

**Erin E. Meyer**  
(415) 676-2252  
emeyer@keker.com

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**VIA ELECTRONIC MAIL**

Jean King, Acting Director (jean.king@usdoj.gov)  
cc: Steven C. Lang, Program Director (steven.lang@usdoj.gov)  
Executive Office for Immigration Review  
U.S. Department of Justice  
5107 Leesburg Pike  
Falls Church, VA 22041

Re: *EOIR Policy Memoranda and Regulatory Review*

Dear Acting Director King:

We represent the Refugee and Immigrant Center for Education and Legal Services (“RAICES”), Tahirih Justice Center (“Tahirih”), and Innovation Law Lab (“Law Lab”) and submit this letter on their behalf.

**I. INTRODUCTION**

**RAICES, Tahirih, and Law Lab are nonprofit organizations that are dedicated to upholding the rights of immigrants and refugees, including by supporting asylum-seeking immigrants and other respondents in immigration court proceedings.**

We submit this letter to alert you of certain recent policy changes made by the former administration that alter the procedures and structures of EOIR in a manner that undermines respondents’ rights to a full and fair hearing in immigration court, their counsel’s ability to fully support them, and the court system’s ability to fairly and efficiently adjudicate the cases before it. This letter is limited in scope and is not meant as a comprehensive response to all recent policies. We thought it important, however, to draw the agency’s attention to some discrete areas where immediate reforms could help depoliticize EOIR, promote judicial efficiency and decrease backlogs, and substantially improve EOIR’s ability to protect respondents’ rights and fairly adjudicate individuals’ claims for relief.

## **II. PROVIDING NONCITIZENS TIME TO SEEK AND RETAIN COUNSEL AND ALLOWING IMMIGRATION JUDGES TO CONTROL THEIR DOCKETS AND DECREASE CASE BACKLOGS**

### **RAICES, Tahirih, and Law Lab urge EOIR to rescind the 2021 Continuances Policy Memo and to revise Policy Memo 19-31 and footnote 7 of the 2018 Memorandum on Case Priorities regarding the use of status dockets.**

In January 2021, EOIR issued the “Continuances” Policy Memorandum (“Continuances Memo”). This memo replaced Operating Policies and Procedures Memorandum (OPPM) 17-01, Continuances from July 2017, implementing a new policy that undermines the right of noncitizens to pursue meritorious claims for relief and prevents noncitizens from pursuing collateral relief to which they are entitled. The Continuances Memo primarily does this in two ways: (A) by eliminating the longstanding practice of giving noncitizens a meaningful opportunity to seek and retain counsel, and (B) by impermissibly encouraging immigration judges to look to a proposed regulatory scheme—which was never finalized and has since been abandoned—that imposes draconian restrictions on what qualifies as “good cause” for a continuance. The memo should be rescinded and replaced with one that ensures cases are adjudicated on their merits. In addition, EOIR should revise Policy Memorandum 19-31 on the use of status dockets, and footnote 7 of the 2018 memorandum on Case Priorities, to make clear that a status case includes any case in which the respondent has a pending application for relief at USCIS and to require all non-detained courts to place all such cases on status dockets, so that immigration judges can control better manage their dockets and prevent case backlogs.

#### **A. The Continuances Memo Undermines Noncitizens’ Right to Counsel Under the INA by Undoing Longstanding EOIR Policy Regarding Continuances.**

The Continuances Memo eliminates a longstanding practice in the immigration courts without which the INA’s right to counsel cannot be meaningful: guaranteeing unrepresented noncitizens at least one continuance so they can seek and retain counsel. By eliminating this guarantee, the Continuances Memo supersedes longstanding interpretations of the INA, which emphasized that noncitizens’ due process rights require that they be given a reasonable time to seek and retain counsel in their removal proceedings. *See Matter of C-B-*, 25 I&N 888, 889 (BIA 2012) (“In order to meaningfully effectuate the statutory and regulatory privilege of legal representation where it has not been expressly waived, the Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.”); 8 U.S.C. § 1229a(b)(4)(B) (identifying right to counsel). But more to the point, this change interferes significantly with the ability of noncitizens to vindicate their rights for relief. As EOIR knows, whether a noncitizen is represented dramatically affects whether they can obtain relief.<sup>1</sup> The result of this new policy, therefore, will necessarily be that noncitizens who are legally entitled to relief will not receive it.

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<sup>1</sup> *See, e.g.,* Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 9 (2015), <https://perma.cc/EE3B-JR7W> (finding that

EOIR should rescind the Continuances Memo and replace it with guidance that better ensures access to counsel. Preserving continuances for counsel is particularly important given the reality that immigration judges currently have few other tools to manage their dockets to ensure that noncitizens can vindicate their procedural and substantive rights in immigration court. Continuances have historically been—and must continue to be—an important means of protecting these rights.

Additionally, guidance on continuances should consider the realities of immigrants in the United States: many immigrants are new to legal proceedings of any kind and may not fully understand the nature of the proceedings against them. Many have never worked with a lawyer in any capacity before, let alone in a capacity that requires reexamining past trauma that is the basis of a claim for protection. Thus, finding and retaining a lawyer will typically not be quick or simple. It may involve multiple meetings, document review, and research on the part of the attorney before accepting a case. Many immigrants in removal proceedings also lack employment authorization, which may contribute to an unstable living situation that further impacts their ability to access counsel. In addition, many immigrants in removal proceedings live in jurisdictions where there are long waitlists for pro bono counsel. If the INA's right to counsel is to be meaningful, immigration judges must have tools to respond to the lived experience of people in removal proceedings who would seek legal representation.

These practical considerations can substantially impact noncitizens' ability to retain and communicate with counsel for their removal proceedings. For example, RAICES worked with a private attorney in Atlanta, Georgia who agreed to set aside a few consultation hours each week, on a pro bono basis, for families that RAICES represented while detained in Texas and who were released to Georgia. While RAICES was able to schedule several families for consultations, almost no families were able to attend, because they lacked transportation to get to downtown Atlanta to complete the consultation. This simple example demonstrates how challenging obtaining counsel can be, and why continuances for this purpose are paramount. EOIR's policy should reflect that, in order to permit both parties to meaningfully participate in the removal proceedings, both parties must have a realistic opportunity to obtain counsel and prepare for their cases.

**B. The Continuances Memo Inappropriately Encourages Immigration Judges to Rely on a Proposed Regulatory Scheme that Never Became Final.**

The Continuances Memo inappropriately encourages immigration judges to look to proposed rules that were never finalized for guidance on how and whether to grant continuances. But the

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for similarly situated respondents, immigrants with representation were 5.5 times greater to obtain relief from removal); Matthew Boaz, Practical Abolition: Universal Representation as an Alternative to Immigration Detention, 89 Tenn. L. Rev. 1, 20 (2021) (forthcoming), <http://dx.doi.org/10.2139/ssrn.3801782> (reporting that universal representation pilot programs have found legal representation in removal proceedings to increase an individual's likelihood of obtaining relief between 300% and 1100%).

proposed rules the Continuances Memo cites are premised on an erroneous and unsubstantiated premise: that respondent-based continuances—and especially continuances sought by respondents who supposedly seek delay because they lack meritorious claims—are a major source of delay, and that guidance was necessary because courts historically misinterpreted or misapplied the “good cause” standard for continuances. These notions are not grounded in either law or fact.

Worse still, the proposed rules the Continuances Memo cites impose a draconian conception of “good cause” which, if credited by immigration judges, will significantly impede noncitizens’ ability to vindicate their legal rights. Among other things, the proposed rules:

- Restrict when immigration judges can grant a continuance for noncitizens pursuing collateral relief. For instance, the proposed rules require “clear and convincing evidence” that such relief will likely be granted. This requirement effectively forces noncitizens to meet a higher standard for a continuance than for the collateral relief itself. Indeed, U-Visa, T-Visa, and VAWA petitioners can support their petitions with “any credible evidence,” given that relevant documentary evidence is often in the hands of abusers or traffickers;
- Impose a rule that continuances for collateral relief are only permissible if the relief is available within six months. This rule penalizes noncitizens for USCIS delays and will cause the removal of noncitizens to countries where they may face violence and persecution while they await adjudication of meritorious claims for relief. The negative effects of this policy will be felt most harshly by those with approved petitions who, because of statutory caps, may not be able to get relief within six months despite being legally entitled to it;
- Restrict continuances for unaccompanied minors—whose asylum petitions must first be adjudicated by USCIS—where immigration judges decide that the minors are not eligible for asylum before USCIS adjudicates their applications;
- Effectively deny relief to individuals who are eligible for “parole, deferred action, or the exercise of prosecutorial discretion” by prohibiting continuances in cases where such relief is sought;
- Undermine the INA’s provisions for respondents’ right to counsel by making it harder for them to receive continuances that are required for them to have any meaningful opportunity to search for, find, and retain counsel. These rules disproportionately impact communities of people who find it most difficult to seek and retain counsel, including: unaccompanied minors, survivors of trauma, individuals with mental disabilities, illiterate individuals, speakers of indigenous languages or other languages where finding an interpreter is difficult, and individuals who are detained; and

- Weaken the effectiveness of legal representation to noncitizens by making it harder to receive the continuances needed for thorough preparation.

Notably, the Continuances Memo does not address “good cause” in the context of motions to continue filed by ICE trial attorneys. One such motion relates to paper files. Although EOIR is moving towards electronic filing and electronic records, and for years ICE has used the PLANet electronic records system, it is still relatively commonplace that a trial attorney lacks “the file” (typically referring to a paper A file) and requests a continuance in order to obtain the file. Immigration judges routinely grant these continuances, often for several weeks at a time, without ever considering whether the paper file is actually needed to proceed that day, or whether ICE has established “good cause” for its motion.

The Continuances Memo’s changes are all the more problematic because continuances are one of the few means immigration judges now have to manage their dockets. *See, e.g., Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (removing immigration judges’ general administrative closure authority); *see also Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (ruling that immigration judges do not have discretionary termination authority); EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020) (largely eradicating administrative closure and motions to remand, among many other things). But the heightened limits that these proposed rules purport to impose on immigration judges mean that many noncitizens’ cases will not be adjudicated on their merits, and will instead be lost by default because of the institutional pressures to resolve cases as quickly as possible without considering that noncitizens may have alternate relief available.

The Continuances Memo should be rescinded and replaced with one that does not refer to the draconian proposed rules (which have appropriately been withdrawn). Instead, EOIR should restore judges’ true case-by-case consideration of continuance requests, recognizing that continuances are a necessary and essential docket management tool; that it of course takes time for noncitizens to find and retain appropriate counsel; that continuances are necessary for counsel for noncitizens to effectively represent their clients; and that continuances are sought by EOIR as well as noncitizens for legitimate reasons and should not be automatically viewed as a dilatory tactic or illegitimate tool by immigration judges.

In addition, and more specifically, EOIR should (1) delete the portion of the Continuances Memo that conflicts with current law by removing the right to a continuance to find counsel; (2) provide generally for more ample continuances (of 90 to 180 days) to allow respondents to find counsel; and (3) require immigration judges to grant continuances (or, as discussed below, transfers to a status docket) for respondents with pending petitions before USCIS or any other agency or entity.

**C. The 2018 Narrowed Definition of Status Dockets Prevents Immigration Judges from Managing Their Dockets and Promotes Further Backlog in Cases.**

EOIR should revise Policy Memorandum 19-31 on the use of status dockets, and footnote 7 of the 2018 memorandum on Case Priorities, to make clear that a status case includes any case in which the respondent has a pending application for relief at USCIS and to require all non-detained courts to place all such cases on status dockets. Given that the 2018 memorandum defined “status dockets” for the first time, EOIR has full discretion to redefine those dockets. And redefining them to include any case in which a bona fide petition for relief is pending at USCIS will serve the interests of EOIR, DHS, and respondents alike.

It is no secret that EOIR faces a significant backlog of cases. It is also no secret that, until the Attorney General’s decision in *Matter of Castro-Tum*, immigration judges had the ability to manage that caseload by administratively closing cases in which the respondent had a pending application for relief before USCIS. Unfortunately, although three federal courts of appeals have now recognized that *Castro-Tum* is invalid (see *Sanchez v. Att’y Gen.*, \_\_\_ F.3d \_\_\_, 2021 WL 1774965 (3d Cir. May 5, 2021); *Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020); and *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)), its bar on administrative closure remains the law in much of the country. But status dockets—which are fully consistent with immigration judges’ authority to control their dockets, 8 C.F.R. § 1003.10(b)—can serve the same purpose.

Using status dockets in this way will redirect EOIR’s limited resources, and DHS’s limited resources, to cases in which they are most needed. Many individuals with applications for relief pending before USCIS will ultimately be granted lawful status, obviating the need for EOIR to review their immigration cases. In other words, when a respondent has a petition for relief pending before USCIS, EOIR’s decision on whether that respondent should be removed is not necessarily the final word on the matter. After all, if USCIS subsequently grants relief to an individual, that individual may be entitled to remain in the United States notwithstanding EOIR’s decision. In a situation in which EOIR faces a backlog of more than a million pending cases, it makes no sense to expend resources on cases in which EOIR’s decision could be no more than interim or advisory in nature. Nor does it make sense to spend funds to remove individuals who may ultimately be entitled to remain in the country.

Holding unnecessary proceedings also retraumatizes many respondents. Individuals who flee traumatic violence to seek asylum in the United States—including many individuals who are ultimately denied asylum—are routinely retraumatized by the process of recounting their stories in immigration court. But if individuals have an alternate path to status via relief from USCIS, the only humane course of action—and the only sensible course of action—is to hold their EOIR proceedings in abeyance until USCIS adjudicates their application or petition.

Of course, USCIS also faces backlogs. But immigration court respondents should not be punished for the problems of the agency. Furthermore, contrary to EOIR’s recent pronouncements, delayed adjudication before USCIS does not signify that an applicant is

unlikely to ultimately receive status. An agency-caused delay does not correlate with a weak application for relief. And in any event, backlogs at USCIS should not deter EOIR from managing its own backlogs by prioritizing the adjudication of cases in which respondents do not have other forms of available relief.

### **III. FACILITATING AND PROMOTING PRO BONO REPRESENTATION**

#### **RAICES, Tahirih, and Law Lab urge EOIR to rescind Part III of Policy Memorandum 21-08, Policy Memorandum 19-06, Policy Memorandum 19-13, and the decision to remove public access to the Immigration Judges' Benchbook.**

For decades, EOIR policies acknowledged that representation, and especially pro bono representation, provides a valuable service not only to respondents but also to immigration judges and the BIA. In recent years, however, EOIR has made statements that devalue representation and, consistent with those statements, has issued policies that discourage pro bono and other representatives from appearing in immigration court. EOIR has also revoked public access to the IJ Benchbook, which only promotes disparate and uneven standards among judges for deciding cases. These policies—Part III of Policy Memorandum 21-08, Policy Memorandum 19-06, Policy Memorandum 19-13, and the decision to remove public access to the IJ Benchbook—should be rescinded or substantially revised.

#### **A. Part III of PM 21-08 (Pro Bono Legal Services) Discourages Pro Bono Representation.**

In 2008, EOIR issued Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services. OPPM 08-01 expressly recognized that “[p]ro bono representation in immigration court ... promotes the effective and efficient administration of justice.” OPPM 08-01, at 1. The OPPM based recommended policies on that core fact. Among other things, it encouraged immigration judges to (1) “play an active part in pro bono training programs,” (2) “be flexible in the scheduling with pro bono representatives, particularly in the scheduling of hearings and in the setting of filing deadlines,” (3) “support legal orientations and group rights presentations,” (4) make records of proceedings “available to pro bono organizations and representatives,” (5) make “self-help legal materials” readily available to the public, and (6) “facilitate pro bono representation wherever minors were involved.” *Id.* at 3-6.

EOIR rescinded OPPM 08-01 in December 2020, as part of Policy Memorandum 21-08. Although that memorandum states that “EOIR continues to maintain a policy of encouraging pro bono representation by all of its adjudicatory components” (PM 21-08, at 3), it nevertheless rescinds all of the language from OPPM 08-01 quoted above. And instead, it encourages immigration judges to do no more than place pro bono attorneys first at master calendar hearings, allow them flexibility in telephonic and video appearances, and promptly complete cases. PM 21-08, at 3. Further, the memorandum improperly suggests that extending any other kind of scheduling courtesy to pro bono attorneys would somehow violate immigration judges’ ethical obligations. *Id.* at 4.

EOIR provided no rationale for abandoning its prior, more expansive encouragement of pro bono representation. The memorandum instead makes only the conclusory claim that “much of the information” in OPPM 08-01 “has become outdated.” PM 21-08, at 1. But the memorandum makes no attempt to explain that passing remark. Further, pro bono representation is no less important now than it was in 2008, and it is no less critical that immigration judges encourage that representation. After all, success in asylum claims has always depended, and continues to depend, on access to counsel—especially for detained respondents. *See* TRAC, *Asylum Decisions*, at <https://trac.syr.edu/phptools/immigration/asylum/>. And there is also no reason to believe that the steps recommended in OPPM 08-01 are somehow less effective at increasing pro bono representation rates than they were in 2008. Thus, by no longer recommending that immigration judges facilitate pro bono representation, PM 21-08 will lower representation rates, causing the denial of claims that would have succeeded with representation in place.

For these reasons, EOIR should immediately rescind Part III of PM 21-08 and reinstate OPPM 08-01. As further steps, EOIR should also explore the possibility of requiring immigration judges to encourage pro bono representation in the ways described in OPPM 08-01, and it should commission a study to determine the most effective ways of increasing pro bono representation of all kinds of respondents in immigration court.

**B. Policy Memorandum 19-06 (Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct) Opens the Door for Abuse and Retaliation by Immigration Judges.**

In addition to OPPM 08-01, certain attorney discipline procedures announced by EOIR in 2019 threaten to discourage high-quality pro bono representation. To be clear, we do not object to an attorney misconduct procedure: We understand that, in immigration law as in other areas of the law, some practitioners do not adhere to professional and ethical standards of conduct and representation. We therefore do not question the need for disciplinary rules and procedures of the sort provided in 8 C.F.R. §§ 1003.101-11. Policy Memorandum 19-06, however, sets up a procedure whereby immigration judges are instructed to “directly submit” all “suspected violations ... to EOIR Disciplinary Counsel.” P.M. 19-06, at 3.

Instructing, or even encouraging, immigration judges to report anything they believe might violate the rules of professional conduct opens the door for abuse and retaliation or, at a minimum, the widespread perception of abuse and retaliation. Many immigration judges, of course, will only report conduct that at least arguably violates professional or ethical rules. However, as documented in numerous complaints, many immigration judges themselves regularly exhibit unprofessional conduct on the bench—usually toward respondents and their counsel. *See generally* Innovation Law Lab & Southern Poverty Law Center, *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 2019), <https://innovationlawlab.org/reports/the-attorney-generals-judges/>; AILA, *AILA Receives Records Relating to EOIR Misconduct*, at <https://www.aila.org/infonet/eoir-records-relating-misconduct>. Whether or not these immigration judges would actually retaliate against counsel



they disfavor by filing ethics complaints for conduct that amounts to nothing more than professional, zealous advocacy, many advocates believe these immigration judges will do so.

That belief is reinforced by the fact that EOIR has recently sought to paint advocates generally as nuisances at best and serial dissemblers at worst. *See, e.g.*, 85 Fed. Reg. at 36,273, 52,501, 75,928-29, 75,935-37. The 2019 policy memorandum on attorney discipline therefore sets up a system in which ethics complaints are both made and resolved by an agency seen as openly adverse to advocates. There can thus be little doubt that the continued use and enforcement of PM 19-06 will discourage all representatives, including pro bono representatives with sterling reputations, from representing respondents in immigration court. The PM should accordingly be rescinded in its entirety, and disciplinary complaints should again be governed only by the relevant regulations.

**C. Prohibiting Public Access to the Current IJ Benchbook Serves No Purpose and Encourages Disparate Standards for Judges to Decide Cases.**

EOIR should also encourage pro bono representation by restoring public access to the current version of the IJ Benchbook. When it was accessible, the benchbook provided a useful substantive training guide for practitioners. It also promoted transparency and uniformity in proceedings by allowing respondents and counsel for both parties to ensure that immigration judges were deciding cases based on the same standards. We see no reason why this fundamental information should be kept from the public, and we urge EOIR to restore public access to the current version of the benchbook (or any similar, successor resource).

**IV. ELIMINATING UNNECESSARY BURDENS ON RESPONDENTS AND COUNSEL**

**RAICES, Tahirih, and Law Lab urge EOIR to (A) rescind any policy of requiring completion of non-mandatory fields on forms, (B) increase limits on brief lengths, (C) amend the Practice Manual to revert back to the prior briefing schedule, and (D) implement an effective e-filing system for all immigration courts.**

Several other recent policy changes place burdens on respondents and counsel and also harm EOIR itself by increasing the time that immigration judges and others spend reviewing individual applications and cases. These policies—(A) a “blank space” policy that appears implicit in Policy Memorandum 21-06 as well as a now-enjoined final rule, (B) the institution of unreasonably short length limits on pre-hearing briefs and briefs before the BIA, and (C) a significant decrease in the time applicants have to prepare for their master hearings—have no offsetting benefits and should be rescinded. In addition, because of difficulties in access to immigration courts and the number of unrepresented and/or detained filers, EOIR should improve and implement ECAS to allow for effective and efficient e-filing in all immigration courts.

**A. Requiring the Completion of Non-Mandatory Fields on Forms is Unnecessary Busywork That Serves No Purpose Other Than to Burden Respondents, Many of Whom are Pro Se.**

In 2019 and 2020, USCIS instituted a policy under which it would reject as incomplete certain forms, including the Form I-589 Application for Asylum and for Withholding of Removal, if any field in the form was blank. Under this policy, applicants had to fill in “N/A” in any field not applicable to them. At the end of 2020, facing class-action litigation over the policy, USCIS stopped enforcing the policy, and on April 1, 2021, it confirmed that it was reverting to pre-2019 policy under which it will reject forms as incomplete only if the applicant “leaves required spaces blank,” “fails to respond to questions related to filing requirements,” or “omits any required initial evidence.” USCIS, USCIS Confirms Elimination of “Blank Space” Criteria, at <https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria>.

It is not entirely clear to us whether EOIR has instituted a “blank space” policy that mirrors the policy USCIS followed in 2019 and 2020. We note, however, that several EOIR policies issued in 2020 can be interpreted as doing so. This includes Policy Memorandum 21-06, which states that “EOIR will continue to reject incomplete applications” without stating when an application will be deemed “incomplete.” PM 21-06, at 3. It also includes the (currently enjoined) final rule published as *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020), given that the proposed version of the rule stated that an asylum application is incomplete “if it does not include a response to each question.” 85 Fed. Reg. 59,692, 59,694 (Sept. 23, 2020).

Form I-589 is notoriously laborious to complete. The U.S. Supreme Court recently noted as much:

If the government finds filling out forms a chore, it has good company. The world is awash in forms, and rarely do agencies afford individuals the same latitude in completing them that the government seeks for itself today. Take this example: Asylum applicants must use a 12-page form and comply with 14 single-spaced pages of instructions. Failure to do so properly risks having an application returned, losing any chance of relief, or even criminal penalties.

*Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) (citing DHS, I-589, *Application for Asylum and for Withholding of Removal: Instructions*, pp. 5, 14; DHS, I-589 Form).

EOIR should make clear that non-required, inapplicable fields on Form I-589 need not be completed and that an application is complete so long as it includes answers for all required fields. There is no rational policy basis for any blank-space policy that requires the insertion of “N/A” in non-applicable, non-required fields. Any such policy also unduly burdens respondents—especially pro se respondents, many of whom have difficulty understanding form instructions—while also creating needless additional work for the agency. And as shown by the

fate of USCIS's blank-space policy, a blank-space policy is also likely to attract litigation with a high chance of success on the merits. In short, a blank-space policy does not serve the interests of the EOIR or anyone else, and the agency should immediately make clear that asylum applicants must only fill in required fields in Form I-589.

**B. The Reduction in Limits on the Length of Briefs Unreasonably Inhibits the Ability to Provide a Complete Presentation of Issues to the Immigration Court.**

EOIR's current policies impose unreasonable restrictions on pre-hearing briefs filed with immigration judges and on briefs filed with the BIA. In 2018, EOIR, for the first time, limited BIA briefs to 25 pages, and in 2020 it did the same for pre-hearing briefs, moving from having no page limit at all to a 25-page limit.

We recognize the need to have some limit on the length of briefs filed with the immigration courts and the BIA. The current limit, however, prevents the full and fair adjudication of cases. Asylum applicants in particular bear the burden of proving a whole host of elements. A survivor of domestic violence inflicted on account of gender and a feminist political opinion, for instance, must show (1) that she suffered past persecution, (2) that she satisfies the requirements for particular social groups, often with respect to numerous proposed PSGs, and/or the requirements for political opinion, (3) that she has established membership in each of those proposed particular social groups, (4) that the required nexus exists, (5) the unwillingness or inability of the state to control the persecutor, and (6) to forestall attempts to rebut the presumption of a well-founded fear of future persecution, that internal relocation would not be reasonable. And she must do so both in immigration court and on any appeal by either party to the BIA, because the Attorney General recently held that the BIA must address every element of an asylum claim, even elements that DHS does not dispute, before granting relief. *See Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020).

Even for highly competent and experienced representatives, in many cases the complexity of asylum law and the variegated facts needed to prove the elements of asylum claims simply cannot be persuasively briefed in 25 pages. The page limit may thus prevent even the best writers from fully airing the relevant facts and issues, increasing the risk of erroneous denials of asylum-eligible cases.

EOIR is also ill-served by the existing page limits. If respondents were given an adequate page limit, immigration judges and the BIA could be assured that the briefing in cases with competent, professional counsel adequately delineates the issues and highlights the most relevant facts. Under the current limits, however, that assumption does not hold. Our understanding is that, to force their briefs to comply with the current limits, some counsel cite wholesale to large portions of the evidentiary record, forgo detailed discussions of governing circuit law, and omit or compress other relevant information. The result is that briefs may be an inadequate guide to the case, forcing immigration judges and BIA members to spend more time

with the underlying record, and with the case as a whole, than they would given adequate page limits.

We suggest that the limits placed on briefing in the federal courts of appeals—which, of course, have the authority to review BIA decisions—provide a useful starting point for determining limits before EOIR. Those courts allow parties either 13,000 or 14,000 words per brief, depending on the circuit. Of course, briefs before the courts of appeals are likely to be more streamlined in terms of the number of issues, because—unlike immigration judges and the BIA after *Matter of A-C-A-A*—the federal courts of appeals typically will not review every issue in a case. A somewhat higher limit is therefore appropriate for EOIR. We propose 17,500 words in counseled cases and the rough equivalent of 40 pages in cases with pro se respondents (who are less likely to have access to word processing software), with the option to file a motion to extend that limit upon a showing that a case is unusually complex. We believe those limits will allow for the complete presentation of issues in most cases without unduly burdening immigration judges.

**C. The Truncated Schedule for Briefing and Evidence in the Immigration Court Practice Manual Makes It Nearly Impossible for Many Applicants to Obtain Counsel and/or Prepare a Case.**

In December 2020, EOIR revised the filing schedule set by its Immigration Court Practice Manual. Where an applicant's pre-hearing brief and evidence were once due 15 days before her merits hearing, they are now due 30 days before the hearing. Manual § II.3.1(b)(2)(A)-(B). This deadline is a major reduction in the amount of preparation time for applicants whose hearings are set in accordance with the 180-day asylum clock, and whose applications require substantial evidence and briefing. An applicant whose hearing is set 45 days from the date of filing, see 8 U.S.C. § 1158(d)(5)(A)(ii), now has just 15 days to prepare her pre-hearing statement and evidentiary submission.

This truncated schedule is especially harmful to the many applicants who are not represented at the time of their master calendar hearings. These applicants are left with as little as 15 days to find an attorney and prepare their case—a truly impossible feat. In combination with the Continuances Memo's elimination of automatic continuances to obtain counsel, these changes to the Practice Manual severely infringe the right of noncitizens to a reasonable opportunity to obtain counsel. See 8 U.S.C. § 1229a(b)(4)(A)-(B); *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012). We urge EOIR to amend the Practice Manual to revert back to the prior longstanding schedule, which dictated that briefing and evidence were due 15 days before a merits hearing.

**D. EOIR's Revocation of Email Filing Creates Severe, Inequitable Obstacles for Applicants Litigating in Certain Immigration Courts.**

Early in the COVID-19 pandemic, EOIR established temporary email filing systems for immigration courts that had not yet implemented EOIR's e-filing system, known as the EOIR Court and Appeals System (ECAS). Beginning in August of 2020, EOIR began suspending the temporary email filing systems, even in courts that had not yet implemented ECAS. This

suspension left more than a dozen courts that required in-person or USPS filing, during a time when both methods were difficult, if not impossible, due to the ongoing pandemic.

As of today, at least ten courts still offer no ability to e-file: Adelanto; Los Angeles (N. Los Angeles, Olive, and Van Nuys locations); Miami; Miami Krome; Newark; Phoenix; Sacramento; and San Francisco. This unnecessary restriction further truncates an already compressed briefing schedule and creates severe obstacles for pro se and detained applicants. We urge EOIR to reinstate email filing—a proven solution—for these courts until they are able to implement ECAS in locations where there currently is no e-filing system, and until they are able to operationalize ECAS effectively in locations where it has already been rolled out.

## **V. DEPOLITICIZING THE EOIR AND PROMOTING THE INTEGRITY OF THE IMMIGRATION ADJUDICATIVE SYSTEM**

**RAICES, Tahirih, and Law Lab urge EOIR, in consultation with the Attorney General, to institute notice-and-comment rulemaking to rescind the portions of the Reorganization Rule that (A) provide for the unprecedented expansion of the EOIR Director’s adjudicative authority; and (B) establish the Office of Policy, place the Office of Legal Access Programs (OLAP) in the Office of Policy, and prevent the Office of General Counsel (OGC) from providing case-specific guidance.**

On November 3, 2020, the Department of Justice published a final rule entitled “Organization of the Executive Office for Immigration Review” (“Reorganization Rule”). *See* 85 Fed. Reg. 69465 (Nov. 3, 2020). Although DOJ billed the rule as one merely concerned with agency procedure and practice, the Reorganization Rule enacted several substantive changes with far-reaching implications that undermine the integrity of the immigration adjudicative system. Each of the changes detailed below should be rescinded.

### **A. The Reorganization Rule Deviated from Longstanding Precedent Precluding the EOIR Director from Issuing Precedential Adjudicative Decisions.**

In a stark departure from previous policy, the Reorganization Rule empowered the EOIR Director to adjudicate BIA cases and issue precedential decisions. Specifically, the Rule amended 8 C.F.R. § 1003.1(e)(8)(ii) to provide that “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.” 8 C.F.R. § 1003.1(e)(8)(ii) (emphasis added). In addition, the new regulation imbues the Director with “the authority to issue a precedent decision.” *Id.* The Rule’s grant of unilateral adjudicative authority to the EOIR Director is a stark about-face from previous policy, which provided in no unclear terms that “[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.” 8 C.F.R. § 1003.0(c) (emphasis added) (effective January 18, 2017 to August 25, 2019). Under the previous regulatory regime, the Director had no power to adjudicate BIA cases, much less issue precedential decisions unilaterally.

This unprecedented expansion of the EOIR Director's powers undermines the integrity of the immigration law system in several ways. First, unlike BIA members, who are attorneys experienced in adjudicating immigration appeals, the EOIR Director occupies a largely administrative role in relation to the immigration court system. Compare 8 C.F.R. § 1003.1(a)(1) (describing BIA members' roles) with 8 C.F.R. § 1003.0(b) (delineating the Director's powers); see also "Office of the Director," <https://www.justice.gov/eoir/office-of-the-director>. As compared to BIA members, the EOIR Director is not as well situated to adjudicate BIA cases because of her existing responsibility to manage and supervise the sprawling administration of EOIR. See 8 C.F.R. § 1003.0(b).

Moreover, authorizing the EOIR Director to issue precedential decisions unilaterally undermines the procedural safeguards built into the regulations. Pursuant to 8 C.F.R. § 1003.1(g)(3), only decisions issued by a three-member panel of the BIA or by the BIA en banc qualified for designation as precedential decisions. Indeed, even the decision to designate (or not to designate) multi-member BIA decisions as precedential required a majority vote of the permanent BIA members. See *id.* Allowing the EOIR Director unilateral authority to issue precedential decisions erodes the requirement that precedential decisions derive from multilateral decision-making by experienced appellate adjudicators. This change has profound implications for the immigration courts, as precedential decisions bind immigration judges throughout the country.

The fact that prior versions of 8 C.F.R. § 1003.1(e)(8)(ii) limited precedential decision-making authority only to BIA members or the Attorney General further underscores that the identity of the adjudicator matters. BIA members, who are intended by regulation to be experienced appellate immigration judges—and importantly, who are not political actors—are the most well-situated adjudicators of BIA appeals. Unlike BIA members, the Attorney General is an overtly political appointee tasked with pursuing the administration's agenda and priorities. The Attorney General's issuance of "certified" decisions in recent years has demonstrated the extent to which placing precedential power in the hands of such a political appointee can seriously undermine the integrity of longstanding asylum law and procedural rights. See, e.g., Innovation Law Lab & SPLC, *The Attorney General's Judges* at 24–26 (discussing abuse of certification power to encourage prejudgment of asylum claims and limit immigration judges' docket management tools). Similarly, the EOIR Director also occupies a political role and is more vulnerable to political influence than rank-and-file BIA members. See "Office of the Director," <https://www.justice.gov/eoir/office-of-the-director> (noting that the Director "represents the position and policies of EOIR to the Attorney General, Deputy Attorney General, Members of Congress, and other governmental bodies, the news media, the bar, and private groups interested in immigration matters"). Furthermore, compared to the Attorney General, the EOIR Director's relative lack of visibility may make the Director even less accountable, as her decisions would inevitably generate less attention.

For the reasons stated above, the unprecedented expansion of the EOIR Director's adjudicative authority should be rescinded. EOIR, in consultation with the Attorney General, should institute

notice-and-comment rulemaking to revoke the relevant portions of the Reorganization Rule and restore the status quo pre-dating August 26, 2019.

**B. The Reorganization Rule Enacted Several Changes That Improperly Politicize EOIR.**

EOIR, in consultation with the Attorney General, should also institute notice-and-comment rulemaking to revoke the portions of the Reorganization Rule that formally establish the Office of Policy; place the Office of Legal Access Programs (OLAP) in the Office of Policy; and prevent the Office of General Counsel (OGC) from providing case-specific guidance. All three changes serve only to politicize EOIR's operations and to undermine the independence of EOIR's professional adjudicators and lawyers.

**1. Formalization of the Office of Policy**

There is no sound basis for EOIR to have an Office of Policy. Though the mission of the Office of Policy is couched in careful, bureaucratic language, experience has made clear that the mission encompasses both making the law that EOIR adjudicators are to apply and ensuring that adjudicators do so in whatever way the Office of Policy desires. After all, the Office of Policy was directly responsible for a flurry of (uniformly anti-asylum) regulations issued in 2019 and 2020, and it is also responsible for training immigration judges in the nuances of those regulations.

These functions are anathema to a judicial or quasi-judicial agency. The core of judicial independence is that judges must be free to exercise their decision-making authority without outside influence. But the interim final rule enshrines exactly such influence into law: It tells the Office of Policy to create uniform standards that must be applied by all immigration judges and BIA members when they interpret and apply the Immigration and Nationality Act. The preferences of EOIR's Director—and the executive branch—are thus made paramount. Accordingly, this system subverts judicial independence. Given that it amounts to the executive branch formally acting as rule-setter, prosecutor, and adjudicator, it also places a "constitutionally intolerable probability of bias" in immigration proceedings. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1901 (2016). The Office of Policy should be abolished, and its administrative—but not its substantive—functions should be transferred to the Office of the Director.

**2. Moving OLAP to the Office of Policy**

Even if it were appropriate for EOIR to retain the Office of Policy—and it is not—that Office should not house OLAP. OLAP's well-established recognition and accreditation functions have been part of DOJ for more than sixty years. They are also a critical part of encouraging representation for asylum seekers—a goal that, as noted above, EOIR previously acknowledged as important.

OLAP's placement in the Office of Policy is anomalous. OLAP's tasks are administrative, not regulatory or substantive, and those tasks have nothing to do with the other functions of the Office of Policy enumerated in the Reorganization Rule and codified at 8 C.F.R. § 1003.0(e). Moreover, OLAP administers federal grants and funds appropriated by Congress, and it is inappropriate for an office focused on shaping substantive immigration law to manage appropriations and grants.

These sharp, irreconcilable disconnects between OLAP and the Office of Policy were put into stark relief in late 2020. In November and December of that year alone, the Office of Policy was involved in five proposed and final rules that adversely affect respondents and their representatives in immigration court and that, as shown above, treated representatives as barely tolerable nuisances rather than as a key component of a well-functioning system. *See, e.g.*, EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698 (Dec. 16, 2020); EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020); EOIR & USCIS, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020); EOIR, *Motions to Reopen or Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 75,942 (Nov. 27, 2020); EOIR, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 75,925 (Nov. 27, 2020). In other words, OLAP's mission of encouraging representation was placed in the hands of an office that worked ceaselessly on policies that discourage representation.

Finally, we note that all of our organizations have accredited representatives who appear before EOIR under OLAP's recognition and accreditation program. Keeping that program free from manipulation and political influence—and from even the suggestion of manipulation and political influence—is essential for our continued work and for the dignity and due process rights of immigrants nationwide. Thus, even if the Office of Policy were to commit to encouraging representation and never again to deviate from that path, the mismatch between the office's mission and OLAP's mission would render the current structure unworkable and intolerable.

### **3. Transfer of Authority to Provide Case-Specific Advice**

Before EOIR promulgated the Reorganization Rule, OGC routinely consulted with attorneys at the Office of Immigration Litigation regarding case-specific issues and determinations. OGC, for example, consulted on whether the government would prosecute appeals to the BIA or would defend against petitions for review filed in the federal courts of appeals. OGC staff also routinely consulted on proposed settlement agreements in individual cases.

The Reorganization Rule transferred these functions to the Office of Policy and expressly prohibited OGC from playing any role in individual cases. *See* 85 Fed. Reg. at 44,538, 44,542. This is exactly backwards. OGC houses lawyers who are sheltered from shifting political winds and who have extensive knowledge of the substance and history of both immigration law and DOJ decisions and procedures. The Office of Policy, in contrast, has consistently proposed and



enacted the policy preferences of political appointees in the executive branch. Thus, by moving the role of providing case-specific advice from OGC to Policy, EOIR again chose to trade nonpartisan expertise for partisan politics. That choice harms EOIR—in addition to respondents and DHS—and should be reversed via notice-and-comment rulemaking.

## **VI. CONCLUSION AND SUMMARY OF REQUESTED RELIEF**

The policies of the prior administration should be closely examined and rescinded or revised to ensure they are consistent with the substantive and procedural rights of individuals in immigration court proceedings, including the right to meaningful access to counsel. As you conduct that review, we hope this letter is a useful tool to identify areas in need of reform and implement prompt change. Individuals appearing in immigration court deserve, and this nation's laws require, an adjudicatory system that is fair, efficient, and non-political. If implemented, the proposed changes outlined in this letter will help EOIR meet those important goals.

For your convenience, below is a summary of the reforms we urge EOIR to implement:

1. Rescind the 2021 Continuances Policy Memo;
2. Revise Policy Memo 19-31 on the use of status dockets;
3. Revise footnote 7 of the 2018 Memo on Case Priorities on the use of status dockets;
4. Rescind Part III of Policy Memorandum 21-08;
5. Rescind Policy Memorandum 19-06;
6. Rescind Policy Memorandum 19-13;
7. Rescind the decision to remove public access to the Immigration Judges' Benchbook;
8. Rescind the policy of requiring completion of non-mandatory fields on forms;
9. Increase limits on brief lengths;
10. Amend the Practice Manual to revert back to the prior briefing schedule;
11. Implement an effective e-filing system for all immigration courts; and
12. In consultation with the Attorney General, institute notice-and-comment rulemaking to rescind the portions of the Reorganization Rule that:
  - a. provide for the unprecedented expansion of the EOIR Director's adjudicative authority,

Jean King  
May 18, 2021  
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Via Electronic Mail

- b. establish the Office of Policy,
- c. place the Office of Legal Access Programs (OLAP) in the Office of Policy, and prevent the Office of General Counsel (OGC) from providing case-specific guidance.

Very truly yours,

KEKER, VAN NEST & PETERS LLP

A handwritten signature in black ink, appearing to read "Eij", written in a cursive style.

Erin E. Meyer  
*Counsel for RAICES, Tahirih, and Law Lab*