AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

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OLP Regulatory Docket Clerk
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4250
Washington, DC 20530

Submitted via www.regulations.gov

Re: Reducing Regulatory Burden; Retrospective Review under E.O. 13563, 76 Fed. Reg. 11163 (Mar. 1, 2011)
OLP Docket No. 150

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the request for information on the Department of Justice's (DOJ) implementation of Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. 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. We appreciate the opportunity to comment on the implementation of Executive Order 13563 as it pertains to the regulations of the Executive Office for Immigration Review [8 CFR Chapter V, Subchapters A, B, and C], and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The Abbreviated Comment Period Is Inadequate for the Submission of Meaningful Remarks

Although we applaud DOJ for reaching out to the public to solicit information and comments on the retrospective review of existing regulations, we point out that a 30-day comment period is grossly

inadequate for the provision of thoughtful and considered remarks. The President's Executive Order was issued on January 18, 2011, directing agencies to develop and submit to the OMB's Office of Information and Regulatory Affairs (OIRA), a preliminary plan for periodic review of existing regulations within 120 days (May 18, 2011). The Executive Order was followed by a February 2, 2011 memorandum from OIRA providing additional guidance to agencies, and requesting draft plans within 100 days (May 13, 2011). While the time period for plan submission seems disproportionate to the monumental undertaking assigned to the agencies, DOJ neglected to publish notice of its request for public comment until March 1, 2011, and as a result, has provided a mere 30 days for comment.

Though DOJ points out that it "is not a major regulatory agency," we note that in commencing this regulatory review, the Department is embarking upon a significant and important project, the results of which have the potential for far-reaching impact on the lives of individuals seeking relief from removal from the United States, and their families. Given the abbreviated comment period, it is virtually impossible to provide extensive, meaningful remarks at this time. We note, however, and appreciate that the Department will provide additional opportunities for public comment on regulations that are ultimately identified for review, and look forward to participating in that process.

How Can the Department Best Promote Meaningful Periodic Reviews of Its Existing Rules and How Can It Best Identify Those Rules That Might Be Modified, Streamlined, Expanded, or Repealed?

The Regulatory Flexibility Act requires agencies to conduct a decennial review of existing regulations. 5 USC §610. As it has done here, the Department should solicit input from the public when conducting its periodic reviews. However, in order for DOJ to receive meaningful and thoughtful comments, an adequate comment period—a minimum of 90 days—must be provided. In order to reduce the burden on both the agency and the public, the Department should also consider staggering its periodic reviews and requests for public input according to the various Titles of the Code of Federal Regulations (CFR) (e.g., Title 2, Title 5, Title 8, etc.). Moreover, proposed regulations that result from the reviews should be published in the Federal Register with a full 120-day comment period to achieve the highest level of public participation.

Factors to Consider in Selecting and Prioritizing Rules and Reporting Requirements for Review

The Department should conduct its regulatory review in a methodical manner with a focus on substance. Factors to consider in selecting and prioritizing rules should include (1) the impact/benefit to the public; (2) significant economic considerations; (3) historical context; (4) nexus to the underlying statute/congressional intent; and (5) national interest considerations. In addition, DOJ should consider conducting its review by individual CFR Title, as opposed to reviewing all DOJ regulations at one time.

Regulations that Should Be Modified, Streamlined, Expanded or Repealed

Though DOJ regulations appear in a number of Titles under the CFR, our focus is on the regulations pertaining to the Executive Office for Immigration Review, found at 8 CFR Chapter V, Subchapters A, B, and C. The list of regulations that we have identified herein, for review, modification, expansion or repeal, is not exhaustive, and we look forward to future opportunities to provide additional comments and suggestions regarding the existing regulations.

- **8 CFR §1003.1(e): BIA Streamlining.** In 2002, BIA adjudication procedures were drastically revised to curtail the use of three-member BIA review panels and encourage the issuance of single-member decisions called "affirmances without opinion" (AWO). The surge in AWOs led to a spike in petitions for review. Efforts to modify the system to provide better training and an increase in three-member panels have not been fully implemented. The streamlining provisions should be included in DOJ's review and repealed.

- **8 CFR §1003.2(d) and §1003.23(b)(1): Post-Departure Motions to Reopen/Reconsider.** The regulations prohibit motions to reopen or reconsider "by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings, subsequent to his or her departure from the United States." The regulations prohibiting post-departure motions conflicts with INA §240(c)(7)(A), which includes a number of limitations on who may file a motion to reopen, but does not except noncitizens who have departed the U.S. These regulations should be included in DOJ's review and repealed.

- **8 CFR §1003.2(f), 1003.6, 1003.23(b)(1)(v): Stays of Removal.** The regulations currently provide that a stay of removal takes effect upon the *granting* of a motion to stay. These provisions should be amended to allow a stay to take effect upon the *filing* of a motion to stay.

- **8 CFR §1003.6, §1003.19(i)(2): Ability of DHS to Stay an Immigration Judge's Order of Release.** These provisions allow DHS to invoke an automatic stay of the order of an immigration judge authorizing release, on bond or otherwise, in certain circumstances. Though 8 CFR §1003.6, implemented in 2006, purports to place some limitations on DHS's power, the rule should be reviewed in its entirety and repealed.

- **8 CFR §1003.19(c): Review of Custody/Bond Determination.** This regulation gives the authority for bond redeterminations to (1) the immigration court having jurisdiction over the place of detention (if the respondent is detained); or (2) the immigration court having administrative control over the case. However, the regulation does not clearly explain whether an immigration judge who originally had jurisdiction over the place of detention, continues to have the authority to redetermine

the bond of a respondent who is transferred to a different detention jurisdiction before a bond hearing, but after the bond application is filed with the court.

- **8 CFR §1003.25(c): Telephonic or Video Hearings.** Merits hearings conducted by video conference may violate the respondent's due process rights because it could have a negative impact on the judge's ability to evaluate the respondent's demeanor and credibility, and restrict the respondent's access to counsel. This regulation should be reviewed and amended to restrict the circumstances in which a merits hearing may be held by video conference.

- **8 CFR §1208.2(c)(3)(ii): Notice of Hearing Procedures and In Absentia Decisions.** The first sentence in this subsection should be amended to add the word "written" before "notice," to ensure that written notice of the date, time and place of an asylum and/or removal hearing is provided, before an application can be denied and/or an *in absentia* order issued.

- **8 CFR §1208.4(a)(4) and (5): "Changed" and "Extraordinary" Circumstances.** Each subsection should contain a sentence emphasizing that the examples of "changed" and "extraordinary" circumstances listed are intended to be illustrative, not exhaustive. Though the regulations currently state that the exceptions to the filing deadline "include but are not limited to" the list provided, in practice, asylum officers, immigration judges and the BIA rarely, if ever, entertain an exception that is not listed. Clarifying language would ensure that the rule is entertained in a manner consistent with the statutory history of the one-year filing deadline: to minimize fraudulent and baseless claims, rather than to prohibit *bona fide* asylum claims from consideration.

- **8 CFR §1208.4(b)(3): Filing Location—Immigration Court.** This regulation should be amended to permit direct filing of an application for asylum with the clerk of the immigration court or the immigration judge during a master calendar hearing. The EOIR Practice Manual forbids the filing of asylum applications with the clerk, but there is no authority in the statute or the regulations for such refusal. Forcing asylum applicants to wait for the next available hearing date, which may be months, or even a year or more away, to file an asylum application, often causes applicants to miss the one-year filing deadline. Requiring an asylum applicant to file a motion to advance a hearing date in order to timely file the application is burdensome, pointless, and stretches the already-overburdened calendars of the immigration courts.

- **8 CFR §1208.7: Employment Authorization.** Arguably the biggest procedural hurdle faced by asylum applicants is the ability to obtain an employment authorization document (EAD). An asylum application must be pending for 150 days before an applicant can apply for an EAD. Currently, EOIR maintains a "clock" which tracks the number of days an asylum application has been pending for EAD purposes. When an asylum applicant who is in removal proceedings files an I-765, application for employment authorization, USCIS relies on the data supplied by EOIR

to determine the number of days the application has been pending. However, EOIR is also under a statutory obligation to complete asylum cases within 180 days, and maintains a second internal "case completion goals" clock on asylum cases. The restrictive reading of the EAD eligibility provisions, coupled with the multiple obligations and clocks, are the cause of extensive problems. Eligible asylum seekers are routinely denied EADs for having not accumulated the requisite time. This section of the regulations should be amended to allow the asylum applicant to provide proof to USCIS of the number of days the application has been pending, so that EOIR is removed completely from the EAD eligibility issue. In addition, the following changes should be made:

- **8 CFR §1208.7(a)(1):** This regulation should be amended to clarify that asylum applicants who have filed outside the one-year deadline, but who claim an exception to that deadline, are eligible for employment authorization. Judges and court administrators often take the position that they are not eligible for an EAD because they are not eligible for asylum. This conflicts with 8 CFR §1208.4(a), which requires a hearing before an asylum application can be denied as untimely.

  This subsection should also be amended to clarify that the EAD clock should resume running once an asylum case has been remanded to the IJ by the BIA, after an appeal of an asylum denial has been sustained.

- **8 CFR §1208.7(a)(2):** This subsection excludes any delay requested or caused by the applicant from the 150-day EAD eligibility period. If an attorney is not available for the first hearing date selected by the IJ, the IJ will stop the EAD clock completely, on the theory that the alien is creating a delay. Denying EAD eligibility to an asylum applicant because his or her attorney has another hearing scheduled or is otherwise unavailable, is inconsistent with the anti-fraud rationale behind the 150-day waiting period. The regulation should be amended to exclude attorney scheduling conflicts from the delay provision. The regulation should also be amended to reflect that while the alien *cannot* count the days between the date the hearing would have proceeded "but for" the requested delay, and the date for which the hearing has been scheduled, he or she *can* count the days between the date of the master hearing and the date on which the case would have proceeded "but for" the delay. This would ensure that the alien is only penalized for the delay actually caused by him or her.

- **8 CFR §1208.7(a)(4):** This subsection mandates denial of an EAD for an applicant who has failed to appear for a scheduled asylum interview before an asylum officer or an immigration judge. Immigration judges take the position that an asylum applicant who fails to attend an asylum interview, or fails to pick up the referral notice from the asylum office on the scheduled date, regardless of the reason, is *permanently* ineligible for an EAD. This subsection should be amended to clarify that this restriction on EAD eligibility shall be lifted once the applicant appears for a subsequently scheduled interview or hearing.

- **8 CFR §1240.4, §1240.10(c): Regulations Regarding Mentally Incompetent Aliens.** The regulations that address notice to, and representation and appearance of mentally incompetent aliens in removal proceedings should be carefully reviewed and expanded to provide adequate protections to this extremely vulnerable population.

- **8 CFR §1240.26(b)(3)(iii), §1240.26(e)(1): Termination of Voluntary Departure Upon the Filing of a Motion to Reopen/Reconsider.** The regulations provide for the automatic termination of voluntary departure upon the filing of a motion to reopen or reconsider. Such individuals are subject to the harsh penalties for overstaying the voluntary departure period, and therefore may be ineligible for the very relief they are seeking in their motion. *See* INA §240B(d). These regulations should be included in the DOJ review and repealed.

- **8 CFR §1240.62 (and §240.62): Jurisdiction over NACARA Applications.** The regulations require certain NACARA-eligible applicants to have their cases adjudicated by an immigration judge. However, in order to get the case to the judge, the applicant must first file the application with USCIS, attend an interview, and be issued a referral. Because these individuals are statutorily eligible for NACARA benefits, it is a waste of judicial resources to require them to go through this process. The regulations should be amended to provide USCIS with jurisdiction over these cases in order to streamline the process and improve efficiency.

- **8 CFR Part 1241: Apprehension and Detention of Aliens Ordered Removed.** In 2005, 8 CFR Part 1241 was amended to eliminate the requirement that in order to remove a person to a particular country, a functioning government must exist in that country, and the country must agree to accept the person. Due to the significant human rights considerations that may be implicated in removing an individual under these circumstances, the provisions requiring a functioning government and acceptance of the alien should be restored.

Issues Requiring the Promulgation of Rules

In addition to the review of the existing regulations described above, we have identified a few areas where the promulgation of proposed rules, along with the commencement of a full notice and comment period, is required.

- **Ineffective Assistance of Counsel.** In *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (BIA 2009), the Attorney General vacated the decision in *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009), and pending the outcome of rulemaking, directed the BIA and the immigration judges to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel. The Acting Director of EOIR was directed to initiate rulemaking procedures "as soon as practicable" to evaluate the framework for evaluating ineffective assistance of counsel claims under *Matter of Lozada*, 19

I&N Dec. 637 (BIA 1988), and to determine what modifications should be proposed for public consideration.

- **Repapering.** Under §309(c)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act, the Attorney General may elect to terminate deportation proceedings, in which a final administrative decision has not been entered, and reinstate the proceedings as removal proceedings to allow non-lawful permanent residents who are ineligible for suspension of deportation because of the stop-time rule under INA §240A(d)(1), to apply for cancellation of removal under INA §240A(b). Though proposed rules were published in the Federal Register on November 30, 2000 (65 Fed. Reg. 71273), to date, interim or final regulations have not been promulgated. Such regulations which would pave the way for these cases to finally be resolved.

- **Full Discovery.** In *Dent v. Holder* (9th Cir. Nov. 9, 2010), the Ninth Circuit found that INA §240(c)(2), which provides that the alien "shall have access" to non-confidential "A" file documents, compelled the government to provide such documents to the petitioner without requiring him to file a request under the Freedom of Information Act (FOIA). We submit that proposed regulations be promulgated to permit attorneys and respondents in removal proceedings to request administrative discovery of non-confidential A file documents, in order to forego the FOIA process and avoid a lengthy wait for disclosure of documents that are essential to effective representation and a full and fair hearing.

Conclusion

We appreciate the opportunity to comment on this request for information and look forward to a continuing dialogue with the Department during the regulatory review process.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION