ROUND TABLE
of Former Immigration Judges

March 27, 2020

VIA E-RULEMAKING PORTAL: www.regulations.gov

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Re: **EOIR Docket No. 18-0101**

Dear Ms. Alder Reid,

We are writing as members of the Round Table of Former Immigration Judges to express our strong opposition to the Department of Justice Notice of Proposed Rulemaking ("proposed rule") regarding the increase in fees for applications, motions, and appeals before the Executive Office for Immigration Review (EOIR).

The Round Table of Former Immigration Judges is a group of former Immigration Judges and Board of Immigration Appeals (BIA) Members who united to file amicus briefs and engage in other advocacy work. The group formed in 2017. In just over two years, the group has grown to more than 40 members, dedicated to the principle of due process for all. Its members have served as amici 47 times in cases before the Supreme Court, eight different circuit courts, one federal district court, the Attorney General, and the BIA. The Round Table of Former Immigration Judges has also submitted written testimony to Congress and has released numerous press statements and a letter to EOIR's director. Its individual members regularly participate in teaching, training, and press events.

The Round Table opposes the proposed rule which serves to increase the filing fee for numerous applications before the Immigration Courts and the Board of Immigration Appeals. Each member of the Round Table has adjudicated applications and motions and has ruled on fee waivers in connection with such applications. Accordingly, the Round Table has the following concerns about the significant increase in fees.

The Proposed Justification for the Fee Increases

EOIR attempts to justify the exorbitant increase in fees by suggesting that under the Independent Offices of Appropriations Act of 1952, "each service or thing of value provided by an agency . . . to a person. . . is to be self-sustaining to the extent possible."[1] However, EOIR also recognizes that "such fees must be 'fair' and based on Government costs, the value of the service or thing provided to the recipient, the public policy or interest served, and other relevant facts."[2]

While EOIR may provide a service to the non-citizen public, unlike the United States Citizenship and Immigration Services (USCIS), where non-citizens may affirmatively apply for immigration benefits, individuals applying for benefits before EOIR are not affirmatively presenting themselves to the immigration courts. Rather, individuals in immigration court proceedings are facing removal from the United States and are entitled to due process in such proceedings. Applications for relief before the immigration court are the primary way in which non-citizens defend themselves from removal. The adjudication of such applications in immigration court is not a "service" in the way USCIS adjudications constitutes a service. Similarly, appeals before the BIA and motions to reopen before the BIA and immigration court are not affirmative services. Therefore, we do not believe that the services provided in adjudicating applications can justify the exceptional increases in fees to proceed with such applications before EOIR.

Moreover, the proposed fees are not "fair." While some of the fees seem fair—the increase from $110 to $145 to file a motion to reopen or reconsider before the Immigration Court-- most of the fee increases are not.[3] Increasing fees to file an appeal at the BIA from $110 to $975 is an 886% increase in the filing fee.[4] Expecting non-citizen respondents to pay such a high fee with no sliding scale or incremental increase in the filing fee is not fair. Respondents do not have a right to appointed counsel if they cannot afford to pay a private attorney. The extent of the fee increases will force respondents to choose between filing applications for relief and hiring attorneys. Therefore, it impacts the right to counsel as well as the right to file applications for relief, which in turn, impacts due process rights.

Furthermore, the agency acknowledges that it is an appropriated agency.[5] Nevertheless, "EOIR has determined that it is necessary to update the fees charged for these EOIR forms and motions to more accurately reflect the costs for EOIR's adjudications of these matters."[6] Yet, as an appropriated agency, EOIR does not rely on filing fees to function. Expecting non-citizen respondents who are required to appear and have a right to defend themselves to supplement the funding of the agency to such a degree is unnecessary and unjust.
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[1] 85 FR 11866, 11866-11867 citing 31 U.S.C. 9701(a) (Feb. 28, 2020)
[2] 85 FR at 11867 (internal citations omitted)
[3] 85 FR at 11871
[4] *Id.*
[5] 85 FR at 11870
[6] *Id.*

The agency further seeks to justify the extensive increase in fees by suggesting, "[t]he mismatch between fees and the underlying costs of review has become more of a burden on the immigration adjudication system as aliens overall have begun filing more of these fee-based forms and motions."[7] However, more non-citizens are filing fee-based forms and motions because the Department of Homeland Security (DHS) has increased enforcement and initiated removal proceedings against more individuals. DHS likewise receives more appropriated funding than EOIR—a recurring problem in the immigration system. This group has firsthand knowledge of the disproportionate funding that is allocated to immigration enforcement as opposed to the immigration court. Those who are targeted for enforcement should not be penalized for defending themselves against such enforcement through applications they are entitled to file by statute. Should the agency be concerned about the increase in respondents and applications in removal proceedings, perhaps DHS should share the financial burden. Rather than requiring respondents to pay exceptionally high fees for applications, DHS could pay a filing fee for each Notice to Appear and Notice of Appeal. Just as respondents must consider costs when filing applications and appeals, so should DHS.

Disincentive to Apply for Asylum

By supporting the proposed fee of $50 for asylum applications proposed by USCIS, the agency is creating a disincentive to apply for asylum. The publication in the Federal Register acknowledges that "in proceedings before an immigration judge, a 50 fee would apply to a Form I-589 if the applicant seeks asylum. The fee would not apply if the applicant filed the Form I-589 for the sole purpose of applying for withholding of removal under the INA or protection under the CAT."[8] This group has heard the cases of thousands of asylum seekers and understands that for most, $50 is a substantial sum of money. Many asylum seekers flee with nothing. Requiring a fee for asylum but not for withholding of removal or protection under the CAT creates a significant disincentive to apply for asylum for refugees seeking protection. Low income applicants should not be forced to seek lesser relief solely because they cannot afford a filing fee. In addition, imposing a fee will create delay in the filing of asylum applications for low income applicants, which will directly impact their right to apply for asylum, as the statute requires that applications be filed within one year of entering the country.[9] Pro se applicants will be at an even greater disadvantage, as they will need to navigate the system for properly paying the filing fee, which can be quite complex. All refuges in the United States seeking protection have a right to apply for asylum, which should not be hindered by a filing fee.[10]

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[7] 85 FR at 11869

[8] 85 FR at 11871-11872

[9] INA § 208(a)(2)(B)

[10] *See* INA § 208

Impact on Non-Citizens' Regulatory Right to Appeal and File Motions to Reopen and Reconsider

Non-citizens have a regulatory right to appeal as well as a regulatory right to file a motion to reopen before the Board of Immigration Appeals in specific circumstances.[11] Non-citizens have a statutory right to file a motion to reopen or reconsider before the Immigration Court.[12] Attaching fees of $975 for an appeal and $895 for a motion to reopen or reconsider before the BIA impinges on the rights of low-income respondents.[13] The fee increase is particularly impactful on low-income respondents who are in expedited proceedings, such as the Family Unit dockets, as these individuals have less time to raise the money necessary to pay filing fees.[14] While the proposed regulation suggests that fee waivers will continue to be entertained[15], it is unclear what guidance will be provided to officials at the BIA who will be adjudicating the fee waivers. Motions to reopen and reconsider and appeals have strict deadlines respondents must adhere to in order to be accepted for filing.[16] If a fee waiver is denied, a respondent will lose his or her right to appeal or reopen proceedings. Moreover, such high fees create a disincentive for low income individuals to pursue their rights.

Fee waivers

Based on our experience as former Immigration Judges and Board of Immigration Appeals Members, the majority of respondents in removal proceedings are low to moderate income individuals. This means that with such a drastic increase in fees, more respondents will be applying for fee waivers, particularly before the BIA, where the fees are exceptionally high. If the BIA grants such fee waivers, as it should, for individuals who clearly cannot pay, the fee increase will not have the intended impact, as more people will qualify for fee waivers and will pay nothing. Moreover, an increase in fee waiver applications will create even more work for Immigration Judges, Appellate Immigration Judges, and EOIR attorneys. In an already overburdened system with a backlog of 1,122,824 cases,[17] the creation of additional and unnecessary work without a plan to manage the increased workload will lead to further delays and backlogs.

Conclusion

These proposed rules are unfair to non-citizen respondents who are required to appear in immigration court and defend themselves through fee-based applications for relief. The Round

[11] 8 C.F.R. §§1003.38(b), 1240.15 (appeals) and §1003.2 (motion to reopen or reconsider)
[12] INA § 240(c)(6) (motion to reconsider) § 240(c)(7) (motion to reopen), respectively
[13] The focus here is on the fee increases before the BIA. The commenters acknowledge that the fee increase from $110 to $145 for motions before the Immigration Court is reasonable and will not impact low income respondents in the manner the in which such increases will impact those same individuals at the BIA.
[14] McHenry Memorandum, "Tracking and Expedition of 'Family Unit' Cases," November 16, 2018, https://www.justice.gov/eoir/page/file/1112036/download; McHenry Memorandum, "Case Priorities and Immigration Court Performance Measures," January 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.
[15] 85 Fed. Reg. at 11871
[16] 8 C.F.R. §1003.2(c)(2) (90 day deadline for a motion to reopen) and §1003.38(b) (30 day deadline for an appeal from a decision of the Immigration Judge).
[17] TRAC Immigration, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/

Table of Immigration Judges therefore urges the Department of Justice to withdraw, not implement this rule.

Very truly yours,

/s/
Steven Abrams
Sarah Burr
Teofilo Chapa
Jeffrey Chase
George Chew
Joan V. Churchill
Matthew Dangelo
Cecelia Espenoza
Noel Ferris
James Fujimoto
John Gossart
Paul Grussendorf
Miriam Hayward
Charles Honeyman
Rebecca Bowen Jamil
Bill Joyce
Carol King
Elizabeth Lamb
Margaret McManus
Charles Pazar
Laura Ramirez
John Richardson
Lory Rosenberg
Susan Roy
Paul Schmidt
Ilyce Shugall
Denise Slavin
Andrea H. Sloan
Polly Webber

The Round Table of Former Immigration Judges