly and efficiently.

As explained in the NPRM, due to the growing BIA caseload, the Department finds it necessary to implement these briefing schedule reforms to ensure that appeals are adjudicated in a timely manner. 85 FR at 52492–93. In doing so, the Department disagrees with commenters’ unsubstantiated alleged potential difficulties caused by the briefing schedule changes outweigh the benefits of more prompt adjudication. Further discussion of commenters concerns with specific briefing-related changes follows below.

ii. Simultaneous Briefing

*Comment:* Regarding the rule’s change to require simultaneous briefing in all cases, commenters noted that almost every appellate adjudication system in

the United States uses sequential briefing in order to allow the parties to respond to each other’s arguments. By contrast, commenters claimed that under this rule, the non-appealing party will not receive sufficient notice of which arguments to focus on in their brief, as the appealing party may include multiple issues in the Notice of Appeal but only brief a few of those issues. Commenters allege that this will result in briefs with cursory coverage of every topic rather than focused arguments on the few key issues raised in the appellant’s brief. Commenters stated this would be particularly problematic in cases with difficult legal issues, such as unaccompanied children or gender-based asylum claims. Commenters also claimed that simultaneous briefing would require the BIA to expend additional effort in reviewing the appeal record, as the parties would no longer be vetting each other’s arguments through sequential briefing and instead may focus on different issues. Commenters further argued that non-detained cases have larger administrative records due to non-detained persons generally having greater relief eligibility and do not invoke the same liberty interests as detained cases, which makes simultaneous briefings less appropriate. Commenters also noted that briefing every potential issue would also inevitably conflict with the BIA’s page limit requirements.<sup>56</sup> As a result, one commenter recommended changing all briefing, including detained cases, to non-simultaneous sequential briefing.

*Response:* Commenters generally failed to engage the specific reasons put forth by the Department—both in the NPRM and previously when it proposed simultaneous briefing in 2002, 85 FR at 52498–99—for adopting simultaneous briefing in all cases or to acknowledge that a change to simultaneous briefing falls principally on DHS because the vast majority of Board appeals are filed by respondents whose initial brief timing as an appellant is unchanged by this rule.<sup>57</sup> To the extent that

<sup>56</sup> See *BIA Practice Manual* at Ch. 3.3(c)(iii) (limiting briefs to 25 pages absent a motion to increase the page limit).

<sup>57</sup> In FY 2019, respondents filed 50,129 appeals from immigration judge decisions, compared to 5,636 appeals filed by DHS and 116 cases in which both parties filed an appeal. Preliminary data from FY 2020 paints a similar picture: Respondents filed 45,117 appeals from immigration judge decisions, compared to 5,965 appeals filed by DHS and 117 cases in which both parties filed an appeal. Because the appellant filed the initial brief under the prior regulation, in approximately 90 percent of appeals in FY 2019 and approximately 88 percent of appeals in FY 2020, the change to simultaneous briefing would have had no impact on the timing of the brief filed by a respondent.

commenters simply disagree as a policy matter that Board cases should be completed in a timely manner, see 8 CFR 1003.1(d); *cf. Doherty*, 502 U.S. at 323 (“as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States”), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and this final rule.

The BIA has used simultaneous briefing for detained appeals for nearly 20 years,<sup>58</sup> with no apparent issues for the parties or the BIA.<sup>59</sup> Conforming non-detained appeals to the same simultaneous briefing schedules will provide consistency across all appeals while helping to more efficiently process the growing appeals caseload. As such, the Department disagrees with commenters requesting that all appeal move to non-simultaneous briefing.

Commenters’ suggestion that the non-appealing party will not receive sufficient notice of which arguments to focus on in their brief because the appealing party may include multiple issues in the Notice of Appeal but only brief a few of those issues is both conjectural and illogical, as party who fails to raise an issue in a brief risks having that issue deemed waived. Thus, the Department would expect that all issues raised in the Notice of Appeal will be briefed.

The Department also disagrees with commenters that the non-appealing party will have difficulty drafting a simultaneous brief without first having the appealing party’s brief to review. To reiterate, this system already occurs in the context of appeals of detained cases, and commenters did not explain why that system has not experienced the problems alleged to necessarily result

<sup>58</sup> 67 FR 54878.

<sup>59</sup> In an analogous situation, EOIR’s Office of the Chief Administrative Hearing Officer (OCAHO) also utilizes a simultaneous 21-day briefing schedule for cases reviewed by the CAHO following the decision of an administrative law judge. 28 CFR 68.54(b)(1) (“In any case in which administrative review has been requested or ordered pursuant to paragraph (a) of this section, the parties may file briefs or other written statements within twenty-one (21) days of the date of entry of the Administrative Law Judge’s order.”). OCAHO cases under the provisions of INA 274A and 274C, 8 U.S.C. 1324a and 1324c, involve violations of worksite enforcement laws, including violations related to completion of Form I-9, and document fraud, and they are just as complex or involved as cases in immigration court, if not more so. Yet, the Department is unaware of any challenge to OCAHO’s simultaneous 21-day briefing schedule for administrative reviews or any reason why it is not an appropriate model or analogy for such a schedule before the BIA.



from utilizing the same system for non-detained cases on appeal. Further, as explained in the NPRM, the appealing party must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any accompanying attachments. 8 CFR 1003.3(b). In doing so, the appealing party must already comply with the following well-established requirements which are unaltered by the final rule:

- The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR–26 or Form EOIR–29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i).
- The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged.
- If a question of law is presented, supporting authority must be cited.
- If the dispute is over the findings of fact, the specific facts contested must be identified.
- Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged.

*Id.*

Commenters did not generally address why this information, which should already be contained in the Notice of Appeal, is insufficient to apprise the opposing party of the issues on appeal.<sup>60</sup> See also *BIA Practice Manual* at Ch. 4.4(b)(iv)(D) (“The statement of appeal is not limited to the space on the form but may be continued on additional sheets of paper . . . Parties are advised that vague generalities, generic recitations of the law, and general assertions of Immigration Judge error are unlikely to apprise the Board of the reasons for appeal.”). As a result, the Department believes these statements provide the non-appealing party with ample information to draft a simultaneous brief in non-detained cases, just as it has in detained cases for many years.

Finally, the Department also has no concerns that appellees will be unable to follow the page limit requirements for briefs, and such concerns are unsupported by any evidence and wholly speculative. Moreover, increases are available by motion at the BIA’s

<sup>60</sup> Commenters did not challenge 8 CFR 1003.3(b), which has been in effect for many years, or suggest that its requirements were inappropriate. To the extent that commenters assert that parties do not comply with this regulatory requirement, such regulatory noncompliance is not a persuasive basis to adopt commenters’ objections. The Department expects both parties to comply with all regulatory requirements regarding appeals adjudicated at the Board.

discretion. See *BIA Practice Manual* at Ch. 3.3(c)(iii).

### iii. Briefing Extensions

*Comment:* Commenters were also concerned about the shortened timeframe for briefing extensions, explaining that by the time a filer receives a response as to whether or not the extension is granted, the 14 days would be nearly expired. Moreover, commenters were concerned with limiting the briefing extension to a single 14-day period, noting that there may be issues that prevent filing within the 14-day extension period, including serious medical issues or a death in the family.

Commenters were also concerned that the shortened briefing extension timeframe would lead to less legal representation before the BIA. Commenters stated that if newly retained counsel, including pro bono counsel, cannot receive a reasonable extension to review the record and prepare a brief, it is unlikely the counsel would accept representation in order to prevent the possibility of providing ineffective representation. As a result, commenters were concerned that this rule would make pursuing appeals even more difficult for pro se respondents.

One commenter stated that requiring the BIA to make individualized good cause determinations for briefing extensions would create a significant burden for the BIA.

Commenters also raised issues with the NPRM’s reference to preventing “gamesmanship” as a reason to shorten the briefing extension time period, stating that the Department did not provide support for this claim.

Commenters claimed that the shortened briefing schedule changes would also create institutional bias against women, such as due to timing issues surrounding child birth and child care responsibilities.

Another commenter stated that shortening the briefing extension period during the COVID–19 pandemic was improper.

*Response:* As an initial matter, the Department notes that underlying most commenter objections was a tacit suggestion that there is an entitlement to briefing extensions and that they should be granted by the Board as a matter of right. That view is incorrect. Briefing extensions are generally disfavored, as parties, including newly retained counsel, should be completing their briefs in the original allotted time, particularly in cases where the briefing period only begins once transcripts are complete. See *BIA Practice Manual* at Ch. 4.7(c)(i), (“In the interest of fairness

and the efficient use of administrative resources, extension requests are not favored.”). Further, there is no entitlement to a briefing extension, and to the extent that commenters opposed the NPRM because they believe parties have a right to an extension—*e.g.*, for newly retained counsel—they are mistaken. *Id.* at ch. 4.7(c) (“The Board has the authority to set briefing deadlines and to extend them. The filing of an extension request does not automatically extend the filing deadline, nor can the filing party assume that a request will be granted. Until such time as the Board affirmatively grants an extension request, the existing deadline stands.”).

Additionally, few commenters acknowledged that notwithstanding the existing language of 8 CFR 1003.3(c)(1), the Board’s longstanding policy has been to limit briefing extensions to 21 days. *BIA Practice Manual* at Ch. 4.7(c)(i). Nor did commenters generally acknowledge that the Board already possesses the authority to shorten the overall briefing period to less than 21 days. 8 CFR 1003.3(c)(1). Consequently, the final rule merely codifies timelines that the Board itself could choose to adopt, and commenters did not persuasively explain why it would be preferable for the Board to adopt those changes through policy or case-by-case adjudication rather than through rulemaking. See *Lopez*, 531 U.S. at 244 (observing that “a single rulemaking proceeding” may allow an agency to more “fairly and efficiently” address an issue than would “case-by-case decisionmaking”); *Marin-Rodriguez*, 612 F.3d at 593 (“An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.”).

To the extent that commenters assert as a policy matter that the Board should always grant a briefing extension for a maximum amount of time because such extensions inherently delay adjudication in the case to the benefit of aliens, *cf. Doherty*, 502 U.S. at 323 (“as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States”), or that the Department should not take measures, consistent with due process, to ensure the timely completion of cases, the Department finds such policy disagreements unpersuasive for the reasons given in the NPRM and this final rule. Moreover, few, if any, commenters acknowledged that this rule applies equally to DHS, which will also have to comply with the timelines, or that this rule will benefit aliens with meritorious claims for relief

or protection by allowing them to receive a decision sooner. To the extent that commenters did not fully assess the implication of the rule—and, thus, provided comments without a complete foundation—the Department finds those comments unpersuasive.

The briefing extension time period in this rule is sufficient for parties to file their briefs, and commenters have not persuasively explained why a total of up to 35 days is an insufficient amount of time to file a brief. Moreover, few commenters acknowledged that the BIA can ask for supplemental briefing if it finds that the briefs submitted are inadequate, which allows an additional opportunity for parties to submit arguments if the BIA believes such additional argument is necessary. The Board, rather than the parties, is ultimately in the best position to determine whether briefing is sufficient in a particular case, and this rule does not restrict the Board's ability to request supplemental briefing if it believes such briefing is helpful. 8 CFR 1003.3(c)(1). In short, the procedures and time provided by this rule are sufficient to ensure that the Board receives appropriate information through briefing in order to aid its adjudication. Further, as noted in the NPRM, 85 FR at 52498–99, the parties need not wait until a briefing schedule is actually issued to begin drafting the brief, and they can use any extension to complete the brief, as appropriate.

The Departments disagree with commenters' supposition that shortened briefing extension time periods will lead to less representation at the BIA. As an initial point, commenters did not explain why a respondent would wait until a briefing schedule has been issued or a brief is due before retaining representation. The Department expects that most aliens whose cases are on appeal will obtain representation as quickly as possible, especially in the cases in which the respondent files the Notice of Appeal. Commenters did not explain what incentive an alien would have to wait until an appeal has been pending for a notable length of time before engaging representation, and the Department is aware of none. Moreover, in any litigation, newly retained counsel takes a client as he or she finds him, and as discussed above, there is no entitlement to a briefing extension in any circumstance, even for newly retained counsel. Consequently, the same concerns advanced by commenters already exist under the present system—*i.e.*, a new representative may be unsuccessful at obtaining an extension

of the briefing schedule—and are unaltered by the rule.<sup>61</sup>

Further, the Department's BIA Pro Bono Project is not tied to the issuance of a briefing schedule. The Department reviews cases for referral through that Project upon the filing of a Notice of Appeal, not upon the issuance of a briefing schedule. Moreover, under current practice, pro bono volunteers who accept a case typically receive a copy of the alien's file before a briefing schedule is issued and, like all representatives, may request an extension if appropriate. Consequently, there is no evidence that shortening the length of a briefing extension, which is already a disfavored practice and not guaranteed to any representative, will have any negative impact on representation before the BIA, particularly pro bono representation.

Regarding commenters' concerns with requiring the BIA to make individualized good cause determinations for briefing extensions, commenters are incorrect that this requirement will significantly burden the BIA. Indeed, such good cause determinations are already incorporated into the regulations, 8 CFR 1003.3(c)(1), and, thus, also into the current BIA practice. Accordingly, the final rule does alter the need for the Board to find good cause in order to grant a briefing extension.

With regards to “gamesmanship,” the Department notes that the shortened briefing extension period may help to reduce any possible future gamesmanship attributable to last-minute extension requests in two respects. First, in the Board's experience, it is not uncommon to receive a briefing extension request filed just before or on the date a brief is due, suggesting that many extension requests are merely last-minute delay tactics rather than genuine representations of unforeseen circumstances preventing adherence to the original schedule. Second, such last-minute requests often occur after the opposing party has already served its brief, as a party submitting a brief by mail will often do so several days in advance of the deadline to ensure that it is timely received. In such situations, if the extension request is granted, the party who sought the extension would then

<sup>61</sup> The Department reiterates that approximately 86 percent of aliens are represented upon appeal under the existing system which is largely codified in this rule. EOIR, *Adjudication Statistics: Current Representation Rates*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1062991/download>. Thus, there is even less basis to assert that this rule will increase the number of pro se cases before the Board.

have at least a full 21 days to review the opposing party's brief and tailor its arguments accordingly in filing an initial brief.

The Department acknowledges that eliminating briefing extensions altogether would also eliminate these risks of dilatory tactics and gamesmanship. However, after considering that alternative, the Department does not believe it is necessary at the present time. Although the final rule will not end either dilatory tactics or gamesmanship, shortening the period for a briefing extension will reduce both the incentive to engage in such tactics and the impact on both the BIA's efficiency and the opposing party when such tactics are employed.<sup>62</sup>

In response to comments about COVID–19, the Department recognizes the challenges caused by the pandemic. However, those challenges are largely inapplicable to the BIA which has maintained generally regular operations during the COVID–19 outbreak because it typically receives briefs by mail or expedited courier service, and it began accepting briefs by email during the pandemic until after it was cleared to enter Phase Two of the Department's plan for returning to normal operations.<sup>63</sup> Moreover, the BIA is scheduled to adopt ECAS in early 2021. Consequently, these challenges do not warrant maintaining the regulatory maximum length for a briefing extension, particularly since the BIA has shortened that length already by policy—which has remained in effect during the COVID–19 outbreak—with no noted adverse effects or challenges.

Lastly, in response to one commenter, the briefing extension changes do not and are not intended to reflect any bias or adverse treatment toward women. To the extent that the commenter suggests that women are incapable of addressing both childbirth or childcare<sup>64</sup> concerns and professional obligations as a representative, the Department categorically rejects such a suggestion.

<sup>62</sup> Although the Department is aware of anecdotal examples of gamesmanship and dilatory tactics occurring, it did not state that such activity occurs in every case. Rather, one of the principles animating this provision of the rule, as well as the provision related to simultaneous briefing, is to ensure that the risk of such activity occurring is reduced and, concomitantly, ensuring that the BIA's regulations provide for as efficient and orderly an appeals system as possible. 85 FR at 52498.

<sup>63</sup> The BIA holds oral argument infrequently and has not held any oral argument sessions since before March 2020.

<sup>64</sup> The Department notes, contrary to the commenter's suggestion, that men may also have childcare responsibilities. Nevertheless, the rule imposes no burden on any caregiver any greater than that which already exists for any representative caring for another individual.

Female attorneys routinely practice before the Board without any particular difficulties—as they do before all types of courts and administrative agencies. Nothing in the rule singles out any particular gender nor suggests that certain genders are inherently incapable of compliance with generally applicable and established procedural rules for representation before a tribunal.

Finally, the Department notes that as the Board received briefs from both parties in fewer than half of the cases in which it issued briefing schedules in FY 2019—and received no brief from either party in approximately 18 percent of such cases—the impact of changes to briefing procedures, including a change to simultaneous briefing and the reduction in the maximum time allowable for a briefing extension, is far less than what many commenters speculated based on supposition and unsubstantiated anecdotes.<sup>65</sup> 85 FR at 52498. The Department has considered the issues and concerns raised by commenters but finds them ultimately unpersuasive for the reasons noted. In short, weighing the need for additional operational efficiency, the ability of the Board to request additional briefing in any case if it believes such briefing is necessary, the importance of reducing opportunities for gamesmanship, the actual number of briefs filed and the party identity of most appeals, and the largely speculative or anecdotal issues raised by commenters, the Department finds that, on balance, the benefits of the changes in the final rule significantly outweigh the purported drawbacks.

#### iv. Reply Briefs

*Comment:* Commenters raised concerns that the rule would, in practice, prohibit the filing of reply briefs. Commenters stated that the parties would have much less than 14 days to file a reply brief because the time period would be shortened by the length of time required to request and have the BIA grant leave to file the reply brief and by the amount of time it takes the opposing parties' brief to be served by mail, which commenters stated routinely takes approximately five days to receive. Commenters also noted that the Department should take into

account the fact that the BIA does not have electronic filing, which would allow the parties to immediately receive opposing briefs and grants of leave to file reply briefs.

*Response:* The Departments first note that reply briefs are generally disfavored. See *BIA Practice Manual* at Ch. 4.6(h) (explaining that the BIA “does not normally accept briefs outside the time set in the briefing schedule” such as reply briefs, but that the BIA may accept reply briefs in limited circumstances). Further, there is no right to file a reply brief, and the Board must accept it through the granting of a motion. *Id.* Most significantly, “[t]he Board will not suspend or delay adjudication of the appeal in anticipation of, or in response to, the filing of a reply brief.” *Id.* Commenters did not persuasively explain why shortening the time to file a brief that is already disfavored, not guaranteed to be accepted, and does not suspend the adjudication of an appeal would have any additional impact on such briefs beyond those already established. Moreover, parties that are allowed to file reply briefs should not require significant time to file such briefs as all issues should have already been covered in the Notice of Appeal and the initial simultaneous briefs; thus, any reply briefs should only be clarifications on existing issues. In short, the rule does not prohibit the submission of reply briefs, but its shortened submission timeline recognizes both their already-disfavored status and the reality of the likelihood that they will have a substantive impact on the adjudication of the case.

The Department again notes that EOIR is currently in the process of a staggered nationwide deployment of the EOIR Court & Appeals System (“ECAS”), which will allow registered attorneys and accredited representatives to view electronic records of proceeding and electronically file against them. See EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018); EOIR, *EOIR Launches Electronic Filing Pilot Program* (July 19, 2018), available at <https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program>. Once ECAS is deployed at the BIA, which is expected in early 2021, registered attorneys and accredited representatives will be able to immediately view and download documents for cases with electronic records of proceeding, which will mitigate commenters' concerns about mail service and its potential effect on briefing schedule timing.

n. Changes to Immigration Judge Transcript Review Process and Forwarding of Record (8 CFR 1003.5)

*Comment:* At least one commenter opposed the rule's transcript review provisions, stating that immigration judges are best positioned to determine the accuracy of a transcript of a decision. Technology and human error, the commenter alleged, result in routine transcription errors, which the commenter asserted required correction by the immigration judge.

Moreover commenters pointed to the following common transcription errors: Punctuation errors, which can drastically change the meaning of a sentence; mis-transcribed legal language, which can also change the meaning of a sentence; and, errors in names, locations, and other issues. Commenters disagreed with the BIA's need to “guess” what the immigration judge said or listen to the audio decision to determine what the transcriber incorrectly typed, and the commenter alleged that without the immigration judge's approval of the ultimate decision and transcript, the BIA would have “no idea if what was transcribed is what was actually ultimately decided by the immigration judge.” Commenters explained that the rule lacked any mechanism for the BIA to return the case to the immigration judge to clarify confusion resulting from a hastily made decision. Further, commenters alleged that sending a case back to the immigration judge after a briefing schedule has been issued would result in adjudication delays. The commenter predicted that a significant increase in remands from the Federal courts would result.

Commenters alleged that the current 14-day time period in which an immigration judge must review the transcript and make corrections is too short, given that, as the commenter alleged, it takes more than a year to get a copy of the transcript. The commenter suggested that hiring more transcribers with appropriate training to produce transcriptions in a timely manner or procuring new technology to produce transcriptions with fewer errors would increase efficiency more so than the provisions of the rule.

Other commenters opposed elimination of the 14-day review process because they stated that it sacrificed quality in favor of speed, risking the possibility that errors that could have been corrected at an early stage in the appeal process absent the rule would now require a remand and further delay. The commenters alleged

<sup>65</sup> Preliminary data from FY 2020 indicates that the Board set a briefing schedule in approximately 30,000 cases; the respondent filed a brief in roughly 21,000 cases (69 percent), and DHS filed a brief in roughly 11,500 cases (38 percent). In approximately 5200 cases (17 percent), neither party filed a brief. As noted in the NPRM, 85 FR at 52498, n.15, these numbers treat the filing of a motion to summarily affirm the decision below as the filing of a brief and do not exclude cases in which a party indicated on the Notice of Appeal that it did not intend to file a separate brief.

that subsequent efficiencies to be gained were minimal.

*Response:* The Department appreciates a commenter's supportive suggestion—and tacit support for additional resources—to hire more transcribers and obtain new technology to improve the quality and timeliness of transcript production. Transcription at the Board may occasionally become an issue, e.g., PM 20–01 at 3 & n.6, and the Department is always looking for additional ways in which to make the process more efficient and accurate. To that end, the Department, through this rulemaking, adopts the NPRM's provisions on this issue without change because it believes such provisions properly balance efficiency in the transcription review process while facilitating the development and distribution of accurate transcripts. Nevertheless, further changes to internal transcription technologies or contracts are outside the scope of this rule.

Regarding other commenters' statements, in general, they did not explain precisely which errors immigration judge review would be able to correct. Immigration judges should not make substantive corrections to a transcript, 85 FR at 52508–09, and there is no operational or legal need for an immigration judge to correct minor typographical errors.<sup>66</sup> To the extent that commenters identified examples of substantive errors, those are generally not the type immigration judges should correct, particularly since the parties are not able to argue whether they are genuinely errors before the immigration judge makes an edit. *Id.*; see also *Mamedov v. Ashcroft*, 387 F.3d 918, 920 (7th Cir. 2004) (“[I]n general it is a bad practice for a judge to continue working

on his opinion after the case has entered the appellate process . . .”).

Many commenters also did not appear to appreciate the distinction in the existing regulation that immigration judges review only the transcript of their decision, not the entire transcript of proceedings. 8 CFR 1003.5(a) (2019). Thus, many potential issues identified by commenters regarding errors in the full transcript of proceedings are inapposite to the change made by this rule.

Additionally, an immigration judge's primary role is to adjudicate cases expeditiously and impartially, not to review transcripts for errors. As explained in the NPRM, the Department uses “reliable digital audio recording technology,” 85 FR at 52508, and maintains a procedure through which parties may address defective or inaccurate transcripts, including the errors cited by commenters. See *BIA Practice Manual* at Ch. 4.2(f)(iii) (instructing parties that believe a transcript contains an error that is significant to their argument or the appeal to identify such defect in briefing). Moreover, pursuant to 8 CFR 1003.1(e)(2), the BIA may also remedy defective transcripts through a remand for clarification or correction. Accordingly, the BIA need not “guess,” as commenters alleged, at what the transcript said or what the decision held.

Further, the NPRM did not neglect to provide or overlook the need for a mechanism through which defective or inaccurate transcripts could be addressed. The BIA Practice Manual already provides such process; thus, concerns that litigation would proliferate based on the absence of such processes are purely speculative and unfounded. Despite this speculation, the Department reiterates the importance of accurate transcripts and will continue to have procedures, as described in the BIA Practice Manual and 8 CFR 1003.1(e)(2), available to ensure that end.

Circuit courts have affirmed EOIR's current procedures through which parties may address defective or inaccurate transcripts in accordance with the BIA Practice Manual and regulations, and courts have criticized the practice of immigration judge-review of a transcript following the filing of an appeal. See *Witjaksono v. Holder*, 573 F.3d 968, 976 (10th Cir. 2009); *Mamedov*, 387 F.3d at 920. Practically, removing the immigration judge-review period will eliminate the possibility that a transcript is incorrectly or inadvertently amended after the decision has been issued. See

85 FR at 52508. Given these safeguards and circuit court considerations, the Department disagrees with commenters that immigration judges should continue to use scarce judicial resources to review transcripts of their decisions.

The Department disagrees that the rule sacrifices quality for speed. As noted, *supra*, immigration judges should not make substantive corrections, and there is no operational need for them to make minor typographical corrections. Consequently, the current regulation serves little, if any, purpose and certainly not one that promotes either quality or speed. Moreover, given the quality of EOIR's audio recording technology systems and the protections to ensure accuracy set out in the BIA Practice Manual and available remedies to address defective transcripts, the Department finds removing the inefficiencies resulting from the immigration judge-review period will not affect the quality of transcripts.

*Comment:* At least one commenter stated that the Department should not end the practice of forwarding physical records to the BIA until ECAS is fully implemented nationwide.

*Response:* The rule amends 8 CFR 1003.5(a) in relevant part to provide that the immigration court shall promptly forward the record of proceeding to the BIA, “unless the Board already has access to the record of proceeding in electronic format.” Accordingly, this change does not end the practice of immigration courts forwarding the record of proceeding, but instead provides the immigration courts and the BIA with flexibilities as ECAS is implemented. It is illogical to require the immigration court to create a physical record of an otherwise electronic record simply for the purposes of sending it to the BIA in case of an appeal if the BIA has the capability of accessing the record electronically.

o. BIA Authority To Grant Voluntary Departure in the First Instance (8 CFR 1003.1(d)(7)(iv), 1240.26(k))

*Comment:* Commenters raised concerns about the rule's changes requiring the BIA to adjudicate voluntary departure requests rather than remand them back to the immigration courts, explaining that the changes raised significant due process and fairness concerns.

Commenters were concerned about allowing the BIA to adjudicate voluntary departure requests without allowing aliens to submit evidence to the BIA supporting their request. For example, commenters stated that required travel documents filed with the

<sup>66</sup> Since 1993, immigration judges have been prohibited from correcting any part of a transcript other than minor typographical errors. EOIR, *Operating Policies and Procedures Memorandum 93–1: Immigration Judge Decisions and Immigration Judge Orders* at 2 (May 6, 1993), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2002/07/31/93-1.pdf> (“The ‘clean-up’ of an oral decision must be limited to the review of the transcript for corrections in punctuation, grammar and syntax.”). There is no need, however, for an immigration judge to correct such minor errors, and commenters did not identify one. Moreover, there is also no consistent practice among immigration judges in reviewing transcripts of decisions. Some review for style and substance, whereas others review only for substance; some review with the record of proceedings at hand, whereas others do not. Inconsistent practices breed inefficiency and risk inadvertent errors. Thus, “there is simply no reason to retain the requirement that immigration judges continue to review transcripts, and removing this requirement will also eliminate the possibility of the transcript being amended incorrectly, even inadvertently, after a decision has been rendered.” 85 FR at 52508–09.

immigration court may have expired by the time the case reaches the BIA. Similarly, commenters stated that the alien may not have submitted all necessary evidence before the immigration court, particularly in cases where the immigration judge grants relief and does not reach the merits of an alternative voluntary departure request. Commenters also raised concerns that the BIA would not have a sufficient record on which to determine which conditions would be necessary to ensure the alien's timely departure from the United States. In addition, commenters were concerned that the BIA will not have the immigration judge's ability to view the alien's credibility, which may go towards the voluntary departure determination.

Separately, commenters claimed the rule did not provide an ability to challenge any BIA denial of voluntary departure under the rule. Commenters also stated that there was no mechanism to remedy an improperly served voluntary departure grant from the BIA, which would prevent the alien from being able to comply with the voluntary departure requirements and conditions and, in turn, result in an alternate order of removal.

Commenters were concerned about the requirement that the voluntary departure bond must be posted within five business days, which commenters argued was too short due to the mail delivery time.

Commenters were concerned that the rule only requires the conditions and consequences to be provided in writing to the alien, rather than in person like the voluntary departure regulations for the immigration courts. Commenters explained that many aliens would have difficulty understanding an English-language voluntary departure order, which could result in significant adverse consequences if they were unable to comply with the order's requirements or conditions.

Commenters noted that, in cases where an immigration judge grants another form of relief or protection, and DHS appeals the decision to the BIA, the rule would prevent the BIA from alternatively considering the alien's voluntary departure request because, as written, the rule requires the immigration judge to have denied the voluntary departure request and the alien to have appealed that denial. However, in granting another form of relief or protection, the immigration judge would not have reached voluntary departure.

One commenter requested clarification on the rule's change

allowing the BIA to grant voluntary departure. First, the commenter asked if noncitizens can apply for voluntary departure in the first instance with the BIA. Second, the commenter questioned whether the rule conflicts with existing regulations prohibiting the BIA from making findings of fact. Similarly, another commenter raised concerns about cases where DHS opposes a voluntary departure grant and whether such cases require a merits hearing and fact-finding before an immigration judge.

Lastly, a commenter raised concerns that this authority would shift the workload of adjudicating voluntary departure requests from immigration courts to the BIA.

*Response:* In general, most commenters' concerns on this issue reflected a misunderstanding of immigration court procedures and relevant law. An alien who seeks voluntary departure as a form of relief from removal must apply for it in the first instance before the immigration judge; otherwise, the alien's opportunity to seek such relief will be deemed waived, both by the immigration judge and by the Board on appeal. 8 CFR 1003.31(c); *Matter of J-Y-C-*, 24 I&N Dec. at 261 n.1 ("Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal"); *Matter of Edwards*, 20 I&N Dec. at 196 n.4 ("We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal."). Thus, the alien will have necessarily already raised the issue to the immigration judge and, particularly for requests for voluntary departure under section 240B(b) of the Act,<sup>67</sup> introduced evidence or a proffer of evidence regarding the alien's eligibility for voluntary departure.

Similarly, if the alien appeals the immigration judge's decision, the alien must raise the issue of voluntary departure eligibility on appeal; otherwise, it would be waived. See *Matter of Cervantes*, 22 I&N Dec. at 561

<sup>67</sup> Because voluntary departure pursuant to INA 240B(a), 8 U.S.C. 1229c(a), requires that the alien waives appeal of all issues, 8 CFR 1240.26(b)(1)(i)(D), the Board is unlikely to see many appeals related to that provision. Nevertheless, an alien who appeals the denial of a request for voluntary departure under INA 240B(a), 8 U.S.C. 1229c(a), will have necessarily raised that issue to the immigration judge. Similarly, by definition, in cases in which DHS appeals a grant of voluntary departure under INA 240B(a), 8 U.S.C. 1229c(a), the alien will have raised the issue and offered evidence of eligibility before the immigration judge.

n.1 (expressly declining to address an issue not raised by party on appeal). Thus, for the Board to even consider an alien's eligibility for voluntary departure, the alien must have already raised the issue with the immigration judge—and with the Board if appealing the immigration judge's adverse decision—and the record must already contain evidence—or at least a proffer of evidence—of the alien's eligibility.

Assuming that an alien did not waive the issue by failing to raise it with the immigration judge, there are no operational impediments to the Board making its own voluntary departure determination. The requirements for such relief under either 8 CFR 1240.26(b) or (c) are straightforward and involve determinations that the Board routinely already makes, e.g., whether an alien has been convicted of an aggravated felony, has good moral character, and is not deportable on national security grounds. Further, the Board routinely reviews credibility determinations made by immigration judges and is well-prepared in assessing the credibility of an alien's assertion or proffer on appeal that he or she possesses "the means to depart the United States and . . . the intention to do so." 8 CFR 1240.26(c)(1)(iv).<sup>68</sup>

Most significantly, the Board already routinely reviews immigration judge decisions about voluntary departure on appeal and possesses the authority to reinstate an immigration judge's grant of such relief. 8 CFR 1240.26(c)(3)(ii). It further already provides advisals, which are required to be in writing, related to voluntary departure if it does reinstate that relief. E.g., 8 CFR 1240.26(i) ("The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure."). In short, the Board already serves as a de facto adjudicator of requests for voluntary departure, and commenters did not identify a particular, realistic scenario in which the Board would be unable to discern from the record whether an alien was eligible for voluntary departure and warranted a grant of such relief as a matter of discretion, especially in cases in which an alien maintains on appeal—and, thus, necessarily asserts eligibility

<sup>68</sup> In a case in which DHS appeals an immigration judge's decision granting another form of relief, that the alien applied for and the immigration judge adjudicated such relief necessarily means that the alien was seeking voluntary departure under INA 240B(b) at the conclusion of proceedings. Therefore, the record below will contain evidence regarding the alien's eligibility for voluntary departure—or else the alien would have waived the issue before the immigration judge—allowing the Board to make a determination on that application on appeal.

through reference to evidence already in the record—that he or she warrants voluntary departure.

The purpose of the changes to allow the Board to grant voluntary departure are to increase operational efficiency by allowing the BIA to grant voluntary departure rather than first requiring remand to the immigration court. With regard to the ability of aliens to submit evidence in support of their voluntary departure requests, the Department notes that the alien must submit all relevant voluntary departure evidence to the immigration court. The BIA will then adjudicate the voluntary departure request like any other appeal by reviewing the record developed at the immigration court. *See* 8 CFR 1003.1(d)(7)(iv) (requiring the BIA to adjudicate voluntary departure requests “based on the record”). Likewise, the BIA will only impose necessary conditions to ensure the alien’s timely departure based on the record on appeal. *See* 8 CFR 1240.26(k)(4).

Responding to a commenter’s concerns about the inability to challenge a BIA denial of voluntary departure, the Department first notes that existing statutory provisions already preclude appeals of voluntary departure decisions to Federal court, and this rule does not—and could not—change those provisions. INA 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i) (stripping jurisdiction to review most discretionary determinations in immigration proceedings, including voluntary departure under INA 240B, 8 U.S.C. 1229c); *see also* INA 240B(f), 8 U.S.C. 1229c(f) (precluding judicial review of denials of voluntary departure under INA 240B(b), 8 U.S.C. 1229c(b)). Moreover, cases in which aliens seek only voluntary departure before an immigration judge—and not another form of relief such as asylum, which is commonly appealed to Federal court—require the waiver of appeal and are, thus, unlikely to be appealed to the Board in the first instance. 8 CFR 1240.26(b)(1)(i)(D). Further, where the Board has denied voluntary departure aliens are not prevented from filing motions to reopen or reconsider if applicable. *See generally* 8 CFR 1003.2; *cf.* 8 CFR 1240.26(e)(1) (providing that such a motion prior to the expiration of the voluntary departure period terminates a “grant of voluntary departure”). In short, the rule has no impact on an alien’s existing ability to challenge the denial of a request for voluntary departure through an appeal to Federal court or a motion to reopen, and commenters’ concerns on those points are, accordingly, unpersuasive.

With regards to commenter’s concerns about being able to post a voluntary departure bond within five days of the BIA’s decision, the Department notes that the five-day requirement remains unchanged from the existing regulations regarding the immigration courts. *See* 8 CFR 1240.26(c)(3)(i). It further notes that immigration judges may issue voluntary departure orders in written decisions that are mailed to aliens, and it is unaware of any noted problems with that process. Moreover, once ECAS is deployed to the BIA, registered attorneys and accredited representatives will be able to immediately view and download documents for cases with electronic records of proceeding, which will mitigate commenters’ concerns about mail service and its potential effect on complying with voluntary departure requirements. *See generally* EOIR, *EOIR Courts & Appeals System (ECAS)—Online Filing* (Oct. 5, 2020), available at <https://www.justice.gov/eoir/ECAS>.

Nevertheless, in recognition of the fact that Board orders are generally served by mail—unlike orders of immigration judges which are more often served in person—the final rule states that aliens will have ten business days, rather than five, to post a voluntary departure bond if the Board’s order of voluntary departure was served by mail. Further, as the Board is currently transitioning to an electronic filing system and expects to fully deploy that system within the next year, the final rule retains a period of five business days to post a voluntary departure bond if the Board’s order was served electronically.

In response to commenters’ concerns about aliens being unable to understand English-language voluntary departure orders, the Department first notes that all orders, decisions, and notices issued by EOIR—including written decisions issued by an immigration judge granting voluntary departure—are in English and, likewise, all documents filed with EOIR must be in English or accompanied by an English-language translation. *See, e.g.*, 8 CFR 1003.3(a)(3), 1003.33. Moreover, the Department does not believe that an English-language voluntary departure order, which is already used in thousands of cases every year with no noted concerns, raises any due process issues, as a reasonable recipient would be on notice that further inquiry is required. *See Ojeda-Calderon v. Holder*, 726 F.3d 669, 675 (5th Cir. 2013) (citing *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (explaining that due process does not require notices to be in a language the alien can understand)). Additionally,

the Department notes that under longstanding practice, a BIA order reinstating voluntary departure—which is, in all material parts, an order granting voluntary departure—is already issued in English with appropriate warnings. Commenters raised no particular issues with this existing process, and the Department is unaware of any.

In response to commenters’ concerns about cases in which DHS appeals a separate grant of relief or protection, the Department is making edits from the NPRM to clarify the Board’s procedure in that situation. Although cases in which an alien made multiple applications for relief or protection (including voluntary departure), an immigration judge granted at least one application but did not address the request for voluntary departure, DHS appealed the immigration judge’s decision, the BIA determined that the immigration judge’s decision was in error and that the alien’s application(s) should be denied, and the BIA found a basis to deny all other applications submitted by the respondent without needing to remand the case, leaving only the request for voluntary departure adjudicated, should be uncommon, the Department nevertheless makes clarifying edits to 8 CFR 1240.26(k)(2) and (3)<sup>69</sup> to indicate that the BIA may grant voluntary departure in cases in which DHS appeals provided that the alien requested voluntary departure from the immigration judge and is otherwise eligible.

In response to at least one commenter’s concern regarding the expiration of an alien’s travel documents, the Department notes that current regulations do not require the presentation of an unexpired travel document in every case. *See, e.g.*, 8 CFR 1240.26(b)(3)(i) (presentation of a travel document for voluntary departure is not required when “[a] travel document is not necessary to return to [the alien’s] native country or to which country the alien is departing . . . [or] [t]he document is already in the possession of the [DHS].”) Moreover, “[i]f such documentation is not immediately available to the alien, but the immigration judge is satisfied that the alien is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such

<sup>69</sup> The Department also notes that 8 CFR 1240.26(k)(2) and (3) were duplicative in the NPRM and has further edited the provisions to remove the duplication since they apply to both types of voluntary departure under INA 240B, 8 U.S.C. 1229c.

documentation and present it to [DHS].” 8 CFR 1240.26(b)(3)(ii). The rule adopts those provisions by reference and, thus, already addresses this concern to some extent. Nevertheless, the Department is making changes to the final rule to make clear that if the record does not contain evidence of travel documentation sufficient to assure lawful entry into the country to which the alien is departing—and the alien otherwise has both asserted a request for voluntary departure and established eligibility under the other requirements—the Board may nevertheless grant voluntary for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation.

In response to one commenter’s question, the Department notes that respondents cannot apply for voluntary departure in the first instance with the BIA because they would have waived that opportunity on appeal by not raising it before the immigration judge below. 8 CFR 1003.31(c); *Matter of J–Y–C–*, 24 I&N Dec. at 261 n.1 (“Because the respondent failed to raise this claim below, it is not appropriate for us to consider it for the first time on appeal”); *Matter of Edwards*, 20 I&N Dec. at 196 n.4 (“We note in passing, however, that because the respondent did not object to the entry of this document into evidence at the hearing below, it is not appropriate for him to object on appeal.”).

In addition, the rule does not conflict with 8 CFR 1003.1(d)(3)(iv), which generally prohibits the BIA from engaging in fact finding. As explained in the NPRM, the rule does not allow the BIA to engage in additional fact finding if granting voluntary departure, but rather the grant “would continue to be a legal determination based upon the facts as found by the immigration judge during the course of the underlying proceedings . . . .” See 85 FR at 52500. Similarly, in cases where DHS opposed voluntary departure at the immigration court, the record will contain evidence of all necessary facts, or else the application would have been deemed waived or abandoned.

In response to concerns about BIA workload, the Department notes that immigration judges will continue to adjudicate voluntary departure requests in the first instance. This rule merely gives the BIA the authority to grant voluntary departure if certain requirements are met, rather than inefficiently remanding the case back to the immigration judge solely to grant voluntary departure. Moreover, as noted, *supra*, as the BIA already reviews appeals related to voluntary departure

requests and possesses the authority to reinstate voluntary departure, which is the functional equivalent of granting it, simply authorizing the BIA to grant voluntary departure rather than remanding a case back to an immigration judge to take the same action imposes minimal operational burden on the Board but reduces operational inefficiency for EOIR as a whole.

#### 4. Administrative Procedure Act: Sufficiency of 30-Day Comment Period

*Comment:* Many commenters objected to the Department’s allowance of a 30-day comment period instead of a 60-day or longer period. Commenters cited Executive Order 12866 and stated that a 60-day comment period is the standard period of time that should be provided for a complex rule like the NPRM. Commenters also stated that the 30-day comment period is insufficient in the context of the COVID–19 pandemic, which, commenters explained, has strained commenters’ ability to prepare comments due to unique childcare, work-life, and academic difficulties. In addition, commenters stated that there was insufficient time to prepare responses to this rule due to other items that were published or released during the comment period, such as the Department’s NPRM related to asylum procedures that the Department published in the final days of the comment period<sup>70</sup> and the Attorney General’s decision in *Matter of A–C–A–A–*, 28 I&N Dec. 84 (A.G. 2020). Similarly, commenters cited an NPRM that the Department jointly published with DHS in June<sup>71</sup> as an example of the complexity of recent rulemaking for which commenters need adequate time to prepare responses. Some commenters stated that there is no need for urgency and a short comment period given recent drops in asylum seekers at the border. Commenters argued that the Department should withdraw the rule and republish it with a longer period for public comment.

*Response:* As an initial point, the Department notes that a far more sweeping regulatory change to the BIA’s procedures also had only a 30-day comment period, 67 FR at 54879, but that there is no evidence that period was insufficient. Further, commenters did not suggest or indicate what additional issues the comment period precluded them from addressing; to the contrary, the comments received reflect both a

breadth and a level of detail which suggests that the period was more than sufficient. *Cf. City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (“In [showing prejudice] in the context of a violation of notice-and-comment requirements, petitioners may be required to demonstrate that, had proper notice been provided, they would have submitted additional, different comments that could have invalidated the rationale for the revised rule.”). Additionally, to the extent that commenters referred to other proposed rulemakings as a basis for asserting the comment period should have been longer, their comparisons are inapposite. No other proposed rulemaking cited by commenters addressed a small, discrete set of procedures which are already well-established and with which aliens and practitioners have been quite familiar with for decades. In short, the Department acknowledges and has reviewed commenters’ concerns about the 30-day comment period, but those comments are unavailing for all of the reasons given herein.

The Department believes the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the 1,284 public comments received, including numerous detailed comments from interested organizations.<sup>72</sup> The APA does not require a specific comment period length, *see generally* 5 U.S.C. 553(b)–(c), and although Executive Order 12866 recommends a comment period of at least 60 days, a 60-day period is not required. Instead, Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that “[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.” *Nat’l Lifeline Ass’n v. Fed. Commc’ns Comm’n*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment

<sup>70</sup> Procedures for Asylum and Withholding of Removal, 85 FR 59692 (Sept. 23, 2020).

<sup>71</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020).

<sup>72</sup> The Department notes for comparison that the most significant regulatory change to the BIA’s case management process had a 30-day comment period, and the Department received comments from 68 commenters. 67 FR at 54879. Although commenters objected to the 30-day period then as they do now, there is no evidence either then or now that such a window is insufficient. To the contrary, the significant increase in comments regarding a less comprehensive change to the BIA’s case management process during a comment period of identical length strongly suggests that the 30-day period was appropriate.

periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1988) (15-day comment period); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). Here, the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor Saints Peter and Paul Home*, 140 S. Ct. at 2385 (“The object [of notice and comment], in short, is one of fair notice.” (citation omitted)).

The Department also believes that the COVID-19 pandemic has no effect on the sufficiency of the 30-day comment period. Employers around the country have adopted telework flexibilities to the greatest extent possible, and the Department believes that interested parties can use the available technological tools to prepare their comments and submit them electronically. Indeed, nearly every comment was received in this manner. Further, some of the issues identified by commenters—*e.g.*, childcare—would apply regardless of the length of the comment period and would effectively preclude rulemaking by the Department for the duration of the COVID-19 outbreak. The Department finds no basis to suspend all rulemaking while the COVID-19 outbreak is ongoing.

The Department acknowledges that particular commenters may have faced individual personal circumstances which created challenges to commenting, but that assertion is true of every rulemaking. Further, there is no evidence of a systemic inability of commenters to provide comments based on personal circumstances, and commenters' assertions appear to reflect a desire to slow the rulemaking due to policy disagreements rather than an actual inability to comment on the rule.<sup>73</sup>

<sup>73</sup> The Department also notes that several portions of the rule, *e.g.*, the changes to 8 CFR 1003.1(e)(8) and (k), reflect either internal delegations of authority and assignment of responsibility or matters of agency management, personnel, organization, procedure, or practice, making those portions a rule exempt from any period of notice and comment under the APA. 5 U.S.C. 553(a)(2), (b)(A). An internal delegation of administrative authority does not adversely affect members of the public and involves an agency management decision that is exempt from the notice-and-comment rulemaking procedures of the APA. *See United States v. Saunders*, 951 F.2d 1065, 1068 (9th

Overall, based on the breadth and detail of the comments received, the Department's prior experience with a 30-day comment period for a much more sweeping change to BIA procedures, the rule's codification of established law with which practitioners and aliens are already familiar, the discrete and clear nature of the issues presented in the NPRM, the electronic receipt of most comments, and the essential nature of legal services even during the outbreak of COVID-19, the Department maintains that a 30-day comment period was ample for the public to comment on this rule. In short, none of the circumstances alleged by commenters appears to have actually limited the public's ability to meaningfully engage in the notice and comment period, and all available evidence provided by commenters indicates that the comment period was sufficient.

#### 5. Concerns With Regulatory Requirements

*Comment:* Commenters generally expressed concern that the Department did not comply with Executive Orders 12866 and 13563 because the Departments did not adequately consider the costs and possible alternatives to the provisions in the rule due to the significance of many of the rule's provisions.

For example, one commenter asserted that removing the ability to reopen or reconsider cases via *sua sponte* authority constitutes “significant regulatory action” that would trigger a cost and benefits analysis, as required by Executive Order 13563. The commenter stated that the Department should have conducted a cost and benefits analysis for alternatives to the rule, including preserving the current system and defining “exceptional circumstances.” The commenter

Cir. 1991) (delegations of authority have “no legal impact on, or significance for, the general public,” and “simply effect[] a shifting of responsibilities wholly internal to the Treasury Department”); *Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990) (“APA does not require publication of [rules] which internally delegate authority to enforce the Internal Revenue laws”); *United States v. Goodman*, 605 F.2d 870, 887–88 (5th Cir. 1979) (unpublished delegation of authority from Attorney General to Acting Administrator of the Drug Enforcement Agency did not violate APA); *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970) (where taxpayer would not be adversely affected by the internal delegations of authority from the Attorney General, APA does not require publication). Thus, to the extent that commenters complained about the sufficiency of the comment period regarding those provisions not subject to the APA's notice-and-comment requirements, such complaints are also unavailing because commenters were not entitled to a comment period in the first instance.

predicted that the costs would be lower and the benefits higher if the Departments simply defined “exceptional circumstances” rather than entirely remove *sua sponte* authority.”

Similarly, commenters claimed that the rule does not comply with Executive Orders 12866 and 13563 because EOIR did not assess the costs and benefits of available alternatives to prohibiting the general use of administrative closure, including better tracking of administratively closed cases or regulatory changes requiring the parties to notify the court when ancillary relief is adjudicated. Commenters also noted that EOIR did not weigh the costs of unnecessary removal orders that the administrative closure prohibition will cause and the effect on applicants and their families or the costs from the rule's effects on eligibility for unlawful presence waivers before DHS. Similarly, commenters stated that EOIR should consider the reliance interests of adjustment of status applicants who were relying on a grant of administrative closure in order to apply for a provisional unlawful presence waiver. Likewise, a commenter stated that EOIR should consider the effect on legal representation agreements since the rule would render agreements to pursue administrative closure in order to apply for provisional unlawful presence waivers moot. The commenter also claimed that the rule violates Executive Order 13563's requirement to harmonize rules because it contravenes 8 CFR 212.7(e)(4)(iii).

*Response:* As an initial point, the Department has addressed many of these comments, *supra*, particularly regarding proposed alternatives, and it reiterates and incorporates those discussions by reference here. Additionally, commenters assume or conjecture, without evidence, that cases which are administratively closed would otherwise necessarily result in removal orders. As each case is adjudicated on its own merits in accordance with the evidence and applicable law, the Department declines to accept such a sweeping unsubstantiated generalization and finds comments based on such a generalization unpersuasive accordingly.

The Department agrees with the commenter that the NPRM constitutes a “significant regulatory action.” 85 FR at 52509. The Department drafted the rule consistent with the principles of Executive Orders 12866 and 13563 and submitted the rule to the Office of Management and Budget. *Id.* Nevertheless, because the Department believes associated costs will be



negligible, if any, the Department determined that no numeric cost benefit analysis was necessary. As most of the rule is directed at internal case processing, it would substantially improve the quality and efficiency of the BIA appellate procedure while not imposing new costs on the public.<sup>74</sup>

In response to administrative closure-related concerns regarding compliance with Executive Orders 12866 and 13563, the Departments have weighed the relevant costs and benefits of the rule's administrative closure change in accordance with Executive Orders 12866 and 13563. The Department does not believe that the administrative closure changes will have a significant impact on the public, as most immigration courts—all but those in Arlington, Baltimore, Charlotte, and Chicago<sup>75</sup>—currently follow either *Matter of Castro-Tum* itself or an applicable Federal court decision affirming it, e.g., *Hernandez-Serrano*, 2020 WL 6883420 at \*5 (“In summary, therefore, we agree with the Attorney General that §§ 1003.10 and 1003.1(d) do not delegate to IJs or the Board ‘the general authority to suspend indefinitely immigration proceedings by administrative closure.’” (quoting *Matter of Castro-Tum*, 27 I&N Dec. at 272)). Therefore, the effect of this rule

<sup>74</sup> The Department notes that a prior, more comprehensive revision of the BIA's case management process did not contain a numeric cost-benefit analysis of the type suggested by commenters. 67 FR at 54900. Moreover, commenters did not identify what metrics would be appropriate to use to measure, for example, whether the BIA granted a motion to reopen *sua sponte* in contravention of *Matter of J-J* or the predictive outcome of a case that has been administratively closed. The Department is unaware of any established measures of adherence to the law by adjudicators or for case processing questions that turn on the specific facts of each case. In the absence of such measures—and granular data which could be utilized to fulfill them—the Department asserts that its qualitative assessment of the costs and benefits of the rule in the NPRM and in the final rule, in concert with the rule's review by OMB, satisfies the requirements of the relevant Executive Orders.

<sup>75</sup> The Department notes that *Matter of Castro-Tum* did not incorporate all of the legal arguments presented in the NPRM regarding whether immigration judges and Board members have free-floating authority to defer adjudication of cases. E.g., 85 FR at 52503 (discussing tension created by interpreting 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to allow free-floating authority to administratively close cases with references in those provisions to the “disposition” of cases and with the provisions of 8 CFR 1003.1(a)(2)(i)(C) and 1003.9(b)(3) which assign authority to defer case adjudications to the Board Chairman and the Chief Immigration Judge rather than to all Board members and all immigration judges). Thus, circuit court decisions abrogating *Matter of Castro-Tum* did not necessarily address those arguments. Accordingly, independent of *Matter of Castro-Tum*, immigration judges and Board members may still come to the conclusion that they generally lack free-floating authority to administratively close cases.

would simply codify the existing limitations on immigration judges' general authority to grant administrative closure. For those courts that are not bound by *Matter of Castro-Tum*, the Department disagrees that the change will result in unnecessary removal orders, as immigration judges are tasked with resolving the proceedings before them, including determining removability and issuing removal orders if required. See, e.g., 8 CFR 1003.10(b) (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.”). The Department cannot credit commenters' counter-factual speculation as to the likely outcomes of cases that have been administratively closed, for as the Department discussed, *supra*, aliens have opposed administrative closure in individual cases because it interfered with their ability to obtain relief.

As the Department asserted, free-floating authority to unilaterally administratively close cases is in significant tension with existing law, including regulations and longstanding Board case law. 85 FR at 52503–05. To the extent that commenters suggested the Department should consider alternatives to the rule that retain that tension with existing law, the Department finds those suggestions unpersuasive. See *Hernandez-Serrano*, 2020 WL 6883420 at \*1, \*4 (“A regulation delegating to immigration judges authority to take certain actions ‘[i]n deciding the individual cases before them’ does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases administratively—meaning the case was removed from the IJ's docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law. . . . [N]o one—neither Hernandez-Serrano, nor the two circuit courts that have rejected the Attorney General's decision in *Castro-Tum*—has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.”).

Further, in addition to not resolving the legal issues raised by the view that immigration judges and Board members

possess some intrinsic, freestanding authority to administratively close cases, commenters' proposed alternatives suffer from other infirmities or do not otherwise address the problem identified. For example, commenters did not explain why additional tracking of administratively closed cases and a requirement that parties notify the court of a situational change would effectively resolve the legal or policy issues presented. In fact, the Department already tracks administratively closed cases, EOIR, *Adjudication Statistics: Administratively Closed Cases* [hereinafter *Administratively Closed Cases*], Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1061521/download>, and the parties should already be notifying an immigration court or the Board if the basis for an order of administrative closure changes;<sup>76</sup> yet, those items have not resolved the problems with administrative closure identified in the NPRM.

The question of unlawful presence waivers was already addressed by *Matter of Castro-Tum*, 27 I&N Dec. at 278 n.3, 287 n.9, and this final rule does not impact such waivers accordingly. Moreover, the regulation identified by commenters, 8 CFR 212.7(e)(4)(iii), has no analogue in chapter V of title 8, and that regulation is not binding on the Department. Further, such a waiver is both “provisional” and “discretionary,” 8 CFR 212.7(e)(2)(i), and like administrative closure itself, an alien has no right to such a waiver. Further, although aliens in removal proceedings (unless administratively closed) and aliens with administratively final orders of removal are barred from obtaining the waiver, 8 CFR 212.7(e)(4)(iii) and (iv), an alien with an administratively final order of voluntary departure is not, and by definition, aliens must voluntarily depart the United States in order to receive the benefit of such a waiver. Although the Department has considered the link between such waivers and administrative closure—just as the Attorney General did in *Matter of Castro-Tum*—that link is too attenuated to outweigh the significant legal and policy concerns raised by the Department regarding administrative closure.<sup>77</sup>

<sup>76</sup> As representatives are officers of an immigration court and have professional responsibility obligations of candor toward the immigration court, parties with representation should already be notifying an immigration court of a relevant change that would affect the grant of administrative closure.

<sup>77</sup> For similar reasons, the Department finds that this rule does not violate Executive Order 13563 regarding harmonization. To the contrary, the final

Similarly, concerns about putative reliance interests are misplaced. First, as discussed, *infra*, the rule applies, in general, only prospectively, so it does not disturb cases that have already been administratively closed. Second, and relatedly, all changes in the law may impact matters of attorney strategy in interactions with clients, but that is an insufficient basis to decline to change the law.<sup>78</sup> To find otherwise would effectively preclude any law from ever being changed. Third, nothing in the rule prohibits a practitioner from seeking administrative closure; rather, it more clearly delineates the situations in which administrative closure is legally authorized. Fourth, a representative may not ethically guarantee any result in a particular case; thus, to the extent commenters suggest that the final rule restricts or interferes with an attorney's ability to guarantee an alien both a grant of administrative closure and the approval of a provisional waiver, the Department finds such a suggestion unavailing. See Model Rules Prof'l Conduct R. 7.1 cmt. 3 (2020) ("A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."), cmt. 4 ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.") (quoting r. 8.4(c)), and r.8.4(e) ("It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law").

In short, the Department appropriately considered potential alternatives as well as the relevant interests and alleged costs in issuing the

rule promotes regulatory harmonization because it establishes consistency—and eliminates superfluosity—with the authority of the Board Chairman and the Chief Immigration Judge to defer case adjudications as established in 8 CFR 1003.1(a)(2)(i)(C) and 8 CFR 1003.9(b)(3). As discussed, *supra*, it also harmonizes briefing schedules between detained and non-detained appeals and harmonizes the starting point for the adjudicatory deadlines for appeals heard by single BIA members and by three-member panels. In short, the rule promotes harmonization of regulatory requirements in multiple ways.

<sup>78</sup> Furthermore, as *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

final rule regarding administrative closure. On balance, however, the alternatives are either unavailing or would not resolve the issues identified by the Department, and the concerns raised by commenters are far outweighed by both the significant legal and policy issues raised by the Department in the NPRM regarding administrative closure and the increased efficiency and consistency that a formal clarification of its use will provide.

With regards to the costs to persons in removal proceedings who may no longer be eligible to obtain a provisional unlawful presence waiver without administrative closure, the Department believes that the strong interest in the efficient adjudication of cases and the legal and policy issues identified in the NPRM outweigh the potential inability of these persons to obtain provisional unlawful presence waivers, something to which they are not entitled to in the first instance. The Department notes that these persons may still apply for an unlawful presence waiver from outside the United States, and that DHS may choose, as a matter of policy, to amend their regulations to remove the administrative closure requirement for persons in removal proceedings applying for a provisional waiver. Moreover, as *Matter of Castro-Tum* was issued in 2018, aliens and their representatives in jurisdictions following *Castro-Tum* should not be currently relying on the expectation of administrative closure to pursue provisional unlawful presence waivers.

The Department also disagrees that the general prohibition on administrative closure does not harmonize with DHS regulations regarding provisional unlawful presence waivers. The Department considered the interplay of EOIR and DHS's regulations and, due to the strong equities in favor of limiting administrative closure, decided to continue with a general prohibition on administrative closure in immigration proceedings before EOIR. DHS chose to limit the eligibility for provisional unlawful presence waivers as a matter of policy, and DHS may choose to update their more specific regulations accordingly as a result of this rule.

In sum, the Department's analysis fully complied with all relevant Executive Orders, and OMB has appropriately reviewed the rule.<sup>79</sup>

<sup>79</sup> The Department notes that in formulating the NPRM, it also considered other alternatives as well to promote more efficient BIA processing of appeals. For example, the BIA reviewed prior suggestions to charge respondents filing and transcript fees more commensurate with the actual costs of the proceedings or to make all appeals to

*Comment:* At least one commenter stated that the Department failed to adequately consider the costs of the rule on small entities, particularly immigration practitioners, under the Regulatory Flexibility Act (RFA). The commenter predicted that the rule would have a variety of effects on the finances of these practitioners, such as the need for additional appeals in Federal courts or limits on the number of cases a practitioner can ethically accept due to shortened filing deadlines.

*Response:* As the Department stated in the proposed rule, this rule "does not limit the fees [practitioners] may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility." 85 FR at 52509. Moreover, the comments assume, without evidence, that the rule will lead only to adverse outcomes for aliens and, thus, more appeals to Federal court. As noted, *supra*, that unsubstantiated generalization presumes that cases will be adjudicated either unethically or incompetently, and the Department declines to engage in such unfounded conjecture. As also noted, *supra*, the change in filing deadlines falls principally on DHS, and commenters neither acknowledged that point nor explained why a change in filing deadlines that affects few non-government practitioners would have a widespread effect of limiting many practitioners' caseloads. Additionally, although the shortened filing deadlines may change when a particular brief is due to the BIA, the Department disagrees with the commenter's speculation that it would change the overall amount of time required to prepare that brief or related filings, which is determined by the relative complexity of the case.

The rule sets no limits on how many cases an ethical and competent attorney may accept, all courts set filing deadlines, and all ethical and competent attorneys will adjust their practices as needed accordingly. Contrary to an implicit assertion by commenters, the intent of the Board's current practices is not to provide or ensure a minimum level of employment for practitioners; rather, the intent is to provide a fair and efficient system for adjudicating appeals. Consequently, any effects on employment of practitioners due to changes in those procedures are both minimal and incidental or ancillary at most; moreover, to the extent that an ancillary effect would be the provision

the BIA discretionary. 67 FR at 54900. Although the Department may revisit those proposals in the future, they were not incorporated into the NPRM and are not being included in the final rule accordingly.

of representation by a larger cohort of practitioners, as logically intimated by commenters who claim that the rule will limit cases handled by individual practitioners, commenters did not explain why such an effect is necessarily unwelcome. In short, despite commenters' unfounded speculation, the Department finds that further analysis under the RFA is not warranted.

The Department has reviewed this rule in accordance with the RFA, 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, Mar. 29, 1996, 110 Stat. 847, and has determined that this rule would not have a significant economic impact on a substantial number of small entities. The rule will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge or the number of cases a representative may ethically accept under the rules of professional responsibility.

Moreover, this determination is consistent with the Department's prior determination regarding much more sweeping changes to procedures before the Board. *See* 67 FR at 54900 (“The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it affects only Departmental employees, aliens, or their representatives who appear in proceedings before the Board of Immigration Appeals, and carriers who appeal decisions of [DHS] officers. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.”). The Department is unaware of any challenge to that determination regarding its 2002 rulemaking which significantly streamlined Board operations and made greater changes to Board procedures, including altering the Board's standard of review for credibility determinations, than this final rule. The Department thus believes that the experience of implementing that prior, broader rule also supports its conclusion that there is no evidence that this final will have a significant impact on small entities as contemplated by the RFA.

Additionally, the portions of the rule related to administrative closure would not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). That portion of the rule applies to aliens in immigration proceedings, who are individuals, not entities. *See* 5 U.S.C. 601(6). Nothing in that portion of the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those

representatives are employed, and the Departments are unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of “small entities” to which the rule “will apply”). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) (“[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule . . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.”); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (“Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the ‘targets’ of a given rule. The statute requires that the agency conduct the relevant analysis or certify ‘no impact’ for those small businesses that are ‘subject to’ the regulation, that is, those to which the regulation ‘will apply.’ . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.” (citing *Mid-Tex*, 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (“The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency . . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”).

Further, the Department has consistently maintained this position

regarding immigration regulations aimed at aliens, rather than practitioners who represent aliens, including much broader and more sweeping rulemakings. *See, e.g.,* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it “affects only Federal government operations” by revising the procedures for the “examination, detention, and removal of aliens”). That conclusion was reiterated in the interim rule, 62 FR at 10328, which was adopted with no noted challenge or dispute. The parts of this final rule related to administrative closure are similar, in that they, too, affect only the operations of the Federal government. In short, the Department reiterates its determination that there is no evidence that this final will have a significant impact on small entities as contemplated by the RFA.

## 6. Miscellaneous

### a. Retroactivity Concerns

*Comment:* Some commenters expressed concerns that the rule will have an impermissible retroactive effect. First, at least one commenter argued that making the provisions regarding changes to administrative closure and *sua sponte* reopening authority effective on the date of publication to pending cases would have impermissible retroactive effect because doing so would impair the rights that asylum applicants have under current law. Second, at least one other commenter noted that even making changes applicable only to new appellate filings fails to account for downstream effects of the rule that could influence a respondent's filings or other decisions before the immigration judge. Finally, at least one commenter stated that the Department has not sufficiently considered the costs to respondents of the retroactive elements of the rule.

*Response:* As noted, *supra*, the Department is clarifying the generally prospective temporal application of the rule. The provisions of the rule applicable to appellate procedures and internal case processing at the BIA apply only to appeals filed, motions to reopen or reconsider filed, or cases remanded to the Board by a Federal court on or after the effective date of the final rule. As the withdrawal of a delegation of authority by the Attorney General, the provisions of the rule related to the restrictions on *sua sponte*

reopening authority are effective for all cases, regardless of posture, on the effective date.<sup>80</sup> The provisions of the rule related to restrictions on the BIA's certification authority are effective for all cases in which an immigration judge issues a decision on or after the effective date. The provisions of the rule regarding administrative closure are applicable to all cases initiated by a charging document filed by DHS, reopened, or recalendared on or after the effective date.<sup>81</sup>

Commenters are incorrect that the rule's amendments regarding authority over administrative closure and *sua sponte* reopening authority would have impermissible retroactive effect. First, as noted *supra*, the change regarding administrative closure generally applies prospectively and merely codifies the status quo for all but four immigration courts nationwide. Second, there is no right to *sua sponte* reopening or even to file such a cognizable motion. There is similarly no right to administrative closure. Thus, these changes do not remove any "vested rights" from aliens. In addition, in the context of the changes regarding administrative closure, the Department emphasizes that the alien may continue to proceed with their relief applications before USCIS and seek continuances before EOIR, *see Matter of L-A-B-R-*, 27 I&N Dec. 405. Similarly, aliens may continue to utilize motions to reopen, including those filed as joint motions or those based on equitable tolling, in lieu of filing improper motions to reopen *sua sponte*.

Commenters' broad and generalized concerns about alleged downstream effects are wholly speculative and do

not account for either the case-by-case nature of adjudication or the fact-intensive nature of many cases. Hypothetical effects on procedural choices and tactical decisions related to an alien's claims in future cases, including those that have not even been filed or reopened, are not impositions on an alien's legal rights in a manner that has retroactivity concerns. Finally, as commenters' concerns about retroactivity of the rule are unfounded for the reasons given, their concerns about alleged costs imposed by such "retroactivity" are similarly unfounded.<sup>82</sup>

#### b. Creation of Independent Immigration Courts

*Comment:* Multiple commenters stated that the rule highlighted the need for the immigration courts and immigration judges to be "independent" and outside the Executive branch and political influence.

*Response:* These commenters' recommendations are both beyond the scope of this rulemaking and the Department's authority. Congress has provided for a system of administrative hearings for immigration cases, which the Departments believe should be maintained. *See generally* INA 240, 8 U.S.C. 1229a (laying out administrative procedures for removal proceedings); *cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, Executive Office for Immigration Review) ("The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further."). Only Congress has the authority to create a new Article I court or other changed framework for the adjudication of immigration cases. Finally, the Department reiterates that immigration judges and Board members already exercise "independent judgment and discretion" in deciding cases, 8 CFR 1003.1(d)(1)(ii) and 1003.10(b), and are prohibited from considering political influences in their decision-making, *BIA Ethics and Professionalism Guide* at sec. VIII ("A Board Member should not be swayed by partisan interests or public

clamor."), *BIA Ethics and Professionalism Guide* at sec. VIII ("An Immigration Judge should not be swayed by partisan interests or public clamor."). Thus, contrary to commenters' assertions, immigration judges and Board members are already independent adjudicators who do not render decisions based on political influence or political interests. As commenters' claims are unfounded in law or practice—and beyond the scope of this rulemaking—the Department declines to address them further.

#### c. Transactional Records Access Clearinghouse (TRAC) Report

*Comment:* Several commenters objecting to the NPRM's provisions regarding administrative closure pointed to a press announcement and web page by TRAC, issued on September 10, 2020, during the comment period.<sup>83</sup> *See* TRAC, *What's New: The Life and Death of Administrative Closure*, Sept. 10, 2020, available at <https://trac.syr.edu/whatsnew/email.200910.html> (last visited Nov. 25, 2020), and TRAC, *The Life and Death of Administrative Closure*, Sept. 10, 2020, available at <https://trac.syr.edu/immigration/reports/623/> (last visited Nov. 25, 2020) ("TRAC Report"). Commenters asserted that TRAC's analysis undermined the Department's bases for the rule related to administrative closure.

*Response:* The Department has reviewed the TRAC Report referenced by commenters but finds it both unpersuasive as a basis for commenters' suggestions to revise the final rule and largely inapposite to the issue overall. As an initial point, the TRAC Report does not address any of the legal issues surrounding administrative closure raised by the NPRM. 85 FR at 52503–05. Thus, for example, it does not address the existing regulations' references to the "disposition" of a case, the superfluousness issue raised by existing regulations for the Board Chairman and the Chief Immigration Judge allowing them to defer adjudication of cases, or the propriety of authorizing an immigration judge or Board Member to infringe upon the prosecutorial discretion of DHS. Without engaging the Department's legal concerns, the utility and persuasiveness of the TRAC Report are inherently limited.

TRAC's broader claims regarding administrative closure, framed by commenters as a policy challenge to the

<sup>80</sup> As discussed, *supra*, neither party possesses a right to file a "motion to reopen *sua sponte*," and such a motion is, in fact, an "oxymoron." Thus, the restrictions on the use of that authority have no impact on the parties' ability to seek use of that authority, regardless of the current status of a case.

<sup>81</sup> To the extent that the rule merely codifies existing law or authority, however, nothing in the rule precludes adjudicators from applying that existing authority to pending cases independently of the generally prospective application of the rule. For example, the Department notes that independent of the final rule, the Attorney General's decision in *Matter of Castro-Tum*, 27 I&N Dec. 271, remains binding and applicable to all pending cases, except in the Fourth and Seventh Circuits. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) ("[D]etermination and ruling by the Attorney General with respect to all questions of law [as to the INA and other laws relating to the immigration and naturalization of aliens] shall be controlling"); INA 103(g)(2), 8 U.S.C. 1103(g)(2) ("The Attorney General shall . . . review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out [his authorities]."); 8 CFR 1003.1(g)(1) ("[D]ecisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.").

<sup>82</sup> In addition, the Department notes that the commenter cited *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) in support of the argument that the Department failed to consider costs, but the relevant discussion by the Supreme Court in that case is dicta surrounding the reasons that courts must first consider if Congress intended for legislative to have retroactive effect.

<sup>83</sup> Although several commenters cited the TRAC report, TRAC itself did not submit a comment on the NPRM and appears not to have taken a position on it.

Department's position, also provide little support for revising the rule. TRAC listed four conclusions it derived from data analysis on EOIR data<sup>84</sup> regarding administratively closed cases. Those conclusions, however, are of limited probative value and do not undermine the Department's foundations for the rule.

TRAC's first conclusion is that "administrative closure has been routinely used by Immigration Judges to manage their growing caseloads as well as manage the unresolved overlapping of jurisdictions between the EOIR and other immigration agencies." TRAC Report, *supra*. No one, including the Department, has disputed that immigration judges previously used administrative closure. See, e.g., *Administratively Closed Cases*. There is no evidence, however, that it was used effectively to manage caseloads—in the sense of resolving cases more efficiently—or used to resolve issues of overlapping jurisdiction,<sup>85</sup> and TRAC does not provide evidence to the contrary. TRAC merely states the historical frequency of the usage of administrative closure, which is a statement not in dispute or of particular relevance to the rule.

Moreover, TRAC's conclusory observation that "[a]dministrative closures have allowed judges to temporarily close cases and take them off their active docket either because judges wish to focus limited resources on higher priority removal cases or because jurisdictional issues were prolonging the case" is doubtful for several reasons. See *Hernandez-Serrano*, 2020 WL 6883420 at \*4 ("To the contrary, the regulations expressly limit their delegation to actions 'necessary for the disposition' of the case. And that more restricted delegation cannot support a decision *not* to decide the case for reasons of administrative 'convenience' or the 'efficient management of the resources of the immigration courts and the BIA.'" (cleaned up, emphasis in original)). As both TRAC and the Department have noted, administratively closed cases are not "temporarily" closed in any realistic sense of the word; rather, they are taken off the docket for either at least three years (according to TRAC) or at least 10

years (*Administratively Closed Cases*). See *id.* at \*1, \*4 ("A regulation delegating to immigration judges authority to take certain actions '[i]n deciding the individual cases before them' does not delegate to them general authority not to decide those cases at all. Yet in more than 400,000 cases in which an alien was charged with being subject to deportation or (after April 1, 1997) removal, immigration judges or the Board of Immigration Appeals have invoked such a regulation to close cases administratively—meaning the case was removed from the IJ's docket without further proceedings absent some persuasive reason to reopen it. As of October 2018, more than 350,000 of those cases had not been reopened. An adjudicatory default on that scale strikes directly at the rule of law. . . . [N]o one. . . . has explained how a general authority to close cases administratively can itself be lawful while leading to such facially unlawful results.").

Further, administrative closure does not resolve legal questions of jurisdiction, and even if it did, TRAC does not explain why prolonging a case through administrative closure would address the issue of cases already prolonged due to jurisdictional questions. Further, TRAC does not explain why it is appropriate for an immigration judge to choose which cases are a "priority" rather than DHS, who—unlike EOIR and immigration judges—is statutorily tasked by Congress with "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of 2002, Public Law 107–296, sec. 402(5), Nov. 25, 2002, 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). For all of these reasons, TRAC's first conclusion, to the extent it is relied on by commenters, does not provide a persuasive basis for altering the rule.

TRAC's second conclusion, "administrative closure has helped reduce the backlog," is patently incorrect, as both the Department and TRAC's own data establishes. TRAC Report, *supra*. As TRAC acknowledges, "[a]dministrative closure does not terminate a case, it does not provide permanent relief from deportation, and it does not confer lawful status of any kind." TRAC Report, *supra*; see also *Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (BIA 1988) ("The administrative closing of a case does not result in a final order."); *Matter of Lopez-Barrrios*, 20 I&N Dec. at 204 ("However, [administrative closure] does not result in a final order."). Consequently, because administrative closure is not a disposition of a case and does not result in a final order, the case remains

pending, albeit inactive. In other words, the removal of the case from an active docket does not make the case disappear; thus, administratively closed cases contribute to the overall tally of pending cases—colloquially called a "backlog"—just as much as active cases do. Both TRAC's data and the Department's data, EOIR, *Adjudication Statistics: Active and Inactive Pending Cases*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1139516/download>, show that the pending caseload, including both active and inactive cases, has grown considerably in recent years.<sup>86</sup> This growth has occurred for reasons other than administrative closure, particularly since 2017. Nevertheless, the increase in the use of administrative closure beginning in FY 2012 did not reduce the overall pending caseload, contrary to the assertions of TRAC and commenters.

TRAC's third conclusion, "data from the Immigration Courts show that immigrants who obtain administrative closure are likely to have followed legal requirements and obtain lawful status," is both arguable as an assertion of fact and, ultimately of little relevance to the rule. TRAC Report, *supra*. According to TRAC's data, only 16 percent of aliens were awarded relief after their cases were administratively closed, whereas 40 percent were ordered removed or received an order of voluntary departure.<sup>87</sup> *Id.* Those numbers belie the

<sup>86</sup> TRAC itself has issued reports since at least 2009 noting the annual growth in the pending caseload which it terms a backlog. TRAC Immigration Reports, *Immigration Courts*, available at [https://trac.syr.edu/phptools/reports/reports.php?layer=immigration&report\\_type=report](https://trac.syr.edu/phptools/reports/reports.php?layer=immigration&report_type=report) (last visited Nov. 24, 2020). TRAC also noted this increase in the pending caseload even at the height of the use of administrative closure between 2012 and 2018. Compare TRAC Immigration Reports, *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated* (Jan. 15, 2014), available at <https://trac.syr.edu/immigration/reports/339/> (last visited Nov. 25, 2020) (use of administrative closure was intended "as a program to clear cases from the accumulated court backlog") with TRAC Immigration Reports, *Immigration Court Backlog Keeps Rising* (May 15, 2015), available at <https://trac.syr.edu/immigration/reports/385/> (last visited Nov. 25, 2020) (caseload still increasing in 2015) and TRAC Immigration Reports, *Immigration Backlog Still Rising Despite New Judge Investitures* (July 19, 2016), available at <https://trac.syr.edu/immigration/reports/429/> (last visited Nov. 25, 2020) (caseload still increasing in 2016).

<sup>87</sup> TRAC reports that 44 percent of cases resulted in the termination of proceedings after being administratively closed, which TRAC intuits to mean there was no longer a valid ground to remove the alien. As terminations may result from different bases, however, it is not clear that every termination resulted from the vitiation of grounds of removal against an alien. Moreover, TRAC's analysis does not consider whether the terminations were proper under the law, which was recently clarified by the Attorney General. See *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018) ("As discussed

<sup>84</sup> The Department does not know what analytics TRAC performed or the precise methods and definitions it employed. Accordingly, the Department cannot speak to the accuracy of TRAC's results. Even assuming the results are accurate, however, TRAC's assertions—and commenters' reliance on them—are unpersuasive for the reasons given.

<sup>85</sup> TRAC does not explain what it means by "overlapping jurisdiction" and does not elaborate further on the point in its Report.

assertion that aliens whose cases have been administratively closed are likely to obtain lawful status.<sup>88</sup> Moreover, whatever outcomes may or may not result following the administrative closure of a case, those outcomes, which are based on specific evidence in each case and applicable law and may cut both for and against the parties, do not effectively outweigh the concerns noted by the Department in issuing the rule.

TRAC's fourth conclusion, "the EOIR significantly misrepresented the data it used to justify this rule," is simply wrong. TRAC Report, *supra*. TRAC bases its claim primarily on the fact that EOIR does not include administrative closure decisions as completed cases; however, TRAC itself acknowledges that administratively closed cases are not final and, thus, not complete. *Id.* ("Administrative closure does not terminate a case, it does not provide permanent relief from deportation, and it does not confer lawful status of any kind."); *cf. Hernandez-Serrano*, 2020 WL 6883420 at \*3 ("Administrative closure typically is not an action taken '[i]n deciding' a case before an IJ; instead, as shown above, it is typically a decision not to decide the case. Nor is administrative closure typically an action 'necessary for the disposition' of an immigration case. Administrative closure is not itself a 'disposition' of a case, as Hernandez-Serrano concedes in this appeal."). Moreover, TRAC does not explain why an administratively closed case should be considered completed in light of longstanding BIA case law that such cases are not, in fact, completed. *See Matter of Amico*, 19 I&N Dec. at 654 n.1 ("The administrative closing of a case does not result in a final order."); *Matter of Lopez-Barrios*, 20 I&N Dec. at 204 ("However, [administrative closure] does not result in a final order.").

above, however, immigration judges have no inherent authority to terminate removal proceedings even though a particular case may pose sympathetic circumstances." Accordingly, it is not clear that the data, even if it is accurate, supports the assertion that aliens whose cases have been terminated "followed legal requirements and obtain[ed] lawful status." TRAC Immigration Reports, *The Life and Death of Administrative Closure* (Sept. 10, 2020) available at <https://trac.syr.edu/immigration/reports/623/> (last visited 11/25/2020).

<sup>88</sup> TRAC did not distinguish cases that would remain eligible for administrative closure under the final rule. Nevertheless, the Department notes that because an appropriate exercise of administrative closure under the rule includes regulations and settlement agreements that allow aliens to seek different types of relief from removal, *Matter of Castro-Tum*, 27 I&N Dec. at 276–78, the fact that only 16 percent of aliens overall obtain relief after their cases are administratively closed is further evidence that the impact of the rule is much less than commenters assert.

Similarly, TRAC asserts that EOIR that did not consider the average number of completed cases by immigration judges over time which TRAC asserts has declined in recent years. As an initial point, the Department notes that TRAC includes decisions of administrative closure as "completions" in its analysis which is contrary to both TRAC's own view and the relevant case law, as discussed above. Nevertheless, even if administratively closed cases were included as completed cases, TRAC's analysis presents an additional flaw.

The Department does not generally provide average, per-immigration judge completion numbers and did not rely on any such statistics in the rule. Further, TRAC's reliance on the raw number of immigration judges to calculate its own average—suggesting that per-immigration judge completions have declined from 737 to 657—illustrates the problem with calculating such an average. Immigration judges are hired throughout the year, they may be promoted at different times in the year, and they may retire, separate, or die during the year. Further, new immigration judges do not begin hearing full dockets of cases immediately upon hire, and immigration judges may also be off the bench for extended periods due to leave, military obligations, or disciplinary action. Thus, the number of immigration judges frequently fluctuates throughout the year and is not static. Consequently, using the snapshot number of immigration judges at the beginning or end of the fiscal year—as TRAC does—does not account for those changes, particularly for newly hired or supervisory immigration judges who are not hearing full or regular dockets. In other words, due to retirements, promotions, and new hires, the actual number of immigration judges who adjudicated cases during a fiscal year—and whose cases are included in the end-of-the-year completion totals—is necessarily different than the end-of-the-year total. TRAC's data does not appear to have controlled for immigration judges who were not or no longer hearing full dockets, including those not hearing full dockets but counted in EOIR's overall total and, thus, the Department finds its assertions unsupported.<sup>89</sup>

<sup>89</sup> In contrast, when the Department does calculate a per-immigration judge completion average, it controls for judges who did not hear regular dockets of cases throughout the fiscal year. *See, e.g., EOIR, Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, Oct. 10, 2019, available at <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion->

Additionally, even if TRAC's analysis were accurate, the implications of it for the rule are not apparent.<sup>90</sup> To the extent that TRAC asserts that immigration judge productivity has declined over time—at least until FY 2019—the Department generally agrees with that assertion, but its relevance to the rule is unclear. Although the Department acknowledges TRAC's tacit suggestion that the limitation of administrative closure by *Matter of Castro-Tum* in FY 2018 contributed to an increase in immigration judge productivity in FY 2019, the Department has not investigated that link explicitly. Moreover, the rule was proposed to address multiple legal and policy concerns with the use of administrative closure, to provide clearer delineation regarding the appropriateness of its usage, and to address inefficiency issues that it has wrought, particularly to the extent that it has contributed to docket churning and unnecessary delays in adjudicating cases. 85 FR at 52503–04. Thus, although decreased immigration judge productivity, which may result from multiple causes including the inappropriate use of administrative closure, may undermine the Department's ability to efficiently adjudicate cases, the rule was not promulgated solely to increase productivity.

In short, to the extent that commenters relied on the TRAC Report as a basis for opposing the rule, the Department finds that Report unpersuasive for the many reasons noted. Consequently, the Department also declines to accept the comments based on it.

### III. Regulatory Requirements

#### A. Administrative Procedure Act

Portions of this final rule state a rule of agency organization, procedure, or practice and reflect matters of agency management or personnel, *e.g.*, the provisions of 8 CFR 1003.1(e)(8) and (k), because they reflect internal

*numbers-fiscal-year-2019* ("On average, immigration judges who performed over the whole year completed 708 cases each in FY19.") (emphasis added)).

<sup>90</sup> The Department notes in passing two additional concerns about TRAC's analysis on this point. First, TRAC divides its analysis by Presidential administration even though the ability of an immigration judge to administratively close a case continued for over a year into the current administration. Second, TRAC does not acknowledge that even under its methodology, per-immigration judge case completions increased in FY 2019. Thus, it is not clear that its overall assertion—a clear decline in per-immigration judge productivity under the current administration—is even factually accurate.

management directives or delegations of authority by the Attorney General. Thus, those portions of the rule are exempt from the requirements for notice-and-comment rulemaking and a 30-day delay in effective date. 5 U.S.C. 553(a)(2), (b)(A). Nevertheless, rather than attempting to parse out different sections of the rule with different effective dates, the Department has elected to publish the entire final rule with a 30-day effective date under the APA. 5 U.S.C. 553(d).

#### B. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the RFA (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The Department's discussion of the RFA in section II.C.5, *supra*, in response to RFA-related comments received on the rule is incorporated in full herein by reference.

#### C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### D. Executive Orders 12866, 13563, and 13771

Portions of this rule involve agency organization, management, or personnel matters and would, therefore, not be subject to review by the Office of Management and Budget (OMB) pursuant to section 3(d)(3) of Executive Order 12866. For similar reasons, those portions would not be subject to the requirements of Executive Orders 13563 or 13771. Nevertheless, rather than parse out individual provisions to determine whether OMB review is warranted for discrete provisions of the rule, the Department has determined that this rule, as a whole, is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to OMB for review.

The Department certifies that this regulation has been drafted in accordance with the principles of Executive Orders 12866, 13563, and 13771. Executive Orders 12866 and 13563 direct agencies to assess the costs

and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

As noted in the NPRM, 85 FR at 52509, the Department believes that the rule will help more efficiently adjudicate cases before the BIA allowing for a reduction in the number of cases pending before EOIR overall and an increase in the BIA adjudicating more appeals annually. The Department believes the costs to the public will be negligible, if any, because the basic briefing procedures will remain the same (and any notable changes fall principally on DHS rather than the public), because current BIA policy already disfavors multiple or lengthy briefing extension requests, because the use of administrative closure has already been restricted subsequent to the decision in *Matter of Castro-Tum*, 27 I&N Dec. 271, because no party has a right to *sua sponte* reopening authority and a motion to exercise such authority is already not cognizable under existing law, and because the BIA is generally already prohibited from considering new evidence on appeal. Further, the Department notes that the most significant regulatory change to the BIA's case management process—and a more comprehensive one than the one in the final rule—was promulgated without the type of numeric analysis commenters suggested is warranted with no noted concerns or challenges on that basis. 67 FR at 54900.

In short, the rule does not impose any new costs, and most, if not all, of the proposed rule is directed at internal case processing. Any changes contemplated by the rule would have little, if any, apparent impact on the public but would substantially improve both the quality and efficiency of BIA appellate adjudications. The Department has complied with the relevant Executive Orders.

The Department did find the rule to be a significant regulatory action and, as such, performed an analysis under Executive Order 13771. In applying Executive Order 13771, the Department determined that this final rule will substantially improve BIA appellate procedure with the result of negligible new costs to the public. As such, no budget implications will result from this

final rule, and no balance is needed from the repeal of other regulations.

#### E. Executive Order 13132—Federalism

This rule will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section six of Executive Order 13132, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### F. Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### G. Paperwork Reduction Act

This rule does not propose new "collection[s] of information" as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (codified at 44 U.S.C. 3501–3521) ("PRA"), and its implementing regulations, 5 CFR part 1320.

#### H. Congressional Review Act

This proposed rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### List of Subjects

##### 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

##### 8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the Department amends 8 CFR parts 1003 and 1240 as follows:

**PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

■ 1. The authority citation for part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

- 2. Amend § 1003.1 by:
  - a. Revising paragraph (c), (d)(1)(ii), and (d)(3)(iv);
  - b. Adding paragraph (d)(3)(v);
  - c. Revising paragraph (d)(6)(ii), (iii), and (iv) and (d)(7);
  - d. In paragraph (e) introductory text:
    - i. Removing “this paragraph” and adding “this paragraph (e)” in its place; and
    - ii. Adding a sentence at the end of the paragraph;
  - e. Revising paragraphs (e)(1), (e)(8) introductory text, and (e)(8)(i) and (iii);
  - f. Removing and reserving paragraph (e)(8)(iv);
  - g. Adding five sentences at the end of paragraph (e)(8)(v) and adding paragraphs (e)(8)(v)(A) through (F); and
  - h. Adding paragraph (k).

The additions and revisions read as follows:

**§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.**

\* \* \* \* \*

(c) *Jurisdiction by certification.* The Secretary, or any other duly authorized officer of DHS, or an immigration judge may in any case arising under paragraph (b) of this section certify such case to the Board for adjudication.

(d) \* \* \*

(1) \* \* \*

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case. Nothing in this paragraph (d)(1)(ii) shall be construed as authorizing the Board to administratively close or otherwise defer adjudication of a case unless a regulation promulgated by the Department of Justice or a previous

judicially approved settlement expressly authorizes such an action. Only the Director or Chief Appellate Immigration Judge may direct the deferral of adjudication of any case or cases by the Board.

\* \* \* \* \*

(3) \* \* \*

(iv)(A) The Board will not engage in factfinding in the course of deciding cases, except that the Board may take administrative notice of facts that are not reasonably subject to dispute, such as:

- (1) Current events;
- (2) The contents of official documents outside the record;
- (3) Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed; or
- (4) Undisputed facts contained in the record.

(B) If the Board intends to rely on an administratively noticed fact outside of the record, such as those indicated in paragraphs (d)(3)(iv)(A)(1) through (3) of this section, as the basis for reversing an immigration judge’s grant of relief or protection from removal, it must provide notice to the parties of its intent and afford them an opportunity of not less than 14 days to respond to the notice.

(C) The Board shall not *sua sponte* remand a case for further factfinding unless the factfinding is necessary to determine whether the immigration judge had jurisdiction over the case.

(D) Except as provided in paragraph (d)(6)(iii) or (d)(7)(v)(B) of this section, the Board shall not remand a direct appeal from an immigration judge’s decision for additional factfinding unless:

- (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 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;
  - (ii) The immigration judge’s factual findings were not clearly erroneous, but the immigration judge committed an error of law that requires additional factfinding on remand; or

(iii) Remand to DHS is warranted following de novo review.

(v) The Board may affirm the decision of the immigration judge or the Department of Homeland Security on any basis supported by the record, including a basis supported by facts that are not reasonably subject to dispute, such as undisputed facts in the record.

\* \* \* \* \*

(6) \* \* \*

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, and the completion of the investigations or examinations is necessary for the Board to complete its adjudication of the appeal, the Board will provide notice to both parties that, in order to complete adjudication of the appeal, the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board. Unless DHS advises the Board that such information is no longer necessary in the particular case, the Board’s notice will notify the alien that DHS will contact the alien to take additional steps to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary investigations or examinations. If DHS is unable to independently update the necessary investigations or examinations, DHS shall send the alien instructions that comply with the requirements of § 1003.47(d) regarding the necessary procedures and contemporaneously serve a copy of the instructions with the Board. The Board’s notice will also advise the alien of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any alien in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If a non-detained alien fails to comply with necessary procedures for collecting biometrics or other biographical information within 90 days of the DHS’s instruction notice under paragraph



(d)(6)(ii) of this section, if applicable, the Board shall deem the application abandoned unless the alien shows good cause before the 90-day period has elapsed, in which case the alien should be given no more than an additional 30 days to comply with the procedures. If the Board deems an application abandoned under this section, it shall adjudicate the remainder of the appeal within 30 days and shall enter an order of removal or a grant of voluntary departure, as appropriate. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, any pending applications for immigration relief or protection should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion. If DHS fails to report the results of timely completed or updated identity, law enforcement, or security investigations or examinations within 180 days of the Board's notice under paragraph (d)(6)(ii) of this section, the Board shall remand the case to the immigration judge for further proceedings under § 1003.47(h).

(iv) The Board is not required to hold a case pursuant to paragraph (d)(6)(ii) of this section if the Board decides to dismiss the respondent's appeal or deny the relief or protection sought.

\* \* \* \* \*

(7) *Finality of decision*—(i) *In general.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. In adjudicating an appeal, the Board possesses authority to issue an order of removal, an order granting relief from removal, an order granting protection from removal combined with an order of removal as appropriate, an order granting voluntary departure with an alternate order of removal, and an order terminating or dismissing proceedings, provided that the issuance of any order is consistent with applicable law. The Board may affirm the decision of the immigration judge or DHS on any basis supported by the record. In no case shall the Board order a remand for an immigration judge to issue an order that the Board itself could issue.

(ii) *Remands.* In addition to the possibility of remands regarding information obtained as a result of the identity, law enforcement, or security investigations or examinations under paragraph (d)(6)(iii) of this section, after

applying the appropriate standard of review on appeal, the Board may issue an order remanding a case to an immigration judge or DHS for further consideration based on an error of law or fact, subject to any applicable statutory or regulatory limitations, including paragraph (d)(3)(iv)(D) of this section and the following:

(A) The Board shall not remand a case for further action without identifying the standard of review it applied and the specific error or errors made by the adjudicator in paragraphs (d)(7)(ii)(B) through (E) of this section.

(B) The Board shall not remand a case based on the application of a “totality of the circumstances” standard of review.

(C) The Board shall not remand a case based on a legal argument not presented in paragraphs (d)(7)(ii)(D) through (E) of this section unless that argument pertains to an issue of jurisdiction over an application or the proceedings, or to a material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the date of the immigration judge's decision, and substantial evidence indicates that change has vitiated all grounds of removability applicable to the alien.

(D) The Board shall not *sua sponte* remand a case unless the basis for such a remand is solely a question of jurisdiction over an application or the proceedings.

(E) The Board shall not remand a case to an immigration judge solely to consider or reconsider a request for voluntary departure nor solely due to the failure of the immigration judge to provide advisals following a grant of voluntary departure. In such situations, the Board shall follow the procedures in § 1240.26(k) of this chapter.

(iii) *Scope of the remand.* Where the Board remands a case to an immigration judge, it divests itself of jurisdiction of that case, unless the Board remands a case due to the court's failure to forward the administrative record in response to the Board's request. The Board may qualify or limit the scope or purpose of a remand order without retaining jurisdiction over the case following the remand. In any case in which the Board has qualified or limited the scope or purpose of the remand, the immigration judge shall not consider any issues outside the scope or purpose of that order, unless such an issue calls into question the immigration judge's continuing jurisdiction over the case.

(iv) *Voluntary departure.* The Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the alien requested voluntary departure

before an immigration judge, the alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging, and the Board finds that the alien is otherwise eligible for voluntary departure, as provided in § 1240.26(k) of this chapter. In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the alien merits voluntary departure as a matter of discretion. If the Board does not grant the request for voluntary departure, it must deny the request.

(v) *New evidence on appeal.* (A) Subject to paragraph (d)(7)(v)(B), the Board shall not receive or review new evidence submitted on appeal, shall not remand a case for consideration of new evidence received on appeal, and shall not consider a motion to remand based on new evidence. A party seeking to submit new evidence shall file a motion to reopen in accordance with applicable law.

(B) Nothing in paragraph (d)(7)(v)(A) of this section shall preclude the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, including civil or criminal investigations of immigration fraud, regardless of whether the investigations or examinations were conducted pursuant to § 1003.47(h) or paragraph (d)(6) of this section, nor from remanding a case to address a question of jurisdiction over an application or the proceedings or a question regarding a ground or grounds of removability specified in section 212 or 237 of the Act.

\* \* \* \* \*

(e) \* \* \* The provisions of this paragraph (e) shall apply to all cases before the Board, regardless of whether they were initiated by filing a Notice of Appeal, filing a motion, or receipt of a remand from Federal court, the Attorney General, or the Director.

(1) *Initial screening.* All cases shall be referred to the screening panel for review upon the filing of a Notice of Appeal or a motion or upon receipt of a remand from a Federal court, the Attorney General, or the Director. Screening panel review shall be completed within 14 days of the filing or receipt. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section, except for those

subject to summary dismissal as provided in paragraph (d)(2)(i)(E) of this section, shall be promptly dismissed no later than 30 days after the Notice of Appeal was filed. Unless referred for a three-member panel decision pursuant to paragraph (e)(6) of this section, an interlocutory appeal shall be adjudicated within 30 days of the filing of the appeal.

\* \* \* \* \*

(8) *Timeliness.* The Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, the Board shall promptly order a transcript, if appropriate, within seven days after the screening panel completes its review and shall issue a briefing schedule within seven days after the transcript is provided. If no transcript may be ordered due to a lack of available funding or a lack of vendor capacity, the Chairman shall so certify that fact in writing to the Director. The Chairman shall also maintain a record of all such cases in which transcription cannot be ordered and provide that record to the Director. If no transcript is required, the Board shall issue a briefing schedule within seven days after the screening panel completes its review. The case shall be assigned to a single Board member for merits review under paragraph (e)(3) of this section within seven days of the completion of the record on appeal, including any briefs or motions. The single Board member shall then determine whether to adjudicate the appeal or to designate the case for decision by a three-member panel under paragraphs (e)(5) and (6) of this section within 14 days of being assigned the case. The single Board member or three-member panel to which the case is assigned shall issue a decision on the merits consistent with this section and with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, subject to concurrence by the Director, or as provided in paragraph (d)(6) of this section or as provided in §§ 1003.6(c) and 1003.19(i), the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days of completion of the record for all cases assigned to a three-member panel (including any additional opinion by a member of the panel).

\* \* \* \* \*

(iii) In rare circumstances, when an impending decision by the United

States Supreme Court or an impending *en banc* Board decision may substantially determine the outcome of a group of cases pending before the Board, the Chairman, subject to concurrence by the Director, may hold the cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8). The length of such a hold shall not exceed 120 days.

\* \* \* \* \*

(v) \* \* \* The Chairman shall notify the Director of all cases in which an extension under paragraph (e)(8)(ii) of this section, a hold under paragraph (e)(8)(iii) of this section, or any other delay in meeting the requirements of paragraph (e)(8) of this section occurs. For any case still pending adjudication by the Board more than 335 days after the appeal was filed, the motion was filed, or the remand was received and not described in paragraphs (e)(8)(v)(A) through (E) of this section, the Chairman shall refer that case to the Director for decision. For a case referred to the Director under this paragraph (e)(8)(v), the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, including the authority to issue a precedential decision and the authority to refer the case to the Attorney General for review, either on his own or at the direction of the Attorney General. The Director may not further delegate this authority. For purposes of this paragraph (e)(8)(v), the following categories of cases pending adjudication by the Board more than 335 days after the appeal was filed, the motion was filed, or the remand was received will not be referred by the Chairman to the Director:

- (A) Cases subject to a hold under paragraph (d)(6)(ii) of this section;
- (B) Cases subject to an extension under paragraph (e)(8)(ii) of this section;
- (C) Cases subject to a hold under paragraph (e)(8)(iii) of this section;
- (D) Cases whose adjudication has been deferred by the Director pursuant to § 1003.0(b)(1)(ii);
- (E) Cases remanded by the Director under paragraph (k) of this section in which 335 days have elapsed following the remand; and,
- (F) Cases that have been administratively closed prior to the elapse of 335 days after the appeal was filed pursuant to a regulation promulgated by the Department of Justice or a previous judicially approved settlement that expressly authorizes such an action and the administrative

closure causes the pendency of the appeal to exceed 335 days.

\* \* \* \* \*

(k) *Quality assurance certification.* (1) In any case in which the Board remands a case to an immigration judge or reopens and remands a case to an immigration judge, the immigration judge may forward that case by certification to the Director for further review only in the following circumstances:

- (i) The Board decision contains a typographical or clerical error affecting the outcome of the case;
- (ii) The Board decision is clearly contrary to a provision of the Act, any other immigration law or statute, any applicable regulation, or a published, binding precedent;
- (iii) The Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or
- (iv) A material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the decision.

(2) In order to certify a decision under paragraph (k)(1) of this section, an immigration judge must:

- (i) Issue an order of certification within 30 days of the Board decision if the alien is not detained and within 15 days of the Board decision if the alien is detained;
- (ii) In the order of certification, specify the regulatory basis for the certification and summarize the underlying procedural, factual, or legal basis; and
- (iii) Provide notice of the certification to both parties.

(3) For a case certified to the Director under this paragraph (k), the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, except as otherwise provided in this paragraph (k), including the authority to request briefing or additional filings from the parties at the sole discretion of the Director, the authority to issue a precedent decision, and the authority to refer the case to the Attorney General for review, either on the Director's own or at the direction of the Attorney General. For a case certified to the Director under this paragraph (k), the Director may dismiss the certification and return the case to the immigration judge or the Director may remand the case back to the Board for further proceedings. In a case certified to the Director under this paragraph (k), the Director may not issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal.

(4) The quality assurance certification process shall not be used as a basis solely to express disapproval of or disagreement with the outcome of a Board decision unless that decision is alleged to reflect an error described in paragraph (k)(1) of this section.

■ 3. Amend § 1003.2 by:

- a. In paragraph (a), revising the first sentence and adding a sentence following the first sentence;
- b. Revising paragraph (b)(1);
- c. Removing the word “or” in paragraph (c)(3)(iii);
- d. Removing the period at the end of paragraph (c)(3)(iv) and adding a semicolon in its place;
- e. Adding paragraph (c)(3)(v), (vi), and (vii); and
- f. Removing paragraph (c)(4).

The revision and additions read as follows:

**§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.**

(a) *General.* The Board may at any time reopen or reconsider a case in which it has rendered a decision on its own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. In all other cases, the Board may only reopen or reconsider any case in which it has rendered a decision solely pursuant to a motion filed by one or both parties. \* \* \*

(b) \* \* \*

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(v) For which a three-member panel of the Board agrees that reopening is warranted when the following circumstances are present, provided that a respondent may file only one motion to reopen pursuant to this paragraph (c)(3):

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen;

(vi) Filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national; or

(vii) Filed by DHS in removal proceedings pursuant to section 240 of

the Act or in proceedings initiated pursuant to § 1208.2(c) of this chapter.

\* \* \* \* \*

■ 4. Amend § 1003.3 by revising paragraphs (a)(2) and (c)(1) and (2) to read as follows:

**§ 1003.3 Notice of appeal.**

(a) \* \* \*

(2) *Appeal from decision of a DHS officer.* A party affected by a decision of a DHS officer that may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a DHS officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer (Form EOIR–29) directly with DHS in accordance with the instructions in the decision of the DHS officer within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate DHS office, together with all required documents, and the fee provisions of § 1003.8 are satisfied.

\* \* \* \* \*

(c) \* \* \*

(1) *Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In all cases, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. The Board, upon written motion and a maximum of one time per case, may extend the period for filing a brief or, if permitted, a reply brief for up to 14 days for good cause shown. If an extension is granted, it is granted to both parties, and neither party may request a further extension. Nothing in this paragraph (c)(1) shall be construed as creating a right to a briefing extension for any party in any case, and the Board shall not adopt a policy of granting all extension requests without individualized consideration of good cause. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a DHS officer.* Briefs in support of or in

opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board and only if filed within 14 days of the deadline for the initial briefs. Upon written request of the alien and a maximum of one time per case, the DHS officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for up to 14 days for good cause shown. After the forwarding of the record on appeal by the DHS officer the Board may, solely in its discretion, authorize the filing of supplemental briefs directly with the Board and may provide the parties up to a maximum of 14 days to simultaneously file such briefs. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a DHS office, shall include proof of service on the opposing party.

\* \* \* \* \*

■ 5. Revise § 1003.5 to read as follows:

**§ 1003.5 Forwarding of record on appeal.**

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be promptly forwarded to the Board upon the request or the order of the Board, unless the Board already has access to the record of proceeding in electronic format. The Director, in consultation with the Chairman and the Chief Immigration Judge, shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges. The Chairman and the Chief Immigration Judge shall take such steps as necessary to reduce the time required to produce transcripts of those proceedings and to ensure their quality.

(b) *Appeal from decision of a DHS officer.* If an appeal is taken from a decision of a DHS officer, the record of proceeding shall be forwarded to the Board by the DHS officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs, unless the DHS officer reopens and approves the petition.

**§ 1003.7 [Amended]**

- 6. Amend § 1003.7 by removing “Service” and “the Service” each place they appear and adding in their place the acronym “DHS”.
- 7. Amend § 1003.10(b) by:
  - a. Removing “governing standards” and adding “governing standards set forth in paragraph (d) of this section” in its place; and
  - b. Adding two sentences at the end of the paragraph.

The additions reads as follows:

**§ 1003.10 Immigration judges.**

\* \* \* \* \*

(b) \* \* \* Nothing in this paragraph (b) nor in any regulation contained in part 1240 of this chapter shall be construed as authorizing an immigration judge to administratively close or otherwise defer adjudication of a case unless a regulation promulgated by the Department of Justice or a previous judicially approved settlement expressly authorizes such an action. Only the Director or Chief Immigration Judge may direct the deferral of adjudication of any case or cases by an immigration judge.

\* \* \* \* \*

- 8. Amend § 1003.23 by:
  - a. In paragraph (b)(1) introductory text:
  - i. Revising the first sentence and adding a sentence following the first sentence; and
  - ii. Removing “this paragraph” and adding “this paragraph (b)(1)” in its place;
  - b. Adding paragraphs (b)(4)(v) and (vi).

The revision and additions read as follows:

**§ 1003.23 Reopening or reconsideration before the Immigration Court.**

\* \* \* \* \*

(b) \* \* \*

(1) *In general.* Unless jurisdiction is vested with the Board of Immigration Appeals, an immigration judge may at any time reopen a case in which he or she has rendered a decision on his or her own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. Unless jurisdiction is vested with the Board of Immigration Appeals, in all other cases, an immigration judge may only reopen or reconsider any case in which he or she has rendered a decision solely pursuant to a motion filed by one or both parties. \* \* \*

\* \* \* \* \*

(4) \* \* \*

(v) *Exceptions to time and numerical limitations.* The time and numerical

limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed when each of the following circumstances is present, provided that a respondent may file only one motion to reopen pursuant to this paragraph (b)(4):

(A) A material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien; and

(B) The movant exercised diligence in pursuing the motion to reopen.

(vi) *Asserted United States citizenship or nationality.* The time limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen proceedings filed based on specific allegations, supported by evidence, that the respondent is a United States citizen or national.

**PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES**

■ 9. The authority citation for part 1240 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

- 10. Amend § 1240.26 by:
  - a. Redesignating paragraph (j) as paragraph (l);
  - b. Adding a new reserved paragraph (j); and
  - c. Adding paragraph (k).

The addition reads as follows:

**§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.**

\* \* \* \* \*

(k) *Authority of the Board to grant voluntary departure in the first instance.* The following procedures apply to any request for voluntary departure reviewed by the Board:

(1) The Board shall not remand a case to an immigration judge to reconsider a request for voluntary departure. If the Board first finds that an immigration judge incorrectly denied an alien’s request for voluntary departure or failed to provide appropriate advisals, the Board shall consider the alien’s request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases which an alien has appealed an immigration judge’s

decision or in which DHS and the alien have both appealed an immigration judge’s decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the alien timely appealed;

(ii) The alien’s notice of appeal specified that the alien is appealing the immigration judge’s denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging;

(iii) The Board finds that the immigration judge’s decision was in error; and

(iv) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which DHS has appealed an immigration judge’s decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge and provided evidence or a proffer of evidence in support of the alien’s request;

(ii) The immigration judge either granted the request or did not rule on it; and,

(iii) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the alien’s timely departure from the United States, if supported by the record on appeal and within the scope of the Board’s authority on appeal.

Unless otherwise indicated in this section, the Board shall advise the alien in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b), (c), (d), (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the alien of the duty to post the bond with the ICE Field Office Director within 10 business days of the Board’s order granting voluntary departure if that order was served by mail and shall advise the alien of the duty to post the bond with the ICE Field Office Director within five business days of the Board’s order granting voluntary departure if that order was served electronically. If documentation sufficient to assure lawful entry into the country to which the alien is departing is not contained in the record, but the alien continues to assert a request for voluntary departure

under section 240B of the Act and the Board finds that the alien is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the alien in writing of such conditions. The

alien may accept or decline the grant of voluntary departure and may manifest his or her declination either by written notice to the Board within five days of receipt of its decision, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the alien of a motion to reopen or reconsider the Board's decision, or by filing a timely petition

for review of the Board's decision. The alien may decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

\* \* \* \* \*

**James R. McHenry III,**

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