



## NATIONAL OFFICE

📍 6400 Arlington Blvd, Ste 400  
Falls Church, VA 22042

✉ Justice@tahirih.org

☎ 571-282-6161 (p)  
571-282-6162 (f)

October 11, 2023

Submitted via: <https://www.regulations.gov/>

Chief Raechel Horowitz  
Immigration Law Division  
Office of Policy  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 1800  
Falls Church, VA 22041

Re: **Comment in Response to Department of Justice  
Executive Office for Immigration Review Notice of  
Proposed Rulemaking: *Appellate Procedures and  
Decisional Finality in Immigration Proceedings;  
Administrative Closure*  
Docket No. EOIR 021-0410  
AG Order No. 5738-2023  
RIN 1125-AB18**

Dear Chief Horowitz,

The Tahirih Justice Center ("Tahirih") submits the following comment<sup>1</sup> to the Department of Justice Executive Office for Immigration Review (EOIR or "the Department") in response to the above-referenced Notice of Proposed Rulemaking, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (NPRM or "the Proposed Rule") published on September 8, 2023, at 88 Fed. Reg. 62,242 et seq. Tahirih welcomes the publication of the Proposed Rule, which largely promotes justice and fairness for noncitizens in removal and other proceedings before EOIR.

---

<sup>1</sup> All sources cited in this comment, including but not limited to court opinions, legislative history, and secondary sources, are incorporated by reference into the administrative record.

## I. Introduction

Tahirih is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to immigrants fleeing all forms of gender-based violence, including human trafficking, forced labor, forced marriage, domestic violence, rape and sexual assault, and female genital mutilation/cutting. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 32,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih promotes a world where immigrant survivors can live in safety and with dignity.

Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence. *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*<sup>2</sup>; Tahirih Justice Center, *Congressional Testimony*<sup>3</sup>; Tahirih Justice Center, *Comments*<sup>4</sup>; Tahirih Justice Center, *Publications*<sup>5</sup>.

## II. Rescission of unlawful provisions in the 2020 Rule

Tahirih welcomes the Proposed Rule's rescission of most provisions of an earlier rule promulgated in 2020 and designed to prioritize speed over justice and fairness. *See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 (Dec. 16, 2020) ("the 2020 Rule"). The 2020 Rule included a number of provisions that eviscerated procedural protections for immigrant survivors seeking relief in immigration courts and the Board of Immigration Appeals ("the Board" or BIA), creating a speedy conveyor belt toward removal without due process or access to justice. The 2020 Rule violated the Administrative Procedure Act and has been enjoined since March 10, 2021.<sup>6</sup>

The Proposed Rule largely reverses the amendments imposed by the 2020 Rule, eliminating harmful provisions that curtailed access to justice. Tahirih welcomes the following changes to appellate procedures:

- Restoration of the longstanding 21-day consecutive briefing schedule for non-detained individuals (proposed 8 C.F.R. § 1003.3(c)(1));
- Restoration of the Board's authority to grant an extension of 90 days to file any brief (proposed 8 C.F.R. § 1003.3(c)(1));
- An increase, from 13 days to 21 days, to the time period to file a reply brief in support of a motion to reopen or reconsider (proposed 8 C.F.R. § 1003.2(g)(3));

---

<sup>2</sup> <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>

<sup>3</sup> [https://www.tahirih.org/news-media/publications/?\\_publication\\_categories=congressional-testimony](https://www.tahirih.org/news-media/publications/?_publication_categories=congressional-testimony)

<sup>4</sup> [https://www.tahirih.org/pubs/?post\\_type=pubs&s=](https://www.tahirih.org/pubs/?post_type=pubs&s=)

<sup>5</sup> <https://www.tahirih.org/news-media/publications/>

<sup>6</sup> *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021).

- Restoration of the Board’s authority to remand to the immigration judge for further factfinding and the expansive scope of the immigration judge’s review (proposed 8 C.F.R. 1003.1(d)(3)(iv));
- Protection of the immigration judge’s authority to make appropriate factfinding on remand (proposed 8 C.F.R. § 1003.1(d)(7));
- Removal of the Board’s authority to find new facts on appeal, instead deeming submission of new facts on appeal a motion to remand (proposed 8 C.F.R. § 1003.1(d)(3)(iv));
- Removal of the Board’s authority to affirm on any basis in the record (*see* enjoined 8 C.F.R. § 1003.1(d)(3)(v));
- Restoration of the Board’s and immigration judges’ traditional authority to *sua sponte* reopen or reconsider a case (proposed 8 C.F.R. § 1003.2(a) and § 1003.23(b));
- Restoration of the Board’s self-certification authority (proposed 8 C.F.R. § 1003.1(c)); and
- Removal of the 90-day deadline to complete biometrics processing where necessary for adjudication of a motion or appeal (proposed 8 C.F.R. § 1003.1(d)(6)(ii), (iii)).

These measures restore important procedural protections without imposing on the Board any material or proven inefficiency. With these revisions, noncitizens will be better equipped to access the appellate process, pursue newly available relief, protect against retraumatization, and represent themselves.

Tahirih encourages prompt publication of the final rule. The harmful provisions of the 2020 Rule are currently enjoined by federal litigation in which Tahirih is a party. However, these provisions continue to appear in the current online version of the eCFR, leading to confusion among advocates and adjudicators about applicable rules. Prompt finalization of this rule will clarify the eCFR and prevent future errors.

### III. Administrative closure

Administrative closure is an effective case management tool. It allows EOIR to eschew numerous unnecessary hearings for individuals likely to receive alternative immigration relief from USCIS or a state court that would protect against removal. Tahirih welcomes the reasoned restoration of EOIR’s authority to administratively close cases. Tahirih offers the following suggestions and clarifications to the Proposed Rule to ensure adequate protections for immigrant survivors of violence.

#### A. Procedural requirements for withdrawal motions

After a case is administratively closed, a withdrawal of representation currently requires recalendaring, moving to withdraw, and—after withdrawal is ruled upon—moving again to administratively close the case. These procedural requirements impose serious burdens on counsel, who often represent clients *pro bono*, as well as EOIR, which must rule on several motions rather than a single withdrawal motion. The final rule should therefore clarify that an attorney or representative may move to withdraw from an administratively closed case, and an immigration judge may rule on such a motion, while the case remains administratively closed.

## B. Protection for noncitizens who do not want administrative closure

EOIR has requested feedback on whether the Proposed Rule should offer protections for noncitizens who wish to proceed with removal proceedings notwithstanding DHS's request to administratively close the case. Tahirih supports the noncitizen's agency in determining the forum in which she wishes to proceed as well as the type of relief she wishes to pursue. Some cases may appear appropriate for administrative closure, such as where the respondent has a pending petition for U nonimmigrant status. But current processing times at USCIS coupled with the annual U visa cap indicate that an application for U nonimmigrant status filed today may not result in an approval for approximately 20 years. If the respondent also wishes to pursue asylum instead of accepting administrative closure, fairness requires that she have her day in court rather than be required to wait two decades to receive legal status.

## IV. Termination

Tahirih appreciates the codification of EOIR's longstanding authority to terminate cases for several reasons, and in particular, when a noncitizen has obtained legal status during the pendency of EOIR proceedings. 88 Fed. Reg. at 62, 281 (proposed 8 C.F.R. § 1003.18(d)(1)(D)).

### A. Any credible evidence of other legal status

Tahirih encourages EOIR to clarify the regulations to allow immigration judges to accept any credible evidence of legal status. In the past, some judges have required specific types of evidence, even where such evidence is unavailable through no fault of the respondent, and they have denied motions to terminate on that basis.

For example, one Tahirih attorney moved for termination because USCIS had granted her client's I-360 VAWA self-petition. In granting the I-360, USCIS had issued an employment authorization document reflecting the I-360 grant, but it failed to send a timely approval notice for the I-360 form itself. The immigration judge denied termination because of the noncitizen's failure to provide the I-360 approval notice, even though the (c)(9) EAD was undisputed evidence that the respondent held legal status.

Rather than allow immigration judges to impose unreasonably narrow requirements for proof of status, EOIR should clarify that any credible evidence of such status will suffice to support a motion to terminate under proposed 8 C.F.R. § 1003.18(d)(1)(D). A more lenient standard is required because proof of status depends on prompt and accurate processing by USCIS, where mistakes are sometimes made. Requiring a respondent to provide a particular document punishes noncitizens for USCIS delay or error. Instead, a reasonable approach is that EOIR accept "any credible evidence" of status, including an approval notice granting a noncitizen a designated status, an employment authorization document designating the category associated with the specified legal status, and other undisputed, even if indirect, evidence of the specified legal status.

### B. No *sua sponte* termination

Tahirih encourages EOIR to clarify that, in cases where an immigration judge or appellate immigration judge believes termination is appropriate, they should invite both parties to share

their views on termination and rule on such oral or written motions rather than ruling *sua sponte* without party input. Many noncitizens in removal proceedings are eager to demonstrate that they qualify for relief from removal, and termination of proceedings may forever take away their path to legal status. In particular, people seeking asylum may have timely filed an asylum application, and termination may result in a determination that a re-filed asylum application at the Asylum Office is untimely. Tahirih has requested, and awaits, guidance from USCIS on the treatment of promptly re-filed asylum applications with USCIS after termination or dismissal of removal proceedings with EOIR, where those asylum applications are filed more than one year after the noncitizen's arrival in the United States. Without such guidance, termination of removal proceedings without consent of the respondent may be severely prejudicial to the noncitizen, with dire consequences.

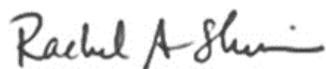
#### V. Terminology

Tahirih appreciates the Department's effort to update its terminology in favor of inclusive and humanizing language in regulations. The term "noncitizen" is an appropriate term to describe immigrants in EOIR proceedings, as they are not citizens of the United States. Additional appropriate terms include "respondent," "individual," and "person." Problematic terms historically used in immigration laws and regulations, such as "alien," are dehumanizing and best avoided.

#### VI. Conclusion

Tahirih applauds the Department's publication of a Proposed Rule that balances efficiency with fairness and justice. Subject to the recommendations herein, Tahirih supports the prompt finalization of this Rule.

Sincerely,



Rachel Sheridan  
Senior Litigation Counsel  
Tahirih Justice Center