



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION



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*Submitted via Regulations.gov*

**Re: Public Comment in Opposition to Interim Final Rule — Appellate Procedures for the Board of Immigration Appeals Rule, Promulgated by the Executive Office for Immigration Review (EOIR), Department of Justice (DOJ), RIN 1125–AB37**

Director of the Executive Office for Immigration Review:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in opposition to the Interim Final Rule (IFR) published in the Federal Register issued by the Executive Office for Immigration Review (EOIR) on February 6, 2026, which unlawfully restructures the appellate procedures of the Board of Immigration Appeals (BIA) and took partial effect March 9, 2026.<sup>1</sup> We urge the Department of Justice to withdraw this rule immediately.

Established in 1946, AILA is a voluntary bar association of more than 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our 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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act and its implementing regulations.

This rule fundamentally restructures the immigration appeals system. It slashes the time noncitizens have to appeal a removal order, transforms the BIA from a reviewing body into a

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<sup>1</sup> *Amica Ctr. for Immigrant Rts. v. Exec. Off. for Immigr. Rev.*, No. CV 26-696 (RDM), 2026 WL 662494, at \*2, \*33–34 (D.D.C. Mar. 8, 2026).

selective gatekeeper that cuts off appellate review in almost all cases, eliminates meaningful briefing opportunities, and accelerates the deportation of thousands of people with valid legal claims. At the same time, it will overwhelm the federal courts of appeals and undermine the integrity of the U.S. judicial system.

We address four core areas of concern: (1) the procedural defects of the IFR itself; (2) the irreparable harm to noncitizens; (3) the unworkable burdens placed on immigration attorneys and legal advocates; and (4) the long-term damage to the federal judiciary.

## **I. The IFR Is Procedurally Defective and Must Be Withdrawn**

The Administrative Procedure Act requires agencies to publish proposed rules, accept public comment for a minimum of 30 to 60 days, and meaningfully consider those comments before finalizing any rule.<sup>2</sup> The use of an Interim Final Rule (IFR), which takes effect before the public has had a genuine opportunity to participate, is a narrow exception reserved for true rules of agency “procedure,” genuine emergencies, and foreign affairs matters where prior notice is impracticable.

This rule does not meet that standard. The restructuring of the BIA's appellate procedures is a matter of domestic administrative law, not foreign affairs. The briefing schedule changes are not exempt from notice-and-comment requirements under the procedural exception because they impose a direct and material burden on parties' ability to vindicate their legal rights, not merely alter the form of how they do so. A compressed briefing deadline reduces the arguments noncitizens can raise and how well they can develop them, with downstream consequences for waiver and forfeiture in federal court review. The agency's efficiency rationale does not save the rule since it will have a substantial impact on parties' rights and thus requires notice and comment regardless of the agency's internal justification.

The invocation of the IFR mechanism here is not merely a procedural shortcut; it is a signal that the agency is unwilling to subject its own rationale to public scrutiny. Rules that cannot survive the notice-and-comment process should not be imposed by administrative decree.

## **II. The Rule Will Cause Irreparable Harm to Noncitizens**

### **A. The 10-Day Appeal Deadline Is Constitutionally Insufficient**

The rule reduces the deadline to file an appeal with the BIA from 30 days to just 10 calendar days in violation of due process principles and the Immigration and Nationality Act.<sup>3</sup> For detained noncitizens, who have limited or no access to phones, the internet, or legal counsel, this timeline is functionally impossible. A noncitizen who does not speak English, who has just learned of an adverse immigration judge decision, and who is being held in a detention facility cannot realistically retain an attorney, review the record, and file a legally sufficient notice of appeal in 10 days.

Although the IFR assumes respondents have already had time to obtain counsel, it fails to account for why new representation may be needed at the BIA stage: for example, prior counsel may not

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<sup>2</sup> 5 U.S.C. § 553.

<sup>3</sup> 8 CFR § 1003.38.

handle appeals, family resources may be exhausted, or a detained respondent may have been transferred far from their original attorney.

Moreover, a *pro se* respondent who succeeded before the immigration court may still be unable to navigate the appellate process without assistance. For example, an individual who was granted withholding of removal but received a negative asylum determination may still wish to appeal the adverse ruling to seek the fuller protection that asylum status provides, including the right to apply for lawful permanent residence and to petition for family members. Such a respondent, having navigated the immigration court hearing without counsel, may lack the legal knowledge necessary to identify appealable issues, draft a coherent notice of appeal, and meet the IFR's compressed 10-day deadline, all while potentially detained or isolated from support networks. The fact that a respondent achieved partial success below does not mean they are equipped to pursue appellate relief, particularly where the distinction between forms of protection and their long-term immigration consequences requires legal sophistication that most *pro se* individuals do not possess.

### **B. The Summary Dismissals of Nearly All Cases Will Undermine Due Process and Increase Error**

Under the new rule, the BIA will summarily dismiss all appeals unless a majority of the BIA votes within 10 days to allow consideration. In addition, the BIA will make summary dismissal decisions before a full record of proceedings, or even a transcript of the immigration judge's oral decision, has been produced. When the BIA declines to hear a case, the immigration judge's decision becomes the final agency order, and ICE can immediately deport the impacted person. People with valid legal claims will be wrongfully removed to countries in which they will face persecution and worse before those claims can be heard.

The IFR significantly narrows the BIA's traditional role as an appellate body by rendering summary dismissal the default in most cases while sharply limiting the circumstances in which appeals receive full, reasoned review.<sup>4</sup> Federal courts of appeals have repeatedly held that the BIA must meaningfully review the record before it, and that failure to do so constitutes reversible error.<sup>5</sup> Courts have vacated BIA decisions where the BIA failed to consider meaningful evidence, neglected to address central arguments, or affirmed without sufficient reasoned explanation to permit judicial review.<sup>6</sup> A framework that reduces the availability of reasoned review will increase

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<sup>4</sup> See Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. 5267, 5270-73 (Feb. 6, 2026) (interim final rule) (expanding use of summary dismissal and establishing "streamlined" disposition as the default for most appeals).

<sup>5</sup> See, e.g., *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974 (4th Cir. 2019) ("it is an abuse of discretion for the BIA or IJ to arbitrarily ignore relevant evidence"); *Kazemzadeh v. U.S. Atty. Gen.*, 577 F.3d 1341, 1355 (11th Cir. 2009) ("remand is necessary when the record suggests that the Board failed to consider important evidence in that record"); *Hernandez v. Garland*, 28 F.4th 917, 921 (8th Cir. 2022) ("the BIA must consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted" and "the BIA must resist the temptation to summarily dismiss (or worse yet ignore) an alien's claims and arguments as though they are nothing more than routine.").

<sup>6</sup> *Id.*

the likelihood that errors remain uncorrected in individual cases while institutionalizing the very deficiencies that courts have found unlawful.<sup>7</sup>

The proposed rule will violate due process and 8 U.S.C. § 1229a(b)(4)(C) which requires EOIR to maintain a complete record of proceedings. How can an appellate body fairly evaluate a claim when the record is incomplete? How can a noncitizen's attorney identify and articulate the legal errors when the basis for those errors has not yet been transcribed? The answer, of course, is that they cannot. As a result, the rule will not promote fairness but will instead accelerate removals at the expense of due process in immigration proceedings.

### **C. BIA Review Is Necessary to Protect Noncitizens**

For people fleeing persecution or political repression, immigration appellate review is a vital lifeline. An immigration judge can and does make mistakes. Errors of law and denials of due process and statutory rights routinely occur in removal proceedings before immigration judges. The BIA exists precisely to catch those mistakes before they result in the irreversible harm of deportation to a dangerous country.

That reality is compounded by the extraordinary institutional pressures now placed on immigration judges that make those mistakes inevitable. These pressures include chronic understaffing and insufficient support resources; frequent and disruptive docket reshuffling and shifting case-priority directives, and employment-related pressures that can incentivize speed over due process<sup>8</sup>.

This rule virtually eliminates the appeal safeguards for vulnerable populations seeking humanitarian protection. By transforming the BIA into a body that selectively chooses which cases to hear by requiring the summary dismissal of appeals unless the Board votes within 10 days to allow merits consideration (and before the record is complete), this IFR ensures that many meritorious claims will never receive full appellate consideration. By eliminating the BIA's appellate function, the IFR contravenes the statutory requirements of 8 U.S.C. §§ 1101(a)(47) and 1229a(b)(4)(B).<sup>9</sup> The consequences are not procedural inconveniences. Deportations can and do result in permanent family separations and people being removed to foreseeable harm.

Additionally, federal review will only be available in *some* cases. Federal courts are statutorily prohibited from reviewing denials of most forms of discretionary relief (including cancellation of removal) with the exception of asylum cases, for which federal appellate jurisdiction is separately mandated. When the BIA summarily dismisses an appeal involving a discretionary determination,

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<sup>7</sup> Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. at 5270.

<sup>8</sup> See <https://www.aila.org/library/policy-brief-america-needs-independent-fair-and-efficient-immigration-courts>.

<sup>9</sup> 8 U.S.C. § 1101(a)(47) defines a "order of deportation" and "order of exclusion," the finality of which depends on meaningful appellate review, while 8 U.S.C. § 1229a(b)(4)(B) expressly guarantees respondents the right to appeal and to have a reasonable opportunity to examine evidence and present a defense. By curtailing the BIA's appellate function, the IFR undermines the statutory framework Congress established to ensure that removal orders are subject to meaningful review before becoming final.

there is no federal court to which a noncitizen can turn. In those cases, the BIA's summary dismissal is the end of the road.

### **III. The Rule Imposes Unworkable Burdens on Immigration Attorneys and Advocates**

#### **A. Legal Service Providers Cannot Operate Under These Constraints**

The combination of a 10-day appeal deadline, simultaneous briefing, and a prohibition on extensions except in cases of extreme hardship makes it extremely difficult for legal service providers to deliver constitutionally adequate representation. By imposing these unnecessary restrictions, the IFR violates the Immigration and Nationality Act's guarantee of the right to counsel and meaningful representation.<sup>10</sup> The likely result is that more people who might otherwise receive legal representation will instead proceed *pro se*, with limited understanding of the truncated deadlines, briefing requirements, or the consequences of missing these deadlines.

#### **B. Simultaneous Briefing and the Elimination of Reply Briefs Undermine the Adversarial Process**

The rule requires parties to submit simultaneous briefs and all but eliminates reply briefs except in extraordinary circumstances. This dismantles one of the core features of adversarial legal practice. A party cannot meaningfully respond to arguments it has not yet seen. The requirement of simultaneous briefing is not a neutral procedural reform since reply briefs allow parties to identify and correct mischaracterizations of law and fact, respond to new arguments raised in the opposing brief, and sharpen the issues before the tribunal. Eliminating them will reduce the court's ability to evaluate the dispositive issues in the case and will result in more errors.

### **IV. The Rule Will Damage the Federal Judiciary and Fail on Its Own Terms**

#### **A. The Rule Transfers, Rather Than Resolves, the BIA Backlog**

EOIR has justified this rule as a response to the mounting backlog at the BIA, which currently holds nearly 220,000 pending cases.<sup>11</sup> But the rule would not resolve the backlog given that it does not apply to appeals already pending at the BIA. This rule's unlawful requirement that the BIA summarily dismiss all appeals unless the full Board votes within 10 days to allow consideration on the merits punts the BIA's backlog to federal courts of appeal. When the BIA summarily dismisses cases without full merits review, noncitizens will file petitions for review in the federal courts of appeals. The result will be a flood of petitions for review in circuit courts that are already under significant caseload strain. Emergency stay requests, habeas petitions, and remands back to the BIA will multiply. The net effect on the judicial system is not efficiency but rather a shifting of the bottleneck to a higher level of the federal judiciary, at greater cost to taxpayers and to the parties.<sup>12</sup>

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<sup>10</sup> 8 CFR § 1362.

<sup>11</sup> See <https://www.justice.gov/eoir/media/1344791/dl?inline>.

<sup>12</sup> See, e.g., Comment from Former Appellate Immigration Judges in Opposition to RIN 1125-AB37/EOIR Docket No. EOIR-26-AB37 (Feb. 25, 2026) at 8-9. ("The IFR engages in revisionist history by ignoring the process by

## **B. The BIA's Abdication of Its Reviewing Role Erodes National Uniformity in Immigration Law**

The BIA serves a critical function beyond resolving individual cases: it develops a nationally consistent body of immigration law. When the BIA declines to hear cases on the merits, it also declines to develop, clarify, and harmonize immigration law. Forcing noncitizens to turn to circuit courts to seek meaningful judicial review raises the likelihood of acute inter-circuit conflict. The result will be greater divergence in how immigration law is applied across the country, as different circuit courts of appeals reach inconsistent conclusions on questions the BIA would previously have resolved. On the other hand, preserving BIA review in the first instance lowers the chances of fragmented circuit court opinions and helps maintain consistency in immigration law across the country.

This is not a hypothetical concern. It is the predictable consequence of transforming a specialized administrative appellate body into a gatekeeper that routes most appeals away from full review.

## **C. Genuine Reform Requires Investment, Not Exclusion**

If the goal is to reduce the BIA backlog, there are better ways to do it. The BIA's membership was dramatically reduced in recent years; restoring its full complement of judges would increase capacity without sacrificing due process. Targeted case management reforms, improved transcription and record production timelines, and investment in legal aid organizations to reduce the number of unrepresented respondents would all address root causes of delay without stripping noncitizens of their appellate rights.

Speed and fairness are not mutually exclusive. But this rule pursues speed by eliminating fairness, rather than by investing in the institutional capacity necessary to achieve both.

## **VI. Conclusion**

The BIA Interim Final Rule represents one of the most sweeping and harmful changes to the U.S. immigration appellate system in decades. It was issued without meaningful public participation, takes effect before the public can be heard, and will cause irreversible harm to noncitizens, immigration attorneys, and the federal judiciary alike. This rule dismantles that process in the name of efficiency.

We call on the Department of Justice and EOIR to:

- Withdraw the IFR immediately and pause its effective date;
- Reissue any proposed changes as a Notice of Proposed Rulemaking with a full 60-day public comment period;

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which Immigration Judges issue oral decisions immediately after an immigration hearing and the backlash that occurred from federal circuit courts from approximately 2002 to 2007, when the Board issued over 50 percent of its decisions as affirmances without opinion (“AWOs”) . . . While the Board was able to reduce its backlog at that time of over 50,000 cases, this resulted in a rapid increase of appeals from the Board to the federal circuit courts because of the speed with which the Board issued AWOs as it reduced its backlog.”)

- Engage in genuine consultation with immigration attorneys, legal service providers, affected communities, and federal judges before implementing any changes to BIA appellate procedure; and
- Pursue backlog reduction through investment in adjudicative capacity, not the elimination of appellate rights.

We thank EOIR for the opportunity to comment and urge the agency to act in accordance with its legal obligations and this nation's commitment to due process.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL