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June 10, 2002

Director, Regulations and Forms Services Division
Immigration and Naturalization Service
425 I Street, NW, Room 4034
Washington, DC 20536

Re: INS Reference No. 1847-97 – Requiring Aliens Ordered Removed from the United States to Surrender to the Immigration and Naturalization Service for Removal, 67 Fed. Reg. 31157 (May 9, 2002)

Dear Director:

On behalf of the undersigned organizations and individuals, we submit the following comments to the supplementary proposed rule published in the Federal Register on May 9, 2002.

The proposed rule requires individuals who were ordered removed, and those who failed to depart after a grant of voluntary departure, to surrender for removal within 30 days of the date of the final order of removal. The proposed rule also bars people who fail to comply with the rule from discretionary relief, including asylum, for a period of ten years from the date of departure from the United States. Moreover, the rule also precludes these people from filing a motion to reopen with the Board of Immigration Appeals ("BIA") or the immigration court.

We oppose this rule because it exceeds the statutory authority of the Attorney General and conflicts with several statutory provisions, particularly those pertaining to in absentia hearings and asylum. Moreover, rather than significantly increase the percentage of people who surrender for removal – the stated goal of the rule – the proposed rule will adversely affect noncitizens who want to comply with the law, but inadvertently fail to surrender. The notice provisions fail to adequately inform those subject to this rule of their duty to surrender. In addition, as described in many of the comments below, this

proposed rule is unnecessarily restrictive. It leaves no discretion to the district director, the BIA and the immigration judges to waive the consequences of failing to surrender in extraordinary circumstances.

I. The Proposed Rule Exceeds Statutory Authority.

A. The Proposed Rule Attempts to Legislate in an Area Where Congress Has Not Provided Any Authority.

The Immigration and Nationality Act ("the Act") contemplates that noncitizens ordered removed will report to INS in order to effectuate removal. *See generally* INA § 241. The Act, however, does not attach consequences for failing to report to INS. Certainly, Congress could have legislated on this matter. Congress has explicitly barred certain forms of discretionary relief in other situations where a person procedurally defaults during the removal process. *See* INA § 240(b)(7) (consequences for failing to appear for a hearing); INA § 240B(d) (consequences for failing to depart after a grant of voluntary departure). Congress, however, decided not to include consequences for failing to surrender. The Attorney General now may not reverse this decision by promulgating regulations on a matter that Congress chose not to legislate.

B. The Proposed Rule Imposes Extra-Statutory Penalties for Failing to Appear.

The Act already provides consequences for failing to appear for a removal hearing. INA § 240(b)(7). Section 240(b)(7) of the Act says that any person who does not appear for a removal hearing, after receiving oral notice of the time and place of the hearing and the consequences of failing to appear, other than because of exceptional circumstances, is ineligible for cancellation of removal, voluntary departure, adjustment of status, change of status, and registry for ten years from the date of the order of removal. *Id.* The duty to surrender may be understood as nothing more than an appearance rule with a new date. Since Congress clearly articulated consequences for failing to appear and provided specific notice requirements, the Attorney General has no authority to modify the consequences and notice requirements.

Nonetheless, this is what the proposed rule attempts to do. The proposed rule bars additional forms of relief, namely, asylum and waivers under sections 212(h) and 212(i). *Proposed* 8 C.F.R. § 241.18(c). The proposed rule also changes the period of time for which the person is ineligible for discretionary relief (from ten years from the date of removal to ten years after the departure or removal from the United States). *See id.* Finally, the proposed rule changes the notice requirements in that oral notice is not required. *Proposed* 8 C.F.R. § 241.17(f).

The Attorney General simply cannot legislate a matter on which Congress has spoken so specifically.

II. The Rule Must Not Conflict with the INA's Provisions Pertaining to Motions to Reopen.

A. The Proposed Rule Must Be Interpreted to Allow Noncitizens to File Motions to Reopen To Rescind In Absentia Orders of Removal.

Proposed section 3.23(b)(5)(i) states, "Notwithstanding the requirements of paragraph (b)(1) of this section, a motion to reopen or reconsider will not be granted in the case of an alien who failed to surrender for removal in accordance with § 241.16 of this chapter . . . ." We interpret this to mean that the preclusion on motions to reopen applies only to motions under 8 C.F.R. § 3.23(b)(1) (i.e., motions filed within 90 days of the decision) and not motions filed under 8 C.F.R. § 3.23(b)(4) (i.e., motions excepted from the 90 day filing deadline). This interpretation is consistent with the reference to 8 C.F.R. § 3.23(b)(1) in the text of proposed 8 C.F.R. § 3.23(b)(5)(i).

Also, this interpretation is necessary to avoid a conflict with INA § 240(b)(5). Section 240(b)(5)(C) of the Act explicitly allows a noncitizen to file a motion to reopen to rescind an in absentia order *at any time* if the failure to appear was because of lack of notice. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 3.23(b)(4)(ii). A person may also file a motion within 180 days of the order of removal if failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C)(i); 8 C.F.R. § 3.23(b)(4)(ii). If proposed 8 C.F.R. § 3.23(b)(5)(i) precluded filing motions to reopen to rescind an in absentia order, then situations may arise where an individual would be precluded from exercising his or her statutory right to move to rescind an unlawful order of removal. A regulation cannot conflict with the statute or attempt to take away rights expressly granted by the statute.

For example, under the proposed rule, situations may arise where an individual was improperly served with the Notice to Appear (NTA), but was properly served with the notice of the duty to surrender. Proposed 8 C.F.R. § 241.19(c) states that for the purpose of notice of the duty to surrender "in the case of an alien who is not personally served with an order of removal, service by first class mail to the last address provided by the alien in accordance with section 239(a)(1)(F) of the Act, or part 3 or part 265 of this chapter shall be sufficient."[1]

Notices concerning removal proceedings may be sent by mail to the last address provided by the respondent in accordance with section 239(a)(1)(F) of the Act. INA § 239(c). Section 239(a)(1)(F) states that the NTA must inform the respondent in removal proceedings that he or she must immediately notify the government of a change of address. INA § 239(a)(1)(F). The NTA also must inform the respondent of the consequences of failing to do so (i.e., that an in absentia order of removal may be entered

[1]The service provision in the original proposed rule stated, "service is sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with section 239(a)(1)(F) of the Act." 63 Fed. Reg. 47205, 47209 (Sept. 4, 1998). This difference between the original proposed rule and the supplementary proposed rule is significant because the last address under section 239(a)(1)(F) (and 8 C.F.R. part 3) is distinguishable from the last address under 8 C.F.R. § 265. The background information should have addressed this change from the original proposed rule.

by the immigration court). *Id.* According to the BIA, the "last address" under section 239(a)(1)(F) "must be an address consequent to the alien's being put on notice of the particular address obligations contained in the Notice to Appear." *Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001). Thus, an individual may not be properly ordered removed in absentia unless the respondent receives the Notice to Appear. *See id.* at 190.

Section 265 states that all noncitizens required to register under part 262 of the Act must report every change of address to INS within ten days of the change. 8 C.F.R. § 265. This section implements part 265 of the INA. The BIA held that section 265 does not "authorize the issuance of an in absentia order of removal as a consequence of [its] violation." *See Matter of G-Y-R-*, 23 I&N Dec. at 190.

Thus, given the difference between a section 239(a)(1)(F) address and a section 265 address, situations may arise where the NTA was not properly served, but the notice of the duty to surrender was properly served. If an individual failed to inform INS of an address change under section 265 of the Act and as a result does not receive the NTA, he or she may be charged with receiving proper notice of the duty to surrender, even if this is not proper notice of the NTA. *See proposed* 8 C.F.R. §§ 241.17(f), 241.19(c). Further, if this person were improperly ordered removed in absentia, he or she must be allowed to move to rescind the in absentia removal order *at any time* under section 240(b)(5)(C)(ii) and *Matter of G-Y-R-*. For that reason, proposed 8 C.F.R. § 3.23(b)(5)(i) must not preclude motions to reopen to rescind in absentia orders under 8 C.F.R. § 3.23(b)(4).

Another example of where a rule precluding motions to reopen to rescind an in absentia order would conflict with the statute is where a respondent does not appear for his or her removal proceedings because of exceptional circumstances, but does not learn of the order of removal of removal until after 30 days has passed. This often arises where a person is the victim of ineffective assistance of counsel or fraud. Under the Act, the only way to raise an ineffective counsel or fraud claim when the person did not attend the hearing as a result is to file a motion to reopen with the immigration court. INA § 240(b)(5)(C)(ii).

If the rule were interpreted to preclude these motions if an individual failed to surrender, not only would this rule violate the INA § 240(b)(5)(C)(i), but also it would conflict with circuit court law which has recognized a due process right to effective counsel. *See, e.g., Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2nd Cir. 2000); *Chmakov v. Blackman*, 266 F.3d 210 (3rd Cir. 2001); *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696 (6th Cir. 2001); *Chowdhury v. Ashcroft*, 241 F.3d 848 (7th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999).

Also, as discussed in Part V, B of these comments, such a rule would conflict with BIA case law which allows noncitizens to reopen their cases if they show that their failure to appear for the hearing was because counsel was incompetent. *See Matter of Grijalva*, 21

I&N Dec. 472, 474 (BIA 1996)[2]; *Matter of Lopez*, 184 F.3d 1097, 1099-1100 (9th Cir. 1999). Please note that exceptional circumstances, ineffective assistance of counsel, and fraud are addressed in Part V, B of these comments.

B. The Proposed Rule Must Be Interpreted to Allow Noncitizens to File Motions to Reopen To Apply for Withholding of Removal and CAT.

Likewise, proposed 8 C.F.R. § 3.2(c)(5) and 8 C.F.R. § 3.23(b)(5)(i) must be interpreted to allow individuals who fail to surrender to file motions to reopen pursuant to 8 C.F.R. §§ 3.2(c)(3)(ii) and 3.23(b)(4)(i). Sections 3.2(c)(3)(ii) and 3.23(b)(4)(i) implement INA § 240(c)(6)(C)(ii), which allows individuals who have been ordered removed to file motions to reopen their cases to apply for withholding of removal under INA § 241(b)(3) and relief under the Convention Against Torture (CAT) if the basis of the motion is changed country conditions. There are no time limitations for these motions. INA § 240(c)(6)(C)(ii); 8 C.F.R. §§ 3.2(c)(3)(ii), 3.23(b)(4)(i).

Any interpretation of these proposed rules that does not allow filing motions to reopen under 8 C.F.R. §§ 3.23(b)(4) or 3.2(c)(3)(ii) would preclude some people from applying for these two forms of non-discretionary relief – relief that is not barred by the proposed rule. Therefore, the regulation would impermissibly conflict with INA § 240(c)(6)(C)(ii).

C. The Rule Should Say that Noncitizens Who Do Not Receive Proper Notice of the Duty to Surrender May File Motions to Reopen Their Removal Proceedings.

Certainly, the proposed rule makes clear that the duty to surrender does not attach until the individual has been provided with notice of the duty. *Proposed* 8 C.F.R. § 241.16(a). Nonetheless, for clarity, proposed sections 3.2(c)(5) and 3.23(b)(5) should be amended to say that where notice of the duty to surrender was not proper, the immigration judge or BIA should reopen the case without first requiring the person to surrender.

III. It Is Unlawful to Deny Discretionary Relief to Noncitizens Whose Removal Orders Have Been Rescinded.

Where an immigration judge grants a motion to reopen to rescind an in absentia order under section 240(b)(5) of the Act, the respondent must be allowed to apply for discretionary relief. The proposed rule is unclear as to whether proposed 8 C.F.R. § 241.18(c) bars a person in this situation from applying for discretionary relief upon reopening.

Any rule that bars individuals from applying for discretionary relief where the underlying order of removal is rescinded would violate due process. A person cannot be subjected to the consequences of failing to surrender when the underlying removal order is later found

[2]The BIA has held, however, that to establish counsel's ineffectiveness or incompetence, the aggrieved party must comply with the procedural requirements set out in *Matter of Lozada*, 18 I&N Dec. 637 (BIA 1988).

unlawful. *C.f. United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (holding that a noncitizen is not subject to a collateral consequence of an unlawful deportation order). Therefore, the proposed rule should be amended to clarify that no person whose removal order is rescinded is subject to the consequences contained in proposed 8 C.F.R. § 241.18.

IV. The Consequences for Failing to Comply With This Rule are Inconsistent with INA § 208.

Although asylum is discretionary, and the Attorney General may by regulation establish criteria for denying asylum as a matter of discretion, INA § 208(b)(2)(C), the criteria must be consistent with the other provisions of section 208 of the Act. *See* INA § 208(b)(2)(C). Section 208(a)(1) mandates that any noncitizen physically present in the United States, "irrespective of such alien's status," must be afforded the opportunity to apply for asylum. INA § 208(a)(1). Denying asylum for not complying with the surrender requirements, particularly where the putative asylee could not comply, is tantamount to a status-based eligibility bar, which clearly is impermissible under the Act. *See id.*

Moreover, this proposed regulation is distinguishable from the firmly resettled regulation at issue in *Yang v. INS*, which was cited in the background information of the proposed rule. *See* 79 F.3d 932 (9th Cir. 1996) *cited in* 67 Fed. Reg. at 31159. In *Yang*, the court found that it was within the Attorney General's discretion to bar relief to all individuals who firmly resettled in another country prior to coming to the United States. *Id.* The firmly resettled bar, however, did not conflict with section 208 because "firmly resettled aliens are by definition no longer subject to persecution." *Id.* at 939. Alternatively, here, the proposed rule is inconsistent with the statute in that it turns a procedural default into a status based bar to relief. Section 208 does not allow this. *See* INA § 208(a)(1).

V. Problems with Adopting a Significantly Changed Definition of "Exceptional Circumstances"

A. No Reason is Provided for Changing the Language from the Original Proposed Rule.

The proposed rule provides for a waiver of the consequences of the duty to surrender where an individual demonstrates that "the failure to surrender was due to exceptional circumstances as defined in section 240(e)(1) of the Act." *Proposed* 8 C.F.R. § 241.18(c)(2). The rule also says that "[e]xceptional circumstances do not include reliance on advice of counsel or any other individual, and no waiver is available based on such reliance." *Id.*

The original proposed rule did not make any reference to "reliance on advice of counsel or any other individual," nor did it describe any circumstances that do not constitute exceptional circumstances. *See* 63 Fed. Reg. at 47209. Thus, the supplementary

proposed rule was changed significantly from the rule as initially proposed; this should have been addressed in the background section of the supplementary proposed rule.

B. The New Definition of Exceptional Circumstances is Inconsistent with Long-Standing BIA and Circuit Court Case Law and Promotes Bad Policy.

The qualification that "reliance on advice of counsel or any other individual" does not constitute an exceptional circumstance is a departure from the long-standing definition of exceptional circumstances. The BIA has held repeatedly that ineffective assistance of counsel is an exceptional circumstance. *See Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996); *see also Matter of Rivera*, 21 I&N Dec. 599, 602 (BIA 1996). In *Matter of Grijalva*, the BIA found that "the respondent, who had no reason not to rely on his counsel at this juncture, was blatantly misled regarding his need to appear at the scheduled hearing." 21 I&N Dec. at 474. Thus, the BIA concluded that the respondent had established that exceptional circumstances prevented him from appearing at his deportation hearing. *Id.*

The BIA's interpretation of exceptional circumstances has been cited with approval by several circuit courts. *See Saakian v. INS*, 252 F.3d 21, 25 (1st Cir. 2001); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000). Moreover, all of the circuit courts to address the issue have found that ineffective assistance of counsel can rise to the level of a due process violation. *See, e.g., Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2nd Cir. 2000); *Chmakov v. Blackman*, 266 F.3d 210 (3rd Cir. 2001); *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696 (6th Cir. 2001); *Chowdhury v. Ashcroft*, 241 F.3d 848 (7th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999). Likewise, the courts have refused to hold an individual responsible when he or she was the victim of fraud, such as when a non-attorney purports to provide legal representation. *See Varela,* 204 F.3d at 1240; *Lopez v. INS*, 184 F.3d 197, 1100 (9th Cir. 1999).

The proposed rule unnecessarily punishes individuals who do not surrender because they reasonably rely on counsel's advice or are victims of fraud.

VI. The Proposed Rule's Requirements Are Unnecessarily Stringent and Make It Impossible for Many Noncitizens to Comply

The proposed rule requires noncitizens subject to a final order of removal to surrender within 30 calendar days of the date of the final order of removal (or one day after the failure to depart on a grant of voluntary departure). *Proposed* 8 C.F.R. § 241.16(b), (c), and (d). Surrender must be made "during regular business hours to the Detention and Removal Program of the Service district office with jurisdiction over the place where the immigration judge completed the removal proceedings." *Proposed* 8 C.F.R. § 241.16(a). In addition, if the location of the district office changes, it is the noncitizen's responsibility to determine the new location. *Proposed* 8 C.F.R. § 241.17(f).

The notices under proposed 8 C.F.R. § 241.17, however, fail to inform noncitizens of the actual surrender date, do not always state where the district office is located, and do not say what the regular business hours are. This is especially a problem since INS district offices hours are not necessarily regular – many offices open at 7 a.m., while others do not open until 8 a.m. More importantly, the closing times vary – many offices close at 3:30 p.m., some close at 3 p.m. and others close even earlier on certain days. The rule also indicates that once any written notice is provided, noncitizens have a duty to surrender, even if no additional notice is ever provided. *Proposed* 8 C.F.R. § 241.17(f). This means that individuals will be required to comply with these very specific requirements, even if they had only once been informed about them months or even years earlier.

It is unreasonable to expect noncitizens, many of whom are uneducated, do not speak English, and do not have access to attorneys, to be able to comply with these requirements, especially since the notices inadequately inform them of these duties. (Part VII of this comment addresses the notice deficiencies in more detail.) As a result, many many noncitizens who want to comply with the duty to surrender may fail to comply with the stringent requirements of this proposed rule. In many cases, applying the consequences of failing to surrender will create unintended, harsh results and will violate the right to due process. This is especially so because there is no good faith exception for people who want to comply with the rule and make a good faith effort to comply, but still are unable to do so.

VII. Problems With the Notice Requirements

A. Written and Oral Notice Must be Provided and the Notices Must Adequately Inform Noncitizens of the Duty to Surrender.

As discussed in Part VI of these comments, the notice requirements in proposed 8 C.F.R. § 241.17 fail to adequately inform noncitizens of the duty to surrender and violate the requirements of due process. *C.f. Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). Under this proposed section, many individuals would be penalized even though they did not fully understand their obligations.

Given the severity of the consequences of failing to surrender, immigration judges should be required to provide notice in writing and orally in a language that the person understands. Moreover, all written notices pursuant to proposed 8 C.F.R. §§ 241.17 must include the following information:

- An explanation of the duty to surrender and the precise date on which they must surrender.

  The proposed rule does not specify that everyone subject to this rule be informed of the surrender date. Instead, the rule suggests that INS, the BIA and the immigration judges will simply recite the technical substance of this rule and leave it to the noncitizen to figure out the date that applies to him or her. A

notice that lacks a precise date for reporting to INS would be meaningless for the vast majority of unrepresented individuals who try, but fail, to comply with this confusing requirement. The notices must state clearly the precise date on which the person must report to INS.

- An explanation of what will happen when they surrender.

- A description of what they should bring with them when they surrender.

- Notification that even if they do not receive further notice about when and where to surrender, they still must report.

- The location/office to which they should surrender and a statement that unless otherwise arranged with INS, this is the only office to which they can report.

  It is particularly important to include this information in the BIA notice as well as the immigration court notice since months, or even years, may pass between the time that the person is initially informed of the duty to surrender and the time that the order becomes final.

- The hours during which the office is open.

B. <u>The Rule Should Mandate In Person Service, Especially Where the Rule Applies Retroactively</u>.

The proposed rule indicates that it applies not only to persons who are placed in proceedings in the future, but also to people currently appearing before the immigration court or the BIA and those who will be released from custody or who will receive voluntary departure.[3] For people whose cases have been pending at the BIA for many years, their addresses may have changed since the appeal was filed. The surrender period

[3]Our understanding of this rule is that it does not apply to individuals who do not fall into one of these categories. Proposed section 241.16(a) says that the surrender rules apply only to noncitizens who have received notice of the duty to surrender pursuant to section 241.17. *Proposed* 8 C.F.R. § 241.16(a). Although section 241.17 allows service "by any other manner," it describes only four situations in which notice must be provided: by the immigration judge, by the BIA, upon release from custody, and upon a grant of voluntary departure. *Proposed* 8 C.F.R. § 241.17(a), (b), (c), (d), and (e). There are no provisions relating to people who already have received final orders of removal and are not still in INS custody. Moreover, because the proposed rule does not explain what would happen if 30 days from the date of the final order had already passed on the effective date of the rule, the rule indicates that it will not apply retroactively to people with final orders of removal.

If this rule is intended to apply retroactively to people with final orders of removal prior to the effective date of this rule, then this should be clearly explained, and the rule must be amended to include additional notice procedures that comply with due process.

is likely to lapse before the notice to surrender is forwarded and received. If INS appealed an order terminating proceedings, and the BIA sustains the appeal, the respondent is likely never to know the outcome of the appeal and of the duty to surrender. This is a particularly problematic in cases where the respondent was a migrant worker or homeless and did not have an address at which to provide notice by mail.

It would be unfair to rely on a notice mailed to individuals who have appeared before the immigration court and always cooperated in their proceedings, but never received actual notice of this new duty and the consequences of failing to comply. As such, the rule should mandate in person service.

VIII. The District Director, BIA, and Immigration Judges Are Precluded From Exercising Discretion to Waive the Consequence of Failing to Surrender, Except When the Failure to Surrender is Due to Exceptional Circumstances.

The proposed rule includes only one exception to or waiver of the consequences of failing to surrender: when the individual shows that his or her failure to appear was because of exceptional circumstances. *Proposed* 8 C.F.R. §§ 3.2(c)(5), 3.23(b)(5), and 241.18(c). Neither the district director, the BIA, nor the immigration judge may waive the consequences of failing to surrender in any other situations.

The proposed rule's background information clearly articulates the position "that denying discretionary forms of relief to those aliens who disobey the law by failing to surrender is a rational exercise of the Attorney General's discretion . . . ." 67 Fed. Reg. at 31159. The proposed rule, however, is unnecessarily unbending. There will be situations where an extraordinary factual situation far outweighs the fact that the respondent failed to surrender when required. One example of this may be where changed country conditions or circumstances make it likely that if the person is removed to his or her home country, he or she would face persecution. This person should be allowed to apply for asylum. Another situation may be where a person becomes eligible for cancellation of removal under the special rules for battered spouses. *See* INA § 240(b)(2).

The proposed rule should be amended to avoid unnecessarily harsh results in extraordinary situations and preserve discretion where it may be appropriate to exercise it.

IX. The Rule Should State Explicitly that a Stay of Removal Suspends the Duty to Surrender.

The background information states, "if a stay is ordered pending a motion to reopen, the order cannot be executed and the duty to surrender is suspended." *See* 67 Fed. Reg. at 31159. This statement is not clear from the language of the proposed rule. Therefore, proposed 8 C.F.R. § 241.16 should be amended to say that a stay, either automatic or granted by the BIA or an immigration judge, suspends the duty to surrender.

X. The Proposed Rule Lacks a Reasoned Basis

A. The Proposed Rule Promotes Inefficiency and Causes Unnecessary Hardship.

Currently, when INS schedules a removal from the United States, the individual is notified of the time and place he or she must report. The proposed rule would change that procedure by requiring all nondetained individuals to surrender for removal within 30 days of the final order of removal (or on the next business day following the failure to voluntarily depart). *Proposed* 8 C.F.R. § 241.16. Presumably, INS will not be able to effectuate the removal of all individuals within 30 days of the final order (or within one day of the voluntary departure date). The rule is unclear as to what will happen if the removal is not imminent when the person surrenders.

One option is for INS to detain these individuals at significant government expense. This is a waste of limited resources – these individuals already have established that they are not dangers to the community, and by surrendering, they have demonstrated that they are not flight risks. Additionally, detention places an unnecessary hardship on individuals awaiting removal from the United States.

Alternatively, upon surrender, INS could decide not to detain them. This would mean that INS later would have to notify the person of a new surrender date or would have to require the person to return on a specified date.

Neither of these options promotes efficiency. It seems like a tremendous waste of resources to require a nondetained person to surrender until removal is imminent.

B. The Proposed Rule Will Not Fully Achieve Its Stated Goal.

This proposed rule likely will not have the intended effect of significantly increasing the percentage of individuals who report for removal. The background information indicates that this rule "would provide an incentive for compliance by denying future discretionary relief for absconding aliens who fail to comply." 67 Fed. Reg. at 31158. According to the background information, "89 percent of non-detained aliens with final orders of [removal] failed to surrender for deportation when ordered to do so." *Id.*

However, even if this rule is adopted, many individuals still will not surrender. First, many people who have been removed lack the opportunity to return to the United States. Many will be statutorily barred from readmission. *See, e.g.,* INA § 212(a)(9). Others simply have few options available for securing a visa. Overall, the chances of a quick return to the United States are minimal, and therefore, the threat of being denied discretionary relief likely will not encourage compliance with the duty to surrender.

Second, as pointed out in the background information to the regulations, presently there are incentives for individuals to surrender. 67 Fed. Reg. at 31159. The Board of Immigration Appeals (BIA) has held that individuals who fail to surrender after receiving an order requiring them to report for removal do not merit the favorable exercise of

discretion required for reopening removal proceedings. *See Matter of Barocio*, 19 I&N Dec. 255, 258 (BIA 1985). Despite *Matter of Barocio*, the overwhelming majority of nondetained individuals still fail to surrender when ordered to do so. 67 Fed. Reg. at 31158. This is particularly significant since reopening is the only way they can apply for many forms of discretionary relief.

Third, many nondetained persons with final orders already are statutorily ineligible for numerous forms of discretionary relief. For example, individuals who failed to depart after a grant of voluntary departure are not eligible, for a period of ten years, for voluntary departure, cancellation of removal, adjustment of status, change of status, and registry. INA § 240B(d). Likewise, individuals who failed to appear for a removal hearing after being provided oral notice of the consequences of failing to appear also are not eligible, for a period of ten years, for these forms of discretionary relief. INA § 240(b)(7). Given the serious consequences to which many noncitizens already are subject, it seems unlikely that this proposed rule will encourage them to surrender.

Given the inefficiency of this proposed surrender procedure, and the fact that it is unlikely that this rule will significantly increase the percentage of people who report for removal, the rationale underlying the promulgation of this rule should be re-examined.

We thank you for the opportunity to submit these comments.

Sincerely,

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On Behalf of:

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American Immigration Lawyers Association
The Center for Constitutional Rights
The Immigrant Defense Project of the New York State Defenders Association
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National Employment Law Project
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
Political Asylum/Immigration Representation Project