

February 4, 2020

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U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529-2140
Submitted via <http://www.regulations.gov>

RE: USCIS–2008–0027; OMB Control Number 1615-0095; Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion

Dear Ms. Deshombres:

The American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center submit the following comment in response to the proposed revisions to U.S. Citizenship and Immigration Services (“USCIS”) Form I-290B, which were published in the Federal Register on December 6, 2019. *See USCIS, Agency Information Collection Activity; Revision of Currently Approved Collection: Notice of Appeal or Motion*, 84 Fed. Reg. 66,924 (Dec. 6, 2019) (“proposed revisions” or “Notice”). Although the proposed revisions take the form of changes to the Form I-290B and its instructions, they make substantial and substantive changes to the USCIS motions and appeals processes. For the reasons below, we urge USCIS to immediately withdraw the proposed revisions and instead dedicate its efforts to ensuring that individuals have full access to the administrative review to which they are entitled.

I. Interest of the Commenters

The American Immigration Council is a nonprofit organization that strengthens America by shaping how America thinks about and acts towards immigrants and immigration. In addition, the Council works toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council envisions an America that values fairness and justice for immigrants and advances a prosperous future for all.

The American Immigration Lawyers Association (“AILA”) is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes 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 U.S. immigration laws.

ASISTA is a national organization dedicated to safeguarding and advancing the rights of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of violence. Our agency has assisted advocates and attorneys across the United States in their work on behalf of immigrant survivors, so that survivors may have greater access to protections they need to achieve safety and independence.

The Catholic Legal Immigration Network, Inc. (CLINIC) embraces the core Gospel value of welcoming the stranger by promoting the dignity and protecting the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 375 affiliates in 49 states and the District of Columbia.

The Immigrant Legal Resource Center (“ILRC”) is a national nonprofit that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC’s mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profits in building their capacity.

Kids in Need of Defense (“KIND”) is a national nonprofit organization dedicated to providing free legal representation and protection to immigrant children who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court. Since January 2009, KIND has received referrals for over 20,000 children from 72 countries. Through its ten field offices nationwide (Atlanta, Baltimore, Boston, Houston, Los Angeles, San Francisco/Fresno, Newark, New York City, Seattle, and Washington, D.C/Northern Virginia), KIND and its pro bono partners have served many children who have been granted lawful immigration status through forms of humanitarian protection, while KIND social services coordinators work to provide children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries, works to address the root causes of child migration from Central America, and advocates for laws, policies, and practices to improve the protection of unaccompanied children in the United States.

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls struggling to survive gender-based violence. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 27,000 individuals, many of whom have applied for T and U Visas, applied for Special Immigrant Juvenile status, or filed for lawful permanent residency under the Violence Against Women Act. Through direct legal and social services, policy advocacy, and training and education provided in five cities across the country, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity.

II. The Proposed Revisions Should be Withdrawn

The proposed revisions are not merely discrete form changes, but rather constitute a structural overhaul of post-decision processes. In other words, the proposed revisions would fundamentally change how a record is built, how the I-290B appeal is reviewed at both USCIS decisionmaking offices and the Administrative Appeals Office (“AAO”), and the very role of the AAO. As discussed elsewhere in these comments, a change of this magnitude requires notice-and-comment rulemaking, not merely the announcement of revisions to form instructions. For the reasons that follow, we urge the withdrawal of the Notice.

A. Under Governing Regulations, the Initial Field Review Process Is Mandatory and May Not Be Waived

USCIS is proposing a revision to Form I-290B that would allow affected parties to waive the Initial Field Review (IFR) process. This is inconsistent with the governing regulation. Under 8 CFR § 103.3(a)(2), the IFR process is mandatory. The regulation provides that “[t]he official who made the unfavorable decision being appealed”—or an official in a jurisdiction to which the appealing party has moved—“*shall* review the appeal” before it reaches the AAO.¹ For all timely-filed appeals, the regulation further provides that “[t]he reviewing official *shall* decide whether or not favorable action”—*e.g.*, the grant of a motion to reopen or reconsider and approval of the underlying request—“is warranted.”² And if the officer decides that “favorable action is not warranted, that official *shall* promptly forward the appeal” to the AAO.³ For untimely appeals, meanwhile, USCIS must determine whether the appeal meets the requirements of a motion to reopen or a motion to reconsider, and if so, the appeal must be treated as a motion, and a decision must be made on the merits of the case.⁴

¹ 8 C.F.R. § 103.3(a)(2)(ii) (emphasis added).

² *Id.* § 103.3(a)(2)(iii) (emphasis added).

³ *Id.* § 103.3(a)(2)(iv) (emphasis added).

⁴ *Id.* § 103.3(a)(2)(v)(B)(2).

USCIS itself has acknowledged that the IFR process is mandatory.⁵ Nevertheless, the proposed revisions permit affected parties to waive the IFR process. Specifically, an affected party may opt out of the process by checking Item 1.b in Part 2 of the revised form I-290B, as follows:

1.b. My brief is attached and I do not want the office that issued the unfavorable decision to review my appeal before forwarding it to the AAO.

We question the legality of this proposal to permit affected parties to waive the IFR process. The IFR process is required by regulation. USCIS has provided no legal authority in the Notice supporting the agency's ability to permit affected parties to waive a process that is mandated by regulation.

We are also concerned about how this proposed change would impact affected parties, especially those who file an untimely appeal. The IFR process *requires* USCIS to determine whether an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider. If it does, the appeal must be treated as a motion, and a decision must be made on the merits of the case. Under the proposed revisions, however, if a party checks the box to waive IFR, USCIS will reject the appeal without first determining whether the appeal meets the requirements of a motion to reopen or a motion to reconsider.⁶ This change will negatively impact affected parties who file an untimely appeal, as it would result in an automatic rejection of the appeal rather than a determination by a USCIS official as to whether or not it meets the requirements of a motion. Such rejections would directly violate the regulatory requirement that an untimely appeal that satisfies the requirements for a motion to reopen or a motion to reconsider *must* be treated as a motion and a decision must be made on the merits of the case.⁷

⁵ USCIS, PM-602-0124, *Initial Field Review of Appeals to the Administrative Appeals Office* (Nov. 4, 2015) (“IFR is required by the regulations. The field office must review the appeal before forwarding it to the AAO.”); USCIS, *Adjudicator’s Field Manual* § 10.8(a)(3)(i) (stating that “IFR is mandatory for appeals to the AAO. The field office must review the appeal before forwarding it to the AAO.”); *see also* *Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1255 (W.D. Wash. 2008) (“shall” in regulation is mandatory).

⁶ *See* USCIS, “Instructions for Notice of Appeal or Motion” at 2, (hereinafter “Proposed Form I-290B Instructions”) (stating “USCIS will reject a late appeal. However, unless you select the box in Part 2., Item Number 1.b., the office that issued the unfavorable decision may determine that the untimely appeal meets the requirements of a motion to reopen or a motion to reconsider and issue a separate.”), *available at* <https://www.regulations.gov/document?D=USCIS-2008-0027-0075> (last visited February 3, 2020).

⁷ 8 CFR § 103.3(a)(2)(v)(B)(2).

B. The Proposed Restrictions on the Use of New Evidence in Appeals and Motions to Reopen Conflict With Current Policy, Regulations, and Due Process Requirements

The proposed revisions would reverse a longstanding USCIS policy -- in place since 1991⁸ -- providing the option to submit new evidence to the AAO on appeal and would also impose restrictions on the submission of new evidence on a motion to reopen.

Under current policy, a party who files a notice of appeal from an adverse USCIS decision has a thirty-day period to submit a brief and any additional evidence in support of the appeal.⁹ Under the proposed revisions, the AAO would not consider “for any purpose” evidence submitted for the first time on appeal where (1) the affected party was “put on notice of the evidentiary requirement”; (2) the party was “given a reasonable opportunity to provide the evidence” before the unfavorable decision; and (3) the evidence “was reasonably available or could have been reasonably discovered or presented in the prior proceeding.”¹⁰ Further, “if a party submits evidence for the first time on appeal that is material and does not fall into one of these three categories, the AAO will *generally* remand the matter to the office that issued the unfavorable decision for consideration as a motion to reopen.”¹¹ Although not stated in the proposed instructions, the Notice implies an exception from the threshold requirement for new evidence on appeal “in exigent circumstances and at USCIS discretion.”¹²

The proposed revisions also limit acceptable evidence on a motion to reopen to “evidence that was not reasonably available and could not have been reasonably discovered or presented in the previous proceeding.”¹³

As with other aspects of the proposed revisions, the proposed evidentiary limitations would work sweeping structural changes across post-decision processes. And as discussed elsewhere in these comments, a change of this magnitude requires notice-and-comment rulemaking, not merely the announcement of revisions to form instructions. For the reasons that follow, we urge the elimination of these limitations on the submission of new evidence on a motion to reopen or appeal.

⁸ See 84 Fed. Reg. at 66,925.

⁹ See I-290B Form Instructions (12/2/19 ed.) 6.

¹⁰ Proposed Form I-290B Instructions 7; see 84 Fed. Reg. at 66,925.

¹¹ Proposed Form I-290B Instructions 7 (emphasis added); see 84 Fed. Reg. at 66,925 (new evidence “may only result in at most a remand”).

¹² 84 Fed. Reg. at 66,925.

¹³ Proposed Form I-290B Instructions 6.

1. The AAO’s consideration of new evidence on appeal, even on a previously identified issue, is appropriate, efficient, and necessary to fairness

The proposed revisions would limit new evidence on appeal where, among other things, the appellant was “put on notice of the evidentiary requirement.”¹⁴ In many circumstances, and even as to an issue identified earlier in the adjudication process, consideration of evidence first submitted on appeal is necessary to demonstrate that initial evidence was misconstrued, or that the issue was otherwise wrongly decided. This discussion describes just a few of the familiar circumstances in which this may be so.

First, USCIS adjudicates a majority of benefits requests primarily on the papers. Even in a case where USCIS issues one or more notices in the nature of a Notice of Intent to Deny (“NOID”) or Request for Evidence (“RFE”), such notices may fail to sufficiently sharpen the issues for determination, and accordingly, the responses may not meet the officer’s expectation. As a result, an officer may conclude that the record warrants a denial, even though available evidence—which may be provided on appeal under current policy—would avoid that outcome. The proposed revisions provide for a remand on the basis of material new evidence falling outside any of the three categories specified in the form instructions, but this remand is not an adequate solution: Remand in those circumstances appears to be permitted but *not* required. Moreover, a remand is premised on the AAO’s review of the new evidence in order to conclude that the evidence is material; and that the applicant was not on notice of the requirement, the applicant was not given an opportunity to respond to it, or the evidence was not reasonably available initially. The remand contemplated in the proposed revisions thereby injects additional delay and inefficiency into the process without guaranteeing that the new evidence will be considered.

Second, in preparing an initial filing and in responding to a NOID or RFE, an applicant necessarily makes judgments about the evidence that is relevant and required to carry the burden. This is especially complicated where relief is sought on humanitarian grounds or by survivors of violence, because evidence in those cases implicates personal, sensitive, confidential, highly charged, or potentially traumatizing information. Moreover, evidence may be unavailable to an applicant due to the dynamics of domestic violence or other victimization.¹⁵ An applicant may reasonably determine that the record supports approval without particular documents or information in evidence. Under current policy, if a denial is based in whole or in part on the absence of the particular evidence, the applicant will have an opportunity to address the issue on

¹⁴ Proposed Form I-290B Instructions 7; *see* 84 Fed. Reg. at 66,925.

¹⁵ *See, e.g.*, Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Immigration and Naturalization Service (Apr. 16, 1996) (stating “adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser’s knowledge or consent.”), available at <https://asistahelp.org/wp-content/uploads/2019/09/Aleinikoff-Memo-1996.pdf> (last visited February 4, 2020).

appeal. Under the proposed revisions, even a pro se applicant would be bound by a choice or a misunderstanding relating to evidence not offered, with no opportunity to recover on appeal.

Third, under 2018 policy guidance, USCIS may issue denials without first sending an RFE or NOID to identify a perceived deficiency in the initial evidence.¹⁶ Thus, to appeal a discretionary denial, the applicant may need to present additional evidence to counter conclusions drawn in the decision. Alternatively, denials may be premised on issues or analysis not apparent in a previously issued RFE or NOID. Under the proposed revisions, the applicant would face rejection of new evidence on the basis that it may relate to a previously noticed evidentiary requirement, or may have been reasonably available previously—even if the need to submit the evidence was not reasonably foreseeable at the outset.

An example illustrates the severe difficulties that the proposed revisions would place on humanitarian applicants. A 16-year-old child filed a special immigrant juvenile (“SIJ”) petition supported by a state court order evidencing a custody determination and other findings prerequisite to SIJ status. After the 180-day deadline for adjudicating the petition had passed, USCIS issued a NOID identifying perceived deficiencies in the state court order. Through counsel, the child timely responded. One year after the petition was filed, USCIS denied it on grounds similar to those in the NOID. The child timely moved to reopen the decision. When USCIS denied the motion, nearly two years had elapsed since the child filed the petition, and USCIS denied the motion on the basis of issues not raised in the NOID or initial denial of the petition, including a factual matter pertaining to the child’s family history. Specifically, USCIS asserted it had “reason to believe” that a custody determination allegedly set forth in a divorce decree purportedly obtained years earlier by the child’s caregiver was incompatible with record evidence respecting custody of the child. Before the deadline for filing an appellate brief and evidence, the child’s counsel obtained records from a foreign court showing that the caregiver’s long-ago divorce petition had been dismissed for procedural reasons without issuance of any decree, much less a custody determination contrary to the record evidence. Approximately six months later, the AAO sustained the appeal, referring specifically to the newly submitted evidence that countered the facts suggested by USCIS on a “reason to believe” basis.

It is unclear if this critical evidence would be acceptable under the proposed revisions. Even if the evidence were deemed to meet the new proposed standard, the result would, at best, be a remand for further analysis—even though that the child’s petition had already been pending two years (four times the permissible time for a SIJ adjudication) at the time the appeal was filed.

¹⁶ USCIS, Policy Memorandum PM-602-0163 (July 13, 2018), *available at*: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf (last visited February 3, 2020).

2. The three-factor test and the “exigent circumstances” exception are ill-defined and vague and call for multi-faceted fact-finding and legal analysis

Under the proposed revisions, new evidence would be excluded from AAO consideration on the basis of the above three-part test that itself entails determining mixed questions of fact and law: Was the applicant given notice of the evidentiary requirement? Did the applicant have an opportunity to respond? And was the new evidence reasonably available or reasonably discoverable in the prior proceeding?

Without expressly stating as much, the proposed revisions imply that this test may be applied by USCIS either during the IFR process or if the appellant files the new evidence with the Notice of Appeal.¹⁷ In addition, where supporting evidence is later filed with the AAO, the AAO must apply the test.¹⁸ Thus, to the extent that the proposed revisions seek to avoid an appellate body making legal and factual determinations in the first instance, it fails on that count.

Moreover, the test in the proposed revisions entails a series of overlapping, equivocal, or speculative inquiries. Those inquiries include the following:

- Where an “evidentiary requirement” is not expressly set forth in statute or regulation, is it in fact an “evidentiary requirement”?¹⁹
- Where notice of a purported evidentiary requirement was given in a form instruction, RFE, NOID, or Notice of Intent to Revoke, did that notice unambiguously indicate the evidence sought to be newly offered?²⁰
- Was the available opportunity for providing the evidence “reasonable” for the particular applicant and the particular evidence?
- What steps would have been entailed in obtaining or discovering the evidence prior to the adverse decision?
- Would those steps be “reasonable” for the applicant?

The SIJ case discussed above, involving the petitioner who submitted new evidence to the AAO in an appeal from the denial of a motion to reopen, illustrates the vague and speculative nature of these questions. Had the appeal been pursued under the proposed revisions, it is not clear whether the proposed instructions would have precluded the submission of the new evidence on appeal or whether the child petitioner could possibly understand whether new evidence would be accepted. It is not clear how, or whether, the child was placed on notice of

¹⁷ While the revision “is meant to make it absolutely clear to filers what happens if the evidence is not concurrently submitted with the Form I-290B” (84 Fed. Reg. at 66,925), the Proposed I-290B Instructions are anything but clear on this point.

¹⁸ 84 Fed. Reg. at 66,925.

¹⁹ See, e.g., Proposed Form I-290B Instructions 7.

²⁰ See *id.*

any requirement to prove that the caregiver’s divorce petition had not resulted in a custody determination that contradicted other facts in the record. It is not clear whether USCIS would have deemed years-old court records of a divorce proceeding to have been “reasonably available” or “reasonably discoverable” prior to “the time” they were purportedly “supposed to have been submitted.”²¹ And it is not even clear when USCIS believes that such evidence was supposed to have been submitted.

To take another example, starting around 2017, USCIS issued numerous RFEs, NOIDs, and denials to SIJ petitioners on the basis that a predicate state court order was insufficient to establish eligibility absent evidence of the court’s authority to restore the child to the custody of a parent with whom the court had found reunification non-viable. No such “evidentiary requirement” is found in the relevant statute or regulations. Accordingly, it would have been reasonable for a petitioner responding to such notices and denials to conclude that such evidence was not legitimately required. Thus, after receiving a denial on that basis, a petitioner might have offered evidence of the court’s authority to make such determinations for the first time on appeal. Under the proposed revisions, a petitioner would presumably have been unable to do so—even though USCIS later reversed course and adopted AAO decisions expressly disavowing a requirement for the evidence described.

The “exigent circumstances” exception included in the Notice²²—but not discussed in the proposed instructions—is similarly vague. The Notice provides no definition, description, or examples of “exigent circumstances,” and it does not explain whether the term is equivalent to the exigent circumstances that pertain or have pertained to virtually all applicants for T or U visas, relief under the Violence Against Women Act (“VAWA”), or SIJ status. The Notice also fails to clarify the scope of “USCIS discretion” in such an exception.²³

Worse still, the Notice provides no information on how such an exception is recognized or what it triggers. The Notice does not state whether the applicant must bring the exigent circumstances to the AAO’s attention with a request to consider new evidence. The Notice does not clarify what the effect of a finding of exigent circumstances would be. It does not make clear whether the AAO will directly consider evidence under the exception, obviating the use of remand.²⁴

²¹ 84 Fed. Reg. at 66,925.

²² *Id.*

²³ *Id.*

²⁴ *See id.* (“except in exigent circumstances, the submission of evidence directly to the AAO may only result at most in a remand, provided the evidence is material and does not fall into one of the three categories described above”).

3. The rationale for not considering new evidence on appeal at the Board of Immigration Appeals is not applicable to AAO appeals

The DHS regulations concerning appeals to the AAO do not prohibit the submission of new evidence on appeal. As the Notice acknowledges²⁵, the Instructions to Form I-290B have permitted the submission of new evidence for the past 28 years. This policy flows from the unique design of appeals to the AAO, under which the immigration officer who made the unfavorable decision “may treat the appeal as a motion to reopen or reconsider and take favorable action” or may forward the appeal to the AAO.²⁶

The AAO has long exercised authority to accept additional evidence as provided by the instructions to Form I-290B.²⁷ In addition, the quarterly AAO processing time reports refer to the need to consider new evidence. The reports state that “[t]he AAO strives to complete its appellate review within 180 days from the time it receives a complete case record after the initial field review. Some cases may take longer than 180 days due to factors beyond the AAO’s control. For example, additional documentation may be needed to complete the record, or the case may be more complex and require additional review.”²⁸

As justification for changing this long-standing policy, the AAO points to the Board of Immigration Appeals (“BIA”), which does not consider new evidence on appeal other than for purposes of deciding whether to remand the case to the decision-maker below. BIA appeals, however, primarily concern decisions made in removal proceedings, which include contemporaneous discussion, arguments, and testimony regarding evidence and applicable law. In this context of hearings in immigration court, the adjudicator may identify close questions or outcome-determinative issues, and may ask one or both parties to address these, in person or by supplementing the record. As structured, then, the hearing is intended to allow for a full development of the issues and evidence while the case proceeds, with each party aware of the points of contention and able to address them.

In contrast, cases reviewed by the AAO do not necessarily include a full development of the issues and evidence. Appeals to the AAO are from unfavorable decisions issued after adjudication of a paper application and supporting documents, such that the applicant and advocate may not know how the adjudicator is construing the evidence until a final decision is

²⁵ *Id.*

²⁶ 8 CFR § 103.3(a)(2)(iii)-(iv).

²⁷ See *Matter of ___*, TSC, SRC 07 249 51518, at 2 n.2 (AAO July 26, 2010) (“The submission of additional evidence on appeal is allowed by the instructions to . . . Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal.”); *Matter of Cleveland Municipal School District*, LIN 06-041-51409, at n.1 (AAO May 13, 2008), (“The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO’s RFE.”).

²⁸ USCIS, *AAO Processing Times*, at <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aa/aao-processing-times>.

made. While RFEs issued during an adjudication may shed some light on issues of concern to an adjudicator, the absence of live testimony in the application process means that the applicant may not know the adjudicator's concerns or what the adjudicator did not understand until the final decision is received.

As an example, in denying an adjustment of status application based on a U visa, an adjudicator misconstrued the applicant's criminal record. The applicant had responded fully to a previously issued RFE regarding his arrest record with additional documents in support of a favorable exercise of discretion. Until the decision was received, however, the applicant and his counsel had no way to know that the adjudicating officer was confused about the meaning of the documents submitted or that the officer would characterize an arrest without a conviction as a significant negative factor. While this decision clearly presented legal arguments to raise on appeal, the case was favorably resolved with the presentation of new evidence on appeal that clarified the applicant's criminal record and further documented the favorable discretionary factors in his case.

In short, given the nature of the USCIS application adjudication process, a full record cannot be developed in a way that compares to the development of the evidentiary record in the adversarial hearing context present in immigration court. For this reason, the analogy to the BIA in the proposed revisions is misplaced, and the option of submitting new evidence, including evidence related to issues already identified, is critical to ensuring an AAO appeal process that provides a meaningful opportunity to contest an unfavorable decision.

4. The proposed restrictions on new evidence for a motion to reopen are inconsistent with existing regulations

The proposed instructions to Form I-290B would also limit acceptable evidence on a motion to reopen to "evidence that was not reasonably available and could not have been reasonably discovered or presented in the previous proceeding."²⁹ This significant change, which is not discussed or even identified in the Notice, is completely unsupported by any text in the motion to reopen regulations at 8 CFR § 103.5. In fact, the only express limitation on evidence submission with respect to motions to reopen relates to motions addressed to cases denied based on abandonment.³⁰ In that limited situation, the regulation requires the moving party to establish that the decision was in error because (i) the requested evidence was not material; (ii) the required initial evidence was submitted with the application or in response to a request to submit it; or (iii) the request for additional information was not sent to the proper address. Apart from this limited circumstance, the motion to reopen regulation simply states, without condition, that

²⁹ Proposed Form I-290B Instructions 6.

³⁰ 8 CFR § 103.5(a)(2).

the “motion must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.”³¹

Implementation of the proposed revisions would lead to draconian outcomes for even innocent mistakes. Under current USCIS policy, an applicant for an immigration benefit who inadvertently fails to submit an “initially required document” will not receive an RFE and faces application denial without an opportunity to correct the record. The current rules of motion to reopen practice allow for errors of this nature to be resolved by filing a motion to reopen with the missing document. Strictly applied, the proposed revisions would preclude USCIS from accepting a missing initially required document that had been previously available. While some applicants in this situation may potentially re-apply for the benefit with the missing documentation, others may face an eligibility bar preventing reapplication, and may also face issuance of a Notice to Appear commencing removal proceedings as a consequence of the denial.

Finally, the proposed restrictions in the Notice instead seem to be drawn from the regulations governing motions to reopen in immigration court. Those regulations, promulgated by the Executive Office for Immigration Review, specify that a motion to reopen an immigration court decision will not be granted “unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been offered or presented at the former hearing.”³² As discussed above, however, the rationale for imposing restrictions in post-hearing proceedings before the immigration courts is not applicable to USCIS adjudications that are limited to review of document submissions. Further, the codification of this limitation underscores that full notice and comment under the Administrative Procedure Act (“APA”), rather than an amendment to form instructions, is the appropriate vehicle for proposing substantive changes to the rules on motions to reopen.³³

5. The proposed restrictions on new evidence will be particularly onerous for applicants for humanitarian relief

By definition, individuals seek humanitarian relief—including U and T visas, relief under VAWA, and SIJ status—on the basis of serious harm they have experienced. That harm often results in trauma, and for many survivors, ongoing vulnerability in their living situations, mental and physical health or economic status will raise obstacles that may delay the gathering, evaluation, and selection of evidence to support their applications. So, too, will difficulties in accessing counsel. For many who now hold status through humanitarian relief, the current rules on evidence have provided a necessary final opportunity to support and clarify the case.

³¹ *Id.*

³² 8 CFR § 1003.23(b)(3).

³³ *See also* Part III, *infra*.

This opportunity reflects the fact that an applicant’s burden is “clear and convincing” evidence, and that it is thus neither necessary nor advisable for an applicant to submit for review all evidence that is conceivably relevant and obtainable. Accordingly, applicants must make reasoned choices about the quantum of evidence necessary to carry their burden. Where the choice does not match the expectations of the adjudicator—who has expertise in applying the law but lacks full familiarity with the applicant’s facts—a denial may result, often without the benefit of clarification through an RFE or NOID. Therefore, particularly in light of USCIS’ 2018 policy on RFEs and NOIDs,³⁴ a motion to reopen or appeal to the AAO may actually be the first opportunity to address the adjudicator’s determination that particular evidence is required.

Relatedly, the psychological or emotional consequences of past harm may impair the applicant’s ability to make strategic choices, particularly during earlier stages of the case. The applicant may become prepared to confront particular facts of his or her history of harm only after the passage of time. Foreclosing reasonable opportunities to supplement following an adjudicator’s initial determination disregards the pressures that applicants face as a practical matter in the selection of evidence.

Moreover, the proposed revisions create new tensions with existing evidentiary rules. Where evidence lies within the control of a person who perpetrated harm on the applicant, it would be reasonable for the applicant to forego seeking that evidence except as a last resort (*e.g.*, on appeal). This approach is supported by current policy against compelling a victim of domestic violence or child abuse to contact the perpetrator for evidence. And the proposed revisions would also conflict with the policy that any credible evidence must be accepted in support of a request for a T or U visa or relief under VAWA.³⁵

An example again illustrates the point. In connection with a petition for SIJ status or a U visa, predicate evidence may be supplied through state court or administrative proceedings. Hypothetically, a state body might have considered evidence of a physical assault on the public record and considered evidence of a sexual assault *in camera*. The state official might forego placing the fact-finding on sexual assault in the record or proceedings, or might seal that portion of the record, and could issue findings legally sufficient to support the application without that evidence. Accordingly, the applicant might choose to base his or her application to USCIS on only the portion of the facts reflected in the court record. This presents the potential for USCIS, at an advanced stage of the process, to deem evidence of the sensitive, off-record information essential to the case. Under the proposed revisions, the petitioner might be forced either to immediately disclose this incredibly sensitive, previously sealed information to USCIS or to pursue an application solely on the basis of the public portions of the record.

³⁴ USCIS, Policy Memorandum PM-602-0163 (July 13, 2018), at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

³⁵ See *e.g.* INA §204(a)(1)(J), INA §214(p)(4); See also 8 CFR 214.14(c)(4); 8 CFR 214.11(d)(2)(ii).

6. Different policies for the submission of new evidence in connection with the same form will lead to widespread confusion for pro se applicants and practitioners alike

The proposed changes to the I-290B form instructions on the submission of evidence will likely cause confusion for practitioners and adjudicators alike. Because of the differing rules on evidence submission depending on whether the form is submitted as a motion to reopen, an appeal with IFR, or an appeal without IFR, the individual completing the form must navigate the instructions to try to determine which rules apply to his or her case. And while the instructions detail the limitations on submission of evidence in connection with appeals, those who are also seeking initial field officer review within the AAO appeal process review may reasonably think that these restrictions do not apply.

As an example, assume that Client A files Form I-290B to reopen a denial of a VAWA self-petition. Along with her motion she submits new evidence without regard to the new evidence limitations that affect appeals. Client B, meanwhile, files Form I-290B in order to appeal the denial of a VAWA self-petition. Because Client B also wants the benefit of consideration of a motion to reopen, she submits new evidence, some of which was previously available and known to her but which she had not considered it necessary to submit. The proposed instructions do not make clear whether the adjudicating officer can consider the new evidence in the context of a motion to reopen even though it falls within the category of evidence generally excluded from consideration by the AAO. They also do not make clear whether the AAO evidence rules apply even though the initial field officer review is tantamount to consideration of a motion to reopen.

The lack of clarity will make it challenging for an affected party to elect the appropriate remedy. Individuals who receive unfavorable decisions on USCIS applications have a short window of time to file an appeal or motion, gather new evidence if necessary and available, and prepare a supporting memorandum or brief. The creation of different rules for consideration of new evidence when filing the same form will predictably cause tremendous confusion and error both in the election of remedies and in the submission of evidence that will be accepted on appeal. And this confusion will further reduce access to review of adverse decisions for vulnerable populations, such as applicants for U visas, T visas, SIJ status, and VAWA relief, who may not have the resources to identify which rules apply to their case and submit a timely filing.

C. The Proposed Revisions Contradict the Long-Standing Use of The *De Novo* Standard of Review for Discretion

The APA affords administrative agencies like the AAO plenary power to review each appeal on a *de novo* basis. The statute provides, “on appeal from or review of the initial decision,

the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”³⁶

The AAO has historically utilized the *de novo* standard of review in its adjudications. The origins of the AAO date back to 1983, when the former Immigration and Naturalization Service (INS) established the Administrative Appeals Unit (AAU). The AAO has traditionally been viewed as “independent” of the field offices, service centers, and other offices that adjudicate immigration benefits. Because of this independence, the AAO reviews all issues (fact, law, policy, and discretion) that come before it *anew*.³⁷

The AAO has undertaken *de novo* review of discretionary decisions for decades and it is a standard long recognized by federal courts.³⁸ Nearly 15 years ago, in response to a CIS Ombudsman Recommendation, the AAO affirmed that this *de novo* authority was “pursuant to Second and Ninth Circuit Court of Appeals decisions.”³⁹ At the time, the AAO was seeking to promulgate an proposed interim rule to affirm “the AAO reviews *de novo* any question of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction.”⁴⁰ The supplementary information to the proposed interim rule noted “the term *de novo* means that the AAO reviews a case as if the original decision never took place. In a *de novo* review, the AAO is not required to give deference to or take notice of the findings made in the original decision.”⁴¹ Thus, the AAO saw its *de novo* authority as grounded in and recognized by several federal courts, and sought to ***promulgate a rule*** to confirm and provide greater transparency to the public.

In addition, as USCIS recognizes in the Notice, the AAO has acknowledged its *de novo* authority in its precedent decisions, which are jointly approved by the Secretary of the Department of Homeland Security (DHS), the Board of Immigration Appeals and the Attorney General, both within the Department of Justice.⁴² For example, in the 2016 precedent decision *Matter of Dhanasar*, which revises the framework for the *discretionary* national interest waiver, the AAO engages in a *de novo* review of the applicant’s equities, reversing the Director.⁴³ Thus, the authority of the AAO to review discretionary determinations *de novo* has already been

³⁶ 5 U.S.C. §557 (emphasis added).

³⁷ AAO Practice Manual, Section 3.3, *De Novo* Standard of Review, available at <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals#FN52> (last visited January 30, 2020).

³⁸ *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis)

³⁹ USCIS Response to the Recommendation of the CIS Ombudsman (December 19, 2005), available at https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf (relying on the authority of *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *Spencer Enter. Inc. v. U.S.*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003)).

⁴⁰ *Id.* (quoting 8 C.F.R. 103.3(h)(2)(i) of USCIS Interim Rule 1615-AB24).

⁴¹ *Id.* (quoting USCIS Interim Rule 1615-AB24 at page 14).

⁴² USCIS. “Precedent Decisions,” available at <https://www.uscis.gov/legal-resources/precedent-decisions> (last accessed February 3, 2020).

⁴³ 26 I&N Dec. 884 (AAO 2016).

recognized and approved by the two agencies that have adjudicative authority over immigration benefits applications.⁴⁴

Thus, AAO has a long-established history of *de novo* review of discretionary determinations. USCIS has provided no indication, no information, that this standard has yielded erroneous results or what benefit changing the standard of review would have to the agency or to applicants. In fact, as we will discuss more below, the proposed revisions would have the opposite effect, and be an incredible, unjustifiable burden to applicants and petitioners, to service providers, and to AAO adjudicators.

1. *De Novo* Review of Discretionary Determinations is the Appropriate Standard of Review

The AAO's current standard of review for discretionary determinations is appropriate because its use is common practice in immigration proceedings. First, applying the *de novo* standard of review to discretionary decisions is already common practice in the immigration adjudication context.⁴⁵ For an example of this, we need go no further than examining the practice of the other appellate body in immigration law, the Board of Immigration Appeals. The BIA applies a *de novo* review of immigration judge discretionary decisions and legal conclusions and only reserves the more deferential "clear error" review for factual findings and credibility determinations.⁴⁶ In addition, all review of DHS officer decisions is *de novo*.⁴⁷ The BIA reviews a litany of immigration applications such as adjustment of status, asylum, cancellation of removal and certain waivers, and proceedings before the immigration judge, which are adversarial in nature and lead respondents and fact witnesses testify. Nevertheless, the BIA reviews IJ discretionary determinations *de novo* as is customary in administrative adjudications before the Executive Office for Immigration Review (EOIR).

In addition, within EOIR, immigration judges can review applications that were previously denied by USCIS such as the I-485 – Adjustment of Status Application and I-589 – Application for Asylum, Withholding of Removal and Relief under the Convention against Torture. When these applications are not approved by a USCIS officer, noncitizens are typically placed in removal proceedings and their applications are reviewed *de novo*. Notwithstanding the fact that immigration officers who adjudicate these petitions may have conducted in person, face to face interviews of noncitizen applicants, immigration judges consider legal conclusion, factual findings, and most importantly discretionary decisions *de novo* once the applicant is in removal proceedings.

⁴⁴ See "Precedent Decisions," *supra* note 42 (stating "Precedent decisions are legally binding on the DHS components responsible for enforcing immigration laws in all proceedings involving the same issues.").

⁴⁵ Immigration Judges also review Asylum Office determinations of negative credible fear and reasonable fear interviews *de novo*. See 8 C.F.R. § 1003.42(d)(1) & (2).

⁴⁶ 8 C.F.R. § 1003.1(d)(3)(i)-(ii).

⁴⁷ 8 C.F.R. § 1003.1(d)(3)(iii).

2. Applying the Most Deferential Standard of Review for AAO appeals of Discretionary Determinations Is Inappropriate

Departing from past practice and precedent, and raising the standard of review to “abuse of discretion” from *de novo* review of discretionary decisions is inappropriate for several reasons. While administrative appeals of employment-based petition denials are not required before filing suit in federal district court, the Notice raises concerns as to the continued viability of an AAO appeal. Issues often arise as to the Service Center’s application of the requirements for a particular visa classification to the evidence presented. It is unclear how petitioners can be assured that this new exception to *de novo* review for “discretionary” decisions will not derail what should be a *de novo* review of whether the evidence is sufficient, under a preponderance of the evidence standard, to meet the visa classification criteria. Without notice and comment rulemaking, where USCIS considers concerns about how it intends to draw the line in practice, AAO appeals may be further complicated by a petitioner’s perceived need to address as a threshold matter why AAO review of its denial is *de novo*.

USCIS indicates that it “questioned” whether use of the *de novo* standard is appropriate given “the initial adjudicator’s role in developing the record, identifying the discretionary factors, and ultimately weighing the [applicant’s] conduct, character, relationships and other humanitarian factors.”⁴⁸ However, USCIS has not provided any justification why AAO review of discretionary determinations should be held at *the most* deferential standard of review, when established regulation and case law has long upheld the use of *de novo* review in immigration matters in which a judge or adjudicator has evaluated a case after formally taking testimony and argument from the parties. Yet, the nature of the adjudications the AAO reviews are generally paper adjudications where no live testimony is taken. The AAO is not given the advantage of an immigration officer’s impressions or decisions based upon a face-to-face interview with the noncitizen applicant, thus a *de novo* standard of review is appropriate. First, the “abuse of discretion” standard of review is the most deferential standard of review and inappropriate for review of immigration officer discretionary decisions. The proposed revisions rely on a legal dictionary’s definition of abuse of discretion; yet the actual term is in fact extremely complex and multifaceted, and can depend on the jurisdiction.⁴⁹

⁴⁸ 84 Fed. Reg. at 66,926.

⁴⁹ For example, the Supreme Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, stated that an abuse of discretion occurs when a court’s decision represents a “clear error of judgment.” 401 U.S. 402, 416 (1971). Cf. “An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003); See Kevin Casey et al. “Standards of Appellate Review in the Federal Circuit: Substance and Semantics” “Abuse of discretion may be found when: (1) the tribunal’s decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision was based on an erroneous conclusion of law; (3) the tribunal’s findings are clearly erroneous; or (4) the record contains no evidence upon which the tribunal rationally could have based its decision.”

https://www.stradley.com/~media/Files/ResourcesLanding/Publications/2001/01/Standards%20of%20Appellate%20Review%20in%20the%20Federal%20Cir_/Files/krc-standards/FileAttachment/krc-standards.pdf (internal citations omitted).

The nature of the adjudications before the immigration officers, such as T visa or U visa adjustments or inadmissibility waivers, are typically adjudicated without an interview and decisions are made solely on the paper record before the officer. The AAO only benefits from the officer notes and limited analysis in the underlying decision upon appeal. Thus, the *de novo* standard of review is appropriate for the legal and factual analysis, but most importantly for the discretionary determinations where there is no testimony or reliable record for which to base the discretionary finding. Applying the most deferential standard of review to these discretionary decisions is incorrect.

It is confusing and inefficient to have two vastly different standards for legal and factual conclusions and discretion. As the AAO is required to review all of the legal and factual determinations “anew” upon appeal, it would be inapposite for it to then give unfettered discretion to the USCIS officer’s discretionary determination in the same case. If, upon applying *de novo* review, the AAO makes new factual findings or legal conclusions, is the AAO then required to defer completely to the USCIS officer’s discretionary determination in the same case? The Notice offers no justification for allowing for the highest, most deferential standard of review to be applied to immigration officers’ discretionary determinations, while other forums, such as the BIA and IJ, do not apply such deferential standard of review of discretionary determinations.

3. The Proposed Revisions Will Significantly Increase Administrative Burdens and Burdens on Stakeholders

Two central purposes of the Paperwork Reduction Act of 1995 (PRA) codified in the statute are to reduce the burdens of individuals, small business, educational and nonprofit organizations...resulting from the collection of information by or for the Federal Government,⁵⁰ and to *ensure the greatest possible public benefit* from and maximize the utility of information collected by or for the Federal Government.⁵¹

In its evaluation of the proposed revisions under the PRA, we call on USCIS to withdraw the information collection as it will dramatically increase the burden for individual applicants, as well as the service providers who assist them.⁵² Further, the proposed revisions diminish the public benefit from Form I-290B by creating stricter requirements which restrict access to and appropriate review of critical protections.”⁵³

⁵⁰ 44 U.S.C. § 3501(1) (Congress stated that one of the purposes of the PRA is to “minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.”)

⁵¹ 44 U.S.C. § 3501(2) (emphasis added).

⁵² 44 U.S.C. § 3501(1) (indicating one of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government).

⁵³ 44 U.S.C. § 3501(2) (emphasis added).

a. Burden on Applicants

Changing the standard of review for discretionary determinations will diminish the public benefit of Form I-290B and the AAO appeals process. The proposed revisions disproportionately harm applicants who already face barriers to full access to immigration relief, including survivors of crime, applicants without legal representation, applicants with low English proficiency, among others. As noted above, a majority of discretionary denials are not subject to review on appeal, but there are several critical discretionary benefits that fall under the AAO's jurisdiction, including critical humanitarian benefits such as Petitions for Qualifying Family Members of a U-1 Nonimmigrant, adjustment of status applications based on U visa or T visa relief, Temporary Protected Status, as well as critical waivers of inadmissibility that are often utilized in humanitarian cases.

The *de novo* review of questions of law, fact, and discretion ensures that these applicants have a uniform framework in which the AAO will consider the appeal of their cases, and provides clarity that the AAO will review all elements of their case with fresh eyes to eliminate potential errors of fact, law, discretion, or any combination thereof. Further, the AAO's complete *de novo* review of questions of law, fact, and discretion can often result in survivors receiving a just and appropriate outcome of their cases. Take for example, a survivor of domestic violence with no criminal history whose appeal of her I-601 waiver was sustained helping her to heal from the years of domestic violence she endured from her abusive spouse. The ability to both provide new information and *de novo* review of the District decision can often make the critical difference in these and other matters.

b. Burden on Service Providers

The Notice represents a significant departure from prior motions and appeal practice, and so it will greatly increase the time, effort and financial resources to comply with the proposed new requirements. All of the undersigned organizations provide resources, technical assistance, and training opportunities to thousands of advocates and attorneys nationwide, many of whom are at non-profit agencies with limited resources. Should the proposed revisions become finalized, we will face the additional burdens of having to update our advisories, training curricula, and resources in order to share accurate information about the proposed revisions. In addition, many of our organizations will spend our limited resources providing additional individual technical assistance on the proposed revisions to attorneys and advocates serving survivors and other applicants.

c. Administrative Burdens on USCIS

The proposed revisions will also cause undue burden to AAO adjudicators who now have to receive the proper training and supervision on implementing two different standards of review. This will alone result in added costs for USCIS. As USCIS provides no information, apart from a legal dictionary definition, on how it will consider "abuse of discretion," the proposed revisions

will undoubtedly yield inconsistent results for applicants. These disparate results will mean that advocates will need to bring additional federal court actions against the agency, which in effect eliminates the usefulness of the AAO as an appellate body.

USCIS creates unnecessary inconsistency among the agencies to create different standards that contradict long-standing and established practices among the appellate bodies adjudicating immigration application. To maintain consistency and avoid confusion among applicants, advocates, and DHS and DOJ personnel, *de novo* review of discretionary determinations should remain the practice with the AAO.

III. The Notice Is Subject to Notice and Comment Under the Administrative Procedure Act

USCIS is proceeding with these proposed revisions to the I-290B Notice of Appeal or Motion under the Paperwork Reduction Act (PRA) of 1995, as if they were simply a technical form change.⁵⁴ This is not the case. Rather than promulgate a rule, the proposed revisions are significant and substantive policy changes disguised as form and instructions revisions. The Notice incorrectly states that the changes it proposes are exempt from the notice and comment procedures in the APA.⁵⁵ In particular, although the Notice argues that it is either a “procedural rule” or an “interpretive” rule within the meaning of 5 U.S.C. § 553(b)(3)(A), it is neither.

A. The Notice Is Not a Procedural Rule

“In general, a procedural rule does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.”⁵⁶ Further, because “[t]he distinction between substantive and procedural rules is one of degree,” the classification of a rule often “depend[s] upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.”⁵⁷ Those policies encompass both the “need for public participation in agency decisionmaking” and the need “to ensure the agency has all pertinent information before it when making a decision.”⁵⁸ Because of the importance of those policies, “[t]he exception” to the APA’s notice and comment process “for procedural rules is narrowly construed and cannot be applied where the agency action trenches on substantial private rights and interests.”⁵⁹

Under that test, the provisions of the Notice are uniformly substantive, and therefore subject to notice and comment, rather than procedural. In fact, the D.C. Circuit has concluded that the announcement of “a new standard of review . . . would surely require notice and

⁵⁴ See 84 Fed. Reg. at 66,924.

⁵⁵ See 84 Fed. Reg. at 66,926.

⁵⁶ *EPIC v. U.S. Dep’t of Homeland Sec’y*, 653 F.3d 1, 5 (D.C. Cir. 2011); accord, e.g., *Chamber of Commerce v. U.S. Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

⁵⁷ *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *EPIC*, 653 F.3d at 5-6).

⁵⁸ *Id.* (quoting *EPIC*, 653 F.3d at 6).

⁵⁹ *Mendoza*, 754 F.3d at 1023 (internal citation and quotation marks omitted).

comment.”⁶⁰ That conclusion directly applies to the portion of the Notice that alters the standard of review applied by the AAO to discretionary decisions. And the Notice’s pronouncement that the AAO cannot review “no risk” determinations under the AWA similarly affects the “rights or interests of parties”⁶¹ by removing a previously available appellate process. Contrary to the assertion in the Notice, the agency’s determination as to AWA appeals does “change substantive standards” related to those appeals—by precluding them altogether.⁶²

Two of the other changes in the AAO cannot be seen as procedural rules because they impose “a ‘new substantive burden’” on those seeking AAO review⁶³ and “set the bar for what” filers “must do to obtain approval.”⁶⁴ Specifically, the AAO’s newfound refusal to consider fresh evidence on appeal places a new burden on filers to anticipate and submit all evidence that might become relevant, even if that relevance is not immediately apparent. The requirement that all grounds of inadmissibility be raised on Form I-290B—a requirement that has, in our experience, never existed in the context of AAO appeals—likewise imposes a new burden on filers.⁶⁵ That change also removes a filer’s preexisting right to limited review. Moreover, as shown above, both of these burdens will be significant and difficult to satisfy, especially for individuals proceeding *pro se* before the agency.

The change allowing filers to waive the IFR process raises additional concerns. That change effectively seeks to amend an existing regulation, codified at 8 C.F.R. § 103.3(a)(2), that makes IFR mandatory.⁶⁶ This regulation went through the APA’s notice and comment process before they took effect.⁶⁷ The APA requires that “agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”⁶⁸

Furthermore, although permitting filers to waive IFR might not create a significant new burden, it does “substantively affect[]” filers “to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking.”⁶⁹ After all, the IFR process may cure agency errors more quickly, and if it does, the continuation of automatic IFR will be of

⁶⁰ *Mendoza*, 754 F.3d at 1024 (internal quotation marks omitted); *accord Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987).

⁶¹ *EPIC*, 653 F.3d at 5.

⁶² *See* 84 Fed. Reg. at 66,926.

⁶³ *EPIC*, 653 F.3d at 6 (quoting *Aulenback, Inc. v. FHA*, 103 F.3d 156, 169 (D.C. Cir. 1997)).

⁶⁴ *Mendoza*, 754 F.3d at 1024.

⁶⁵ The Notice asserts that this change to Form I-290B represents a “clarification of current practice” rather than a change, but it provides no evidence or reasoning in support of that conclusion. 84 Fed. Reg. at 66,924.

⁶⁶ *See* 8 C.F.R. § 103.3(a)(2)(ii) (“the official who made the unfavorable decision being appealed *shall* review the appeal”) (emphasis added); *id.* § 103.3(a)(2)(iii) (“[t]he reviewing official *shall* decide whether or not favorable action is warranted”) (emphasis added); *id.* § 103.3(a)(2)(iv) (if the official decides that “favorable action is not warranted, that official *shall* promptly forward the appeal” to the AAO) (emphasis added).

⁶⁷ *See Appeals, Precedents, Certifications, and Motions*, 55 Fed. Reg. 20,767 (May 21, 1990) (final rule); *Appeals, Precedents, Certifications, and Motions*, 54 Fed. Reg. 29,344 (July 12, 1989) (notice of proposed rulemaking).

⁶⁸ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015).

⁶⁹ *EPIC*, 653 F.3d at 6.

substantial value to the public. It is also the public, not the agency, that will have the most relevant information concerning that process. The change to IFR, like all of the other changes announced in the Notice, is therefore not a procedural rule exempt from notice and comment under the APA.

The cases cited in the Notice do not support a contrary conclusion. The D.C. Circuit held that policies at issue in *American Hospital Association v. Bowen* were procedural because they were “merely hortatory” and “not binding” and because they did no more than “carefully replicate[] the substantive standards” of the governing statute.⁷⁰ The changes in the Notice, by contrast, are binding and do not even purport to be drawn from statutory language. The policy at issue in the D.C. Circuit Court case *Jem Broadcasting Co. v. FCC* is likewise distinguishable.⁷¹ Among other things, the policy at issue there, unlike the policies announced in the Notice, did not significantly alter the rights of, and burdens on, parties who appeared before the agency.⁷² The Notice therefore identifies no good reason to believe that its changes are exempt from notice and comment because they are procedural rules within the meaning of 5 U.S.C. § 553(b)(3)(A).

B. The Notice Is Not an Interpretive Rule

The Notice also fails to identify any persuasive reason to believe that it is exempt from notice and comment because its changes are “interpretive” rather than legislative. An interpretive rule is one that interprets something, which is to say one that “construe[s] . . . language in a relevant statute or regulation.”⁷³ Furthermore, it is not enough for an agency simply to assert that a rule interprets an existing statute or regulation. Rather, “[t]o fall within the category of interpretive, the rule must derive a proposition from an existing document whose meaning compels or logically justifies the proposition,” and “[t]he substance of the derived proposition must flow fairly from the substance of the existing document.”⁷⁴ The sole relevant case cited by the Notice applies essentially the same test.⁷⁵

The Notice, however, does not interpret any statute or regulation. To be sure, the Notice asserts that all of its changes interpret 8 C.F.R. §§ 103.3 and 103.5.⁷⁶ But that assertion is simply wrong. Nothing in either § 103.3 or § 103.5 even begins to speak to two of the changes in the Notice. The regulations are silent as to the standard of review that the AAO will apply. And they are equally silent on the question of the AAO’s jurisdiction over AWA “no risk” determinations.

⁷⁰ *American Hospital Association v. Bowen*, 834 F.2d 1037, 1056 (D.C. Cir. 1987).

⁷¹ 22 F.3d 320 (D.C. Cir. 1994).

⁷² *See id.* at 327.

⁷³ *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

⁷⁴ *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (internal quotation marks omitted); *accord, e.g., Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005).

⁷⁵ *See 84 Fed. Reg. at 66,926 (quoting Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010)).

⁷⁶ 84 Fed. Reg. at 66,926.

As to those changes, the Notice seeks to make significant, freestanding policy changes rather than interpret an existing regulation.

As shown above, the regulations *do* speak to whether the IFR process can be waived—and they directly foreclose that change. Section 103.3(a)(2), a legislative rule promulgated following notice and comment, makes the IFR process mandatory. By instead making IFR optional, the Notice contradicts that regulation, and its change therefore cannot be characterized as interpretive.⁷⁷

Finally, although the regulations contain provisions that are tangentially relevant to the remaining two changes in the Notice, the Notice cannot plausibly be seen as providing a gloss on those provisions. Although 8 C.F.R. § 103.3(a)(1)(v) speaks to the specification of issues for appeal, it states only that an appeal will be summarily dismissed if it does not specify *any* “erroneous conclusion of law or statement of fact.” That provision cannot reasonably be interpreted to mean that Form I-290B must address *every* ground of inadmissibility. Similarly, the fact that § 103.3(a)(2)(vi) expressly allows a brief to be filed as part of an appeal cannot reasonably be read to mean that evidence may *not* be filed. And a party’s ability under § 103.5(a)(2) to submit evidence in support of a motion to reopen also does not speak to whether the AAO may consider such evidence as part of an appeal.

In short, the Notice is procedurally defective because all of its changes must undergo full notice and comment under the APA before they take effect.

IV. Conclusion

USCIS’ proposed revisions to the I-290B Form and Instructions are not just about changes to a form or instructions, but go to the very core of an individual’s ability to receive proper administrative review of their case. For the reasons listed above, we call on USCIS to withdraw the Notice immediately as it contains significant changes which contravene long-established policy, harms an applicant’s access to administrative review, and was not issued under the proper legal framework under the APA.

Respectfully submitted,

The American Immigration Council
The American Immigration Lawyers Association
ASISTA Immigration Assistance
The Catholic Legal Immigration Network, Inc.

Immigrant Legal Resource Center
Kids in Need of Defense
The Tahirih Justice Center

⁷⁷ See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).