AMERICAN IMMIGRATION LAWYERS ASSOCIATION

January 30, 2017

Ms. Jean King
General Counsel
Office of the General Counsel
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Submitted via: www.regulations.gov

Re: RIN 1125–AA25, EOIR Docket No. 180
Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal, 81 Federal Register 230 (Nov. 30, 2016)

Dear Ms. King:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the proposed rule, "Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal," published in the Federal Register on November 30, 2016.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws. We believe that the collective experience and expertise make us particularly well-qualified to offer views on this matter.

Background

INA §240A(e)(1) imposes a cap of 4,000 on the number of suspension of deportation and cancellation of removal cases that may be granted each year. Current regulations provide immigration judges (IJs) and the Board of Immigration Appeals (Board) with the authority to deny or pretermit a suspension of deportation or cancellation of removal application without reserving a decision if an applicant fails to establish statutory eligibility for relief.[1] However, if an applicant establishes statutory eligibility, decisions to grant or deny such relief are reserved until a grant would become available under the numerical cap in a future fiscal year.[2] Thus, IJs

[1] 8 CFR §1240.21(c)(1)
[2] *Id.*

and the Board are currently prohibited from denying an application prior to a grant becoming available for the following reasons: "an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the [INA], a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases."[3]

Under proposed 8 CFR §1240.21(c), IJs and the Board would have the authority issue final decisions denying applications *after* the annual limitation has been reached.[4] The proposed rule would *only* require IJs and the Board to reserve grants.[5] EOIR states that this proposed rule would (1) decrease the high volume of reserved decisions that results from reaching the annual limitation early in the fiscal year; (2) reduce the associated delays caused by postponing the resolution of pending cases before EOIR; and (3) provide an applicant with knowledge of a decision in the applicant's case on or around the date of the hearing held on the applicant's suspension or cancellation application.[6]

AILA acknowledges the agency's on-going efforts to reduce the case backlog and decrease administrative burdens associated with suspension and cancellation of removal cases subject to the annual limitation.[7] However, we have a number of concerns about the proposed rule.

Proposed 8 CFR §1240.21(c) is Inconsistent with Fundamental Fairness and Due Process

The IJ should issue a final decision only when a decision can properly be rendered and security checks are up to date. Cancellation and suspension of removal applications are considered to be continuing applications for purposes of evaluating an alien's moral character and the period which good moral character must be established ends with the entry of a final administrative decision by the IJ or by the Board.[8] Likewise, hardship is not static. It can change, develop, and gets better or worse. However, hardship must be fully developed by the IJ at the hearing, and generally does not develop on appeal given that the Board is prohibited from engaging in fact finding.

Because the proposed rule freezes the record for purposes of a negative decision, but leaves the record open for a potentially positive one, it unfairly disadvantages respondents. For example, under the proposed rule, a father may be the parent of a U.S. citizen child who is suffering from a generally manageable illness, and the IJ informs the respondent that he/she is inclined to deny

[3] *Id.*
[4] 81 Fed. Reg. 86291 (Nov. 30, 2016).
[5] *Id.*
[6] *Id.*
[7] In the proposed rule, EOIR explained that in recent years, the annual 4,000 limitation has been reached early in the fiscal year and these cases are subject to a multiyear backlog.
[8] *See Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005).

because the child's illness is not severe enough that removing the parent would rise to the level of extreme and exceptionally unusual hardship. One year later, the child suffers a serious turn for the worse and now requires round-the-clock care. If the IJ reserved decision, the applicant for cancellation would be able to immediately present this new evidence and the IJ could grant a visa once it became available. If the IJ immediately denied a case, the applicant may have already been deported, and even if not, would have to seek remand from the BIA or a file a motion to reopen. On the other hand, if negative factors develop on a reserved case under the proposed rule, such as age-out or death of qualifying relative, a seemingly positive reserved decision can evolve into a negative decision.

Implementation of Proposed Rule

If EOIR decides to implement the proposed rule for applications that were previously reserved, we urge it to notify the respondent and counsel of any intent to deny the case. Circumstances may have changed since the completion of the individual hearing, which could have occurred many years ago. In the interest of fairness, EOIR should provide the respondent and counsel with the opportunity to supplement the record with additional evidence of good moral character, hardship, and/or discretionary factors prior to issuance of a decision.

Immigration Judges Should Be Able to Provisionally Approve or Provisionally Deny Applications

For the reasons stated above, AILA urges EOIR to keep the current rule in place. If EOIR's goal is to provide applicants with more certainty, [9] we suggest issuing guidance advising IJs to provisionally approve or provisionally deny applications near the date of the hearing. This system would provide applicants with more information, and allow applicants an opportunity to get affairs in order.

Conclusion

We appreciate the opportunity to offer these comments on the proposed rules and look forward to continuing to engage with EOIR on this important issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[9] *See* 81 Fed. Reg. 86294 (Nov. 30, 2016).