

# DOJ Releases Last-Minute Flurry Of Immigration Restrictions - Law360

*By Asher Stockler*

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Law360 (November 25, 2020, 5:13 PM EST) -- The [U.S. Department of Justice](#) on Wednesday proposed regulations that would restrict when immigrants can reopen their cases in court, with mere weeks to go before the Biden administration is expected to take the reins.

Among the most significant changes, the proposals would implement standards for claiming ineffective assistance of counsel that are more stringent than some appellate courts have required; delay immigration proceedings while underlying applications are pending; and codify rules for postponing hearings.

Aaron Reichlin-Melnick, policy counsel at the [American Immigration Council](#), told Law360 that the changes, if implemented, would "impose sweeping new barriers" to obtaining lawful presence in the United States.

"This is yet another attempt by the Trump administration to limit pathways for relief for immigrants and make it more difficult to overturn deportation orders," Reichlin-Melnick said. "The administration has long believed that immigration court offers too many opportunities for immigrants to stay in the United States."

The proposed rules would be finalized after a 30-day comment period that begins Nov. 27. Final rules normally take effect 30 days or more after publication, which would put its effective date after the inauguration of President-elect Joe Biden, who has vowed to liberalize immigration restrictions.

Among the most significant changes, the new rules would reinforce standards for granting motions to reopen — when an immigrant's case should be given a second look because of changed circumstances — or motions to reconsider — when an immigrant's case should be given a second look because of an error of law applied initially.

The DOJ is proposing codifying a standard similar to one articulated in *Matter of Lozada*, where the Board of Immigration Appeals laid out how an immigrant can reopen deportation proceedings because of ineffective counsel.

An immigrant would have to show both that "the counsel's conduct was ineffective" and that such conduct prejudiced the case. The board would use a reasonable probability standard to assess whether the "the outcome of the proceedings would have been different" with competent representation.

While *Lozada* may already be the prevailing framework for ineffective assistance claims, some circuit courts have not required strict adherence to its elements. The DOJ proposals would, instead, hew more closely to the *Lozada* requirements.

Another major change would block motions to reopen or reconsider that are premised on an underlying application, such as a visa, that an immigration agency has not finished adjudicating. The department's reasoning in the draft emphasized the "finite nature" of immigration judges' resources. It also noted that an immigrant could "always apply to" the [U.S. Department of Homeland Security](#) for a temporary pause of removal proceedings in such situations.

Reichlin-Melnick argued that, despite the ability to seek temporary relief from DHS, these changes could still result in concrete harms.

"Now those people would have to wait potentially years to file the motion to reopen, until the [underlying] relief was granted," he said. "But in waiting that long, they would risk having the motion denied for lack of due diligence."

In an attempt to subject a disparate body of case law to "further clarification," the department is also proposing a clearer-cut definition of "good cause" that will determine how and when immigration proceedings can be postponed.

A party to an immigration proceeding will have to show a "particular" and "justifiable" need for continuance, and continuances will be barred in a host of circumstances, including where a delay "would not materially affect" the case.

"Improper uses of continuances lead to unnecessary case delays that do not benefit a respondent with a valid claim," the department said.

One change proposed Wednesday would have the effect of opening up immigration proceedings, following the passage of a law in the 1990s that appeared to conflict with the department's restrictions on motions to reopen and reconsider.

The department is proposing doing away with much of the departure bar, which prevents an immigrant from filing to reopen their case if they have left the United States pursuant to an order of removal.

Instead, the department wants to whittle down the bar on motions to reopen and reconsider to a much narrower range of circumstances: Only an immigrant's voluntary departure from the United States, while a motion to reopen is filed and pending, would result in the automatic withdrawal of that motion, effectively closing the case.

Voluntary departure would still include circumstances where the immigrant left the country pursuant to a final order of removal but where DHS did not "enforce the order."

--Editing by Brian Baresch.

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