COMMENTS ON 8 C.F.R. § 1003.29 (b) (1) & (b) (2) -- CONTINUANCES

ROUND TABLE
of Former Immigration Judges

December 28, 2020

Lauren Alder Reid, Assistant Director
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Federal eRulemaking Portal: http://www.regulations.gov.

Re: Comments in Opposition to Proposed Rulemaking: 85 FR 75925

Good Cause for a Continuance in Immigration Proceedings
RIN 1125-AB03
EOIR Docket No. 19-0410

Dear Ms. Alder Reid,

The Round Table of Former Immigration Judges is composed of 47 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating various applications, motions, and appeals. Our members include nationally-respected experts on immigration law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our immigration laws during our service on the bench. We also ruled on motions to continue and recognize the importance of the right to file such a motion. Whether or not we ultimately reached the correct result in our decisions, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

We as Judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

INTRODUCTION

Initially we note that the current practice of reducing the time for notice and comment severely undermines the ability for the public to digest and comment on rules. The reduction of time to 30 days violates the intent of Congress to give full deliberation to regulatory changes. As experienced adjudicators, we are in a unique position to contextualize these changes, but even with our experience, the breadth of these proposed regulations should allow for additional time to review and comment.

OPENING COMMENT

These proposed rules[2] would violate our Constitution, specifically the 5th Amendment's guarantee of due process to all persons in the United States. Immigration Judges have a duty to accord due process in removal hearings. The proposed rules would make it impossible for Immigration Judges to fulfill their duty to accord due process to the parties before them.

The proposed rules start from an inaccurate, faulty premise that discredits EOIR's own hard working corps of Immigration Judges, by asserting --in the preface to the rule-- that the Immigration Judges are causing: "unnecessary delays … by the improper use of continuances, [by] past misinterpretations and misapplications of the good cause standard with respect to continuances."[3] EOIR's lack of confidence in its own corps of Judges is disheartening, to say the least, but not a basis to change the rules.

The Round Table of Former Immigration Judges and Members of the Board of Immigration Appeals [hereinafter referred to as The Round Table] opposes the proposed rules in total and respectfully urges that they be withdrawn. We provide the following list of reasons why the proposed rules should not be adopted.

SUMMARY OF REASONS FOR OBJECTIONS

1. Given that the proposed rules are constitutionally infirm, they would lack legal validity.

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[2] 85 FR 75925.

[3] 85 FR 75929; Proposed 8 CFR § 1003.29.

2. The bases listed in the proposed rules deemed insufficient to warrant a continuance actually all fit within the concept of good cause. One cannot change the meaning of words by defining them as what they are not. Such is arbitrary and capricious.

3. The proposed regulation violates the concept of the judicial model applicable to the Immigration Court by circumscribing the discretion of the Immigration Judges.

4. The proposed regulation would improperly remove the ability of Immigration Judges to consider specific circumstances on a case by case basis, a necessary exercise when making a finding about the presence or absence of good cause. No rule can envision all the possible circumstances that can arise in individual cases. The attempt at micromanagement of the process interferes with the Judges' ability to reach correct results.

5. The proposed regulation violates due process by setting up restrictive mandatory rules that are inflexible and unfair.

6. The stated objective of combatting backlogs is disingenuous. Analysis would show that a combination of numerous factors has contributed to the stated 1.2 million case --continuously growing-- backlog, none of which can be attributed to improper or abusive grants of continuances by Immigration Judges. The new rules, in fact, would actually add to the backlog rather than reduce it.[4]

7. It is far more efficient for Immigration Judges to spend their time on cases that do not have other means of settlement. A good cause continuance that is granted by the Immigration Judge can open trial time to advance cases in which the parties are both anxious and ready to be heard. This helps to reduce backlogs, not increase them.

8. No data is cited to support the premise that Immigration Judges are continuing cases that should not be continued. The regulation shows unwarranted lack of confidence in the Immigration Judge corps.

[4] The agency itself has contributed substantially to this backlog. Immigration Judges have been stripped already of much of their authority to manage their dockets. The OCIJ, through the ACIJ, unilaterally cancels immigration court dockets for a number of reasons such as new priorities which often involve detailing a judge to another jurisdiction which requires rescheduling his/her existing docket, leading to further delays for those cases. Furthermore, rescheduling by headquarters often leads to additional motions to continue in both locations, because new dates set without consultation with counsel often produce attorney conflicts. Currently the pandemic is a major factor increasing the backlog, as months' worth of cases have had to be postponed.

9. It is inconsistent to require that "good cause" embody a requirement to show exceptional circumstances. "Exceptional circumstances" is a much higher standard than good cause. The proposed rules therefore are internally inconsistent.

10. The proposed regulation severely limits continuances. It limits continuances to pursue collateral relief such as the adjudication of visa petitions, a prerequisite for Immigration Judge jurisdiction to adjudicate an adjustment of status application. It limits continuances, even when USCIS has jurisdiction over applications, such as I-589s for UAC minors, I-360s for SIJ petitions, and I-751 applications.[5] It limits the number of continuances to find counsel, which is a due process violation and a lack of fundamental fairness.[6] It allows just one continuance for attorney preparation which also disregards the principles of fundamental fairness and due process. [7] It states it strongly disfavors continuances of merits hearings.[8] It precludes a continuance (with limited exceptions) where there is a conflict with a hearing in another courtroom or court.[9]

11. This proposed regulation would generate a large increase in interlocutory appeals. This substantial additional litigation would greatly increase the time required to complete cases, add to the backlog, and increase the financial cost to the public.

12. The proposed regulation is unnecessary, as there is already binding caselaw governing the topic, as acknowledged by the preamble to the proposed rule.

DISCUSSION

1. <u>The arguments advanced for the proposed Regulation lack validity.</u>

<u>Interests of Stakeholders. & Experts</u>

In the preamble to the proposed regulation, DOJ/EOIR cites the supposed interest of stakeholders and the backlog of 1.2 million cases as justification for this proposed regulation.[10] The preamble states: "As many stakeholders and experts have recognized, improper uses of continuances lead to unnecessary case delays that do not benefit a respondent with a valid claim." [11]

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[5] 85 FR 75931.
[6] 85 FR 75935-6.
[7] *Id.*
[8] 85 FR 75938.
[9] 85 FR 75937-38.
[10] 85 FR 75930.

[11] 85 FR 75928.

However, no such stakeholders or experts are identified. There is merely a footnote (fn#6) which cites a Georgetown University report which comments that: "Some unauthorized migrants may benefit from…delays…but those with legitimate grounds for relief from removal, such as many asylum seekers, remain in limbo for unnecessarily long periods."[12]

The quoted language complains of long waits for hearing dates but contains no suggestion that improper grants of continuances are responsible.

Despite the referenced footnote quoting immigrant advocates, only DHS and the public are mentioned as interested parties. Displaying an unbalanced perspective, the preamble criticizes immigration attorneys for alleged unreasonable requests for continuances, while no mention is made about the numerous requests for continuances by DHS attorneys for such reasons as inability to find their files or being short-staffed. It is the responsibility of Immigration Judges to treat ALL parties before them fairly and equally. In sum, any attempt to claim the ever-growing 1.2 million case backlog was caused by abuse of discretion by Immigration Judges in granting continuances is both inaccurate and insulting.

2. Impermissibly limiting the meaning of "Good Cause"

The proposed regulation does not attempt to define "good cause;" rather it primarily lists examples of what it claims do not exemplify "good cause." [13] However, those examples include many bases of what is not "good cause" that a reasonable person might well consider good cause for continuance requests. Those examples include:

- attorney conflicts with cases in other courtrooms,
- pending undecided collateral matters that could potentially offer relief that would obviate the need for a removal order or a hearing on a contested form of relief,
- the possible availability of deferred action,
- more than one continuance to obtain counsel or for attorney preparation.

The proposed regulation does not provide clarification or guidance; rather it is an impermissible attempt to redefine the meaning of good cause to something it is not. That can't be done, any more than saying black is white makes it so. The preamble makes clear that continuances are disfavored. With that understanding, the required characteristic of impartiality is removed from the Judges. The proposed regulation appears to be designed to all but eliminate good cause continuances.

3. Rigid time limits

The proposed regulation specifies rigid maximum time limits for grants of continuances, such as 30 days, which are extremely short and likewise unworkable.[14] Such rigid time limits are

[12] *Id.*; fn 6.

[13] 85 FR 75931; Proposed 8 CFR § 1003.29(b)(1).

[14] 85 FR 75935,6; Proposed 8 CFR § 1003.29(b)(2).

impossible to meet, as dockets are often full within the time period specified. Master calendar non-detained dockets are routinely full for the upcoming 30 days, and, under the current case-management system, it is difficult, if not impossible, to add additional slots for cases. Moreover, the merits hearing calendars for non-detained cases for many Judges are currently full for a couple years or more into the future.

4. Attack on Concept of Case by Case Analysis

"Good cause" is inherently a flexible standard, not one that can be rigidly defined. Why? It needs to be a flexible concept because it is impossible to incorporate all the factors that may constitute good cause. Rather, case by case analysis is necessary to assess "good cause". [15] The proposed regulation's prohibition of case by case analysis is fundamentally unfair; and it is violative of due process.

The preamble calls the term "good cause" ambiguous and describes case by case analysis as a problem. The preamble claims case by case analysis is inefficient.[16] On the contrary, determining good cause requires case by case analysis because no two cases are the same. It requires discretionary analysis by a Judge, a human being, who can assess the individual circumstances. Judges are experienced professionals who should be trusted and allowed to independently review and balance the factors presented in an individual case to determine if good cause exists to warrant a continuance. This includes judicial efficiency, the position of the party in opposition (if any), and ultimately what result is necessary to ensure fundamental fairness and due process.

Case by case analysis is required for due process to be accorded. Shortcutting due process in the name of efficiency is short-sighted. It will be self-defeating, as that approach will generate a mountain of appeals that will lead to corrective remands requiring that the cases be redone in a manner that comports with due process. As a result, much more time and energy will have to be spent per case, as will additional government resources. Ultimate disposition of cases will be delayed by months and years while the appeals and rehearings proceed.[17]

5. Interference with the independence of the Immigration Judges

The proposed rule requires Immigration Judges to apply 5 non-exhaustive factors to determine if good cause exists to warrant a continuance. [18] This restrictive language about what may be considered good cause discourages Immigration Judges from granting continuances. The

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[15] 85 FR 75925.

[16] *Id.*

[17] This is not just speculation. An example of this exact scenario can be found in a case arising out of the Third Circuit. The Immigration Judge denied a subsequent continuance request because EOIR had imposed "case completion goals" for Immigration Judges. The BIA affirmed, and the Third Circuit reversed, finding that the denial of the continuance violated due process. *Hashmi v. Att'y Gen.*, 531 F.3d 256 (3d Cir. 2008). The case was remanded back to the BIA, which then sustained the appeal and remanded the case back to the Immigration Court. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *see also* 85 FR 75926-75929.

[18] 85 FR 75926; Proposed 8 CFR § 1003.29(b)(1).

proposed regulation is written in a restrictive and negative narrative, prohibiting individual case by case consideration in many cases. This proposed regulation is a bold attempt to restrict even further the discretionary authority of immigration Judges. It discredits their authority and professionalism.

In rejecting the need for case by case analysis, it appears to the Round Table that this proposed regulation is not intended to be consistent with fundamental fairness, due process, or respect for Immigration Judges' discretionary authority. Instead, it appears that the proposed regulation is designed to limit, if not eliminate, the independence and discretionary authority of Immigration Judges. Its further restriction of Immigration Judges' authority appears designed to assert rigid control over our immigration courts, completely undercutting the decisional independence of the Judges.

6. Efficiency

Rather than improving efficiency and reducing the backlog, the proposed regulation would create additional obstacles to timely, efficient disposition of cases, that would actually increase the backlog, due to the following:

a. As mentioned in the summary, it would eliminate the ability of Judges to prioritize cases that actually need lengthy merits hearings from those that have other potential avenues of disposition and can be dealt with more quickly in the long run.

b. It will add to the burden of already overworked Immigration Judges who are already required by an OPPM to "justify" all grants of continuances with a written order or "clear" oral ruling.

c. It will spawn a large number of interlocutory appeals, clogging the docket of and adding to the backlog at the Board of Immigration Appeals.

d. It will produce grounds for a considerable increase in appeals to the Federal courts, which will result in reversals and remands, delaying ultimate disposition for many more years.

OPPM 17-01 requirement of formal ruling explaining reasons for any continuance granted

Historically, OPPMs (OCIJ Operating Policies and Procedures Memoranda) have used language that speaks to fundamental fairness and due process. For example, OPPM 13-01 contained explicit language to that effect. OPPM 17-01, which replaced OPPM 13-01, repeats the same language, to wit: Immigration Court proceedings require fundamental fairness, due process, and a right to be heard.

Notwithstanding this stated principle, OPPM 17-01 admonishes Immigration Judges that: "justice delayed is justice denied" and adds a requirement that Immigration Judges must "justify" any continuance granted with a written or oral ruling that clearly states the reasons for the grant. [19] This requirement for a formal ruling applies only when a request for a continuance is granted, not when one is denied -- a biased standard to be sure. Neither the OPPM nor the proposed regulation endorse case by case analysis or recognize the professional expertise of Immigration Judges. The proposed regulation, which adds additional restrictions, appears to be an effort to all but eliminate continuances under the veil that continuances are abused and Immigration Judges are complicit. Given that background, the proposed regulation appears to be a punitive measure directed at Immigration Judges for not bending sufficiently to the will of political higher ups at the Department of Justice.

7. The regulation is unnecessary

We already have case precedents. There exists a large volume of published precedent decisions, at both the BIA and Federal Court level, that provide guidance and restrictions on the grant of a continuance by an Immigration Judge. These cases are repeatedly cited by the DOJ/EOIR preamble as justification for the proposed regulation, with the explanation that it would be helpful to put all of the rulings in one place for "clarification" purposes.[20] The preamble claims that the objective of the proposed regulation is to simplify a determination of when good cause exists. The proposed regulation fails to meet that objective. Instead, it will cause confusion, especially because the regulation does not, in fact, codify the meaning of "good cause" set forth in BIA and Circuit Court decisions.

8. Potential for conflicts with the Judicial Branch

Creating a regulation designed to supersede existing case precedent actually adds a level of complication and confusion to the process, as adjudicators will have to make sure they are in compliance with both the case law and the regulation. This will not be an easy task. The language of the regulation is far from simple to understand. It is written in a confusing way; it cites exceptions and exceptions to the exceptions, with references to other regulatory provisions only by their

[19] 85 FR 75936.

[20] 85 FR 75926, referencing *Matter of L-N-Y-,* 27 I&N Dec. 755, 759-60 (BIA 2020); *Matter of L-A-B-R-,* 27 I&N Dec. 405, 412 (A.G. 2018); *Matter of Hashmi,* 24 I&N Dec. 785, 790 (BIA 2009); *Matter of Rajah,* 25 I&N Dec. 127, 130, 135-38 (BIA 2009); *Matter of Sibrun,* 18 I&N Dec. 354, 355-58 (BIA 1983) as well as various circuit court decisions.

regulation number, without further description. The proposed regulation is hardly a model of simplicity, much less clarity.

A serious problem with creating a binding regulation that overlaps with binding Federal case precedents is the potential for conflicts between branches of government. Immigration Judges at both the trial and appellate level are placed in the unenviable position of having to determine whether they are bound to follow binding judicial case law or binding regulations, where it is difficult to reconcile them. A vivid, very recent example of this problem can be found in the sharp reprimand issued earlier this year by the U.S. Court of Appeals for the 7th Circuit, admonishing the Board of Immigration Appeals (the Immigration Courts' appellate judiciary) for contemptuous behavior in disregarding the Court's binding judicial order in a case the Court had remanded to them, and instead applying *dicta* from a precedent decision of the Attorney General (a political appointee).[21]

Historically, case law has provided the guidance for what good cause may be. Case law defining good cause is more appropriate than this proposed regulation, because it recognizes individual facts and circumstances in individual cases. The BIA and Federal courts have provided significant guidance in published decisions. There is no need for yet another regulation hamstringing our Immigration Judges. Let the BIA and Federal circuit courts continue to provide guidance on good cause in immigration court proceedings as they have historically done.

The agency itself admits in the preamble: "…continuances may "`promote efficient case management,'[22]" (quoting *United States* v. *Tanner,* 544 F.3d 793, 795 (7th Cir. 2008))".

Let Immigration Judges maintain the tools they need to manage their dockets efficiently.

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Given the limited time to respond to these regulations, we anticipate that these opposition comments may not be considered. However, the Round Table files these constructive comments in order to preserve the record and the integrity of fundamental fairness and due process.

Very truly yours,

/s/ The Round Table of Former Immigration Judges

Steven Abrams
Terry Bain
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[21] *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035–36 (7th Cir. 2020).

[22] 85 FR 75928-29: (quoting *United States* v. *Tanner,* 544 F.3d 793, 795 (7th Cir. 2008)).

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