December 28, 2020

Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, Virginia 22041
Via federal eRulemaking portal, http://www.regulations.gov

RE: EOIR Docket No. 18-0503; Dir. Order No. 01-2021, Executive Office for Immigration Review, Public Comment Opposing Proposed Rules on Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal

Dear Ms. Alder Reid:

Kids in Need of Defense (KIND) submits the following comments on the Executive Office for Immigration Review's (EOIR) proposed rule titled Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal (the "Proposed Rule"), published in a Notice of Proposed Rulemaking (NPRM), 85 Fed. Reg. 75942 (Nov. 27, 2020). While we focus our comments on those issues most affecting the unaccompanied children we serve, KIND objects to the rule as a whole, as the proposed changes will undermine due process and restrict meaningful access to the statutory right to file a motion to reopen or motion to reconsider.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

I. The Proposed Rule Fails to Provide Sufficient Time for Adequate Public Review and Cannot Be Analyzed in Isolation

The Proposed Rule was issued with only a 30-day comment period, in violation of Executive Order 12,866, and with no suggestion of a good reason for an abbreviated period. Executive Order 12,866, Regulatory Planning and Review, sec. 6(1)(a), 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."). EOIR should re-notice the rule with a proper comment period of at least 60 days.

A limited comment period is particularly improper for a proposal like this Proposed Rule, whose provisions interact with an enormous number of changes that EOIR has finalized to the asylum regulations in the last four weeks. It is impossible to comment on the Proposed Rule here against the unsettled backdrop of those rules and the litigation that surrounds them.

It would be arbitrary and capricious for the agency to finalize this rule without having given the public any opportunity to understand the broad, overarching changes it would make. Requiring speculative analysis in 30 rather than 60 or more days compounds the problem and points to the agency's haste to establish mechanisms that makes it nearly impossible for applicants to access the permanent protections under the immigration code.

II. The Proposed Rule Would Deprive Unaccompanied Children of Due Process by Defining the Circumstances in Which a Motion to Reopen or Reconsider Could Be Granted, Contrary to the INA and the TVPRA.

The Proposed Rule creates barriers to filing motions to reopen or reconsider and limits the adjudicator's discretion to grant such motions. These procedural barriers also create a presumption against the grant of a discretionary stay of removal. These proposed provisions threaten to deprive thousands of asylum seekers of a fair day in court and pose particular hardships for unaccompanied children, who due to their developmental stage, trauma history, and lack of familiarity with immigration law have great difficulty disclosing traumatic experiences, compiling evidence, and completing asylum applications or other applications for relief. Yet unaccompanied children are also a population for which Congress has enacted special protections against return to trafficking, danger, or other harm. The Proposed Rule fails to consider the serious risk if a child is unable to access the protections Congress created specifically for children. It similarly fails to—and indeed it cannot—explain how these procedures comport with protections for unaccompanied children provided for by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Consequently, the Proposed Rule violates not only the Administrative Procedure Act (APA), but also the Immigration and Nationality Act (INA) as amended by the TVPRA.

The Proposed Rule creates unnecessary barriers to a full hearing, not only making it more difficult to reopen cases but strictly limiting the scope of any cases which are reopened. The Proposed Rule shifts the balance of equities such that the respondent bears a heavier burden and cannot access available relief if it is not within the immigration court's jurisdiction. By closing off access to meaningful review, the Proposed Rule will unnecessarily prevent children from obtaining protection and relief. We note, in particular, the following provisions which are most likely to affect children's cases.

A. The Proposed Rule Emphasizes Surrender Requirements at the Expense of the Merits of the Motion – Proposed 8 C.F.R. § 1003.48(c)

Proposed section 1003.48(c) requires that the moving party include in a motion whether they were notified to surrender for "removal, deportation, or exclusion" and whether they complied with the order. While the Proposed Rule directs the adjudicator to weigh favorable and unfavorable factors, evaluating them cumulatively, the mandatory inclusion of information regarding one factor gives greater weight to that factor. This is evident from the Proposed Rule's admonition that failure to surrender is a "very serious adverse factor which warrants the denial of a discretionary motion." 85 Fed. Reg. at 75947-48, citing *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985). No similar discussion encourages the

submission of information about or consideration of countervailing factors that could balance out the failure to surrender.

In fact, the Proposed Rule fails to even acknowledge that a failure to surrender may not be willful or intentional. In KIND's experience, children may receive removal orders, whether in person or *in absentia*, without any clear understanding of the impact of the order. Children may need to reopen their cases for a number of reasons: for example, they may have missed a hearing after being released from ORR custody due to not having received their hearing notice; caretakers may not inform them about or transport them to their hearing, or intervening circumstances may prevent their knowledge of, and attendance at, their hearing. In one such case, a child's caretaker had been the victim of a crime in their home in the U.S. The child was unable to return to the home, and the mail went uncollected. The child received a *in absentia* order, having missed the hearing notice, and then failed to comply with the letter requesting he surrender, which he also did not receive. He was subsequently taken into ORR custody to be removed. Acknowledging the circumstances affecting the child's ability to comply with the surrender request, the immigration court reopened the case to allow him to seek relief from removal, which was subsequently granted.

EOIR should eliminate the Proposed Rule's requirement that motions include a statement regarding whether the individual has complied with the duty to surrender for removal and the regulatory language that says that an individual's failure to comply may result in denial of the motion.

B. The Proposed Rule Acts as a Bar to Available Relief that Cannot Be Adjudicated By the Immigration Court – Proposed 8 C.F.R. § 1003.48(e)(1)(2)

Under the Proposed Rule, neither an immigration judge nor the Board may reopen proceedings due to an application for relief that is pending with another agency if the immigration judge or Board would not have the authority to grant the relief in the first instance. The individual must demonstrate prima facie eligibility for relief in order to have a motion granted. If a visa is required for relief, the prima facie eligibility must include evidence that the individual has a relevant approved current visa, if a visa is required. 85 Fed. Reg. at 75948-49.

This provision is contrary to congressional intent with regard to the adjudication of asylum applications filed by unaccompanied children. Pursuant to the TVPRA, USCIS's Asylum Office has initial jurisdiction to hear unaccompanied children's asylum claims, as Congress determined that an interview is a more child-appropriate forum than an immigration court hearing. If not granted asylum, an unaccompanied child may renew his or her asylum claim before the immigration court, where the immigration judge would then have jurisdiction to hear the claim. Under the Proposed Rule, a child would no longer have the opportunity to file a motion to reopen in order to file an asylum application in the first instance or on the basis of new evidence. The Proposed Rule forces the child to choose between foregoing a viable motion to reopen or having the asylum case adjudicated by the immigration judge, despite the child's statutory right under the TVPRA to have that application adjudicated in the less adversarial setting of the USCIS Asylum Office.[1]

[1] Since publication of the NPRM, a federal court has made clear that USCIS's adjudication of unaccompanied children's asylum claims cannot be displaced by an immigration judge's attempt to find that a child has ceased to

Similarly, a motion to reopen in order to pursue Special Immigrant Juvenile Status (SIJS) would fail under the Proposed Rule because the Immigration Court does not have jurisdiction over the initial stage of this form of relief or if no visa is immediately available. USCIS has jurisdiction to adjudicate the SIJS petition, which, if granted, provides protection for children who have been subjected to abuse, abandonment, neglect, or similar circumstances by one or both parents. INA § 101(a)(27)(J). Under the Proposed Rule, children who are eligible for this unique statutory protection would be unable to access this benefit upon reopening their cases, unless USCIS has adjudicated the petition and a visa was immediately available.

Additionally, the Proposed Rule would bar children from reopening their cases for the sole purpose of seeking relief such as SIJS, T, or U visas. In the example above of the case of the child who received an *in absentia* order, the Proposed Rule would severely limit the options available to him upon re-opening, particularly as he did not initially have counsel. The urgency of moving to reopen such cases may mean that counsel has not fully explored all possible forms of relief with the child. Working with children, particularly tender-aged children and those affected by trauma, presents unique challenges, and it takes time to develop trust to obtain the necessary information. Language issues and confinement in government custody may compound these challenges, creating both psychological and logistical barriers that can have grave consequences for a child's ability to prepare and submit a thorough motion and underlying application for relief.

The Proposed Rule poses particular disadvantages for children, by subjecting them to regulations that would prevent them from being able to reopen their cases should USCIS have jurisdiction to adjudicate their cases. This is contrary to congressional expectations and directives. This necessitates withdrawal of the Proposed Rule.

C. The Proposed Rule Improperly Limits the Scope of a Reopened Case, Wasting Judicial Resources – Proposed 8 C.F.R § 1003.48(e)(3)

Under the existing rules, reopening a case serves to reopen the case for any purpose, regardless of the underlying basis of the motion. 85 Fed. Reg. at 75953. The Department's Proposed Rule "would limit the reopened proceeding to consider only those issues (sic) or issues upon which reopening or reconsideration was granted . . . ." *Id.* This would require the individual "to establish in the motion to reopen or reconsider each basis upon which the respondent intends to apply for relief." *Id.*

With regard to children's cases, it is particularly important to allow an immigration judge or the Board to consider any and all issues, as circumstances may change during the pendency of proceedings. While a child may initially only be seeking asylum, in the course of re-opened proceedings, circumstances may change such that the child becomes eligible for SIJS or VAWA. If the Proposed Rule were to go into effect, it would cruelly bar a child from having the immigration judge consider claims that the child is eligible for under the INA but prevented from accessing on account of this Proposed Rule. The NPRM

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qualify as unaccompanied, and has enjoined U.S. Immigration and Customs Enforcement (ICE) prosecutors from arguing for such determinations in immigration court. Mem. Op. and Order (Dkt. #143, 144), *J.O.P. v. U.S. Dep't of Homeland Sec.*, No. 19-cv-1944 (D. Md. Dec. 21, 2020) (expanding preliminary injunction). The expanded *J.O.P.* injunction reinforces the need for EOIR to stay its hand when a respondent is pursuing relief over which USCIS has jurisdiction.

suggests that the Proposed Rule will not prejudice those applying for relief, as they "can always apply to DHS for a stay of removal while DHS adjudicates the underlying application." 85 Fed. Reg. at 75948. In doing so, however, EOIR overlooks the barriers to applying for stays before multiple agencies (as the stay would come from ICE while the adjudication is pending at USCIS); assumes the availability of discretionary stays by another agency that may not be granted; and fails to consider the harms that could result if a child eligible for humanitarian protection is in fact deported. As such, EOIR should eliminate this proposal from the language of the Proposed Rule.

D. The proposed rule creates egregious barriers to obtaining a stay of removal – Proposed 8 C.F.R. § 1003.48(k)

The Proposed Rule creates new and onerous requirements to successfully obtain a stay of removal. The requirements include a list of factors that the immigration judge or Board must consider when determining whether to grant a stay; specific instructions for submitting a motion for discretionary stay in conjunction with the motion to reopen or rescind; and prohibitions on the immigration judge or Board's granting a stay unless the motion is accompanied by proof that the individual initially sought a stay from DHS. While the adjudicator is to balance the factors, there is not to be a presumption that "the balance of factors weighs in favor of granting a discretionary stay." 85 Fed. Reg. at 7595859. Further, the Proposed Rule emphasizes that a stay is an extraordinary remedy. 8 C.F.R. § 1003.48(k)(1) (proposed). In the example above at Section II.A., if a stay had not been granted, the child would have been removed to his home country where there was no caretaker or home for him, and he would have faced great harm.

The administrative requirements of the Proposed Rule with regard to stays impose onerous requirements for children and fail to fully consider the range of issues that may arise in children's cases and the grave risks posed by the potential removal of children seeking protection from abuse, neglect, and persecution, among other dangers. Instead of a balancing test that prioritizes preventing irreparable harm, the Proposed Rule sets out exacting procedural standards with which individuals must comply in the hopes of being granted a stay. The Proposed Rule places more emphasis on the procedural requirements of service on the opposing party than on the irreparable harm that the individual may face should a stay not be granted. Weighing the risk of irreparable harm most heavily is the appropriate way to ensure the immigration court or Board will be able to then fully consider the evidence and arguments presented in the motion to reopen or reconsider.

III. Conclusion

The Proposed Rule magnifies the barriers to reopening or reconsidering the cases of unaccompanied children, who due to their developmental stage and trauma history, and limited familiarity with immigration law have great difficulty disclosing traumatic experiences, compiling evidence, and completing applications for relief, and may become subject to removal orders during the process of trying to present meritorious claims for relief. Unaccompanied children are also a population for which Congress has enacted special protections against return to trafficking, danger, or harm, and the Proposed Rule undermines that solicitude. For the foregoing reasons and others, the Proposed Rule should be withdrawn.

Sincerely,

/s/

Maria Odom
Vice President for Legal Programs
Kids in Need of Defense