U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW

PETITION

of

WASHINGTON LEGAL FOUNDATION

concerning

PROPOSED AMENDMENT TO REGULATIONS GOVERNING MOTIONS TO REOPEN, TO BRING REGULATIONS INTO COMPLIANCE WITH 8 U.S.C. § 1229a(c)(7)

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June 25, 2010

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Re: Petition to Amend 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4)(i)

Dear Ms. Stutman,

The Washington Legal Foundation (WLF) hereby petitions the Executive Office of Immigration Review (EOIR) to revise existing regulations governing motions to reopen final orders of removal. The current regulations are inconsistent with a statutory provision, 8 U.S.C. § 1229a(c)(7), governing limitations on the number of motions to reopen that an alien may file. The current regulations were adopted prior to enactment of the statute in September 1996, but the Department of Justice (DOJ) never revised those regulations to bring them into compliance with the statute.

Enacted as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1229a(c)(7) governs motions to reopen removal proceedings after an alien has been ordered removed. It strictly limits an alien to filing *one* motion to reopen, subject to a single exception creating a "special rule for battered spouses, children, and parents." 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(iv). The pre-IIRIRA regulations also limited an alien to filing a single motion to reopen, but they provided a broader set of exceptions to that numerical limitation – including an exception permitting a successive motion to reopen to allow an alien to apply for asylum or withholding of deportation "based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered." 8 C.F.R. § 1003.2(c)(3)(ii). Yet despite the inconsistency between the limitation on motions to reopen imposed by Congress in 1996 and the pre-existing regulations, DOJ has never seen fit to amend the regulations to eliminate the inconsistency. There is no plausible argument that the pre-IIRIRA regulations can be deemed to constitute a reasonable interpretation of IIRIRA's mandate.

The inconsistency between the statute and the regulations was starkly illustrated by an asylum case that came before the U.S. Supreme Court earlier this year, *Kucana v. Holder*, 130 S. Ct. 827 (2010). The issue before the Court was whether the federal courts possessed jurisdiction to review a decision by the Board of Immigration Appeals (BIA) to uphold the Attorney

General's discretionary denial of an alien's motion to reopen immigration proceedings. But the parties before the Court failed to raise an issue that should have been fatal to the alien's claims: the motion to reopen denied by the BIA was the alien's *second* motion to reopen, and thus 8 U.S.C. § 1229a(c)(7)(A) barred the alien from filing the motion. The immigration judge (IJ) and the BIA nonetheless had entertained the numerically barred motion on the basis of 8 C.F.R. § 1003.2(c)(3)(ii), because the alien sought to reopen proceedings for the purpose of filing an asylum petition based on an allegation of changed conditions in his native Albania. Unless the EOIR takes steps to amend the regulations, IJs and the BIA are likely to continue to entertain successive motions to reopen that Congress has determined should be barred.

I. Interests of WLF

The Washington Legal Foundation is a public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully present in this country. WLF regularly litigates in support of efforts to enforce the nation's immigration laws, to ensure prompt deportation of aliens who enter or remain in the United States in violation of our law and thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. *See, e.g., Nken v. Holder*, 129 S. Ct. 1749 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Jama v. ICE*, 543 U.S. 520 (2005). WLF has also litigated in support of congressional efforts to streamline the immigration review process so as to prevent removable aliens from imposing unwarranted delays on the removal process. *See, e.g., Kucana v. Holder*, 130 S. Ct. 827 (2010).

WLF's members include many United States citizens and lawful residents who seek to ensure that DOJ properly carries out its role in enforcing the immigration laws by, among other things, promptly deporting removable aliens in a manner consistent with the procedures laid out by Congress. WLF's members have an interest in seeing that the DOJ's regulations concerning removal proceedings and an alien's ability to reopen such proceedings are in accordance with the United States Code as enacted by Congress under IIRIRA.

II. The Role of DOJ and the Executive Office for Immigration Review (EOIR)

The Department of Justice is charged with adjudicating immigration cases in accordance with the Nation's immigration laws. Pursuant to that authority, DOJ has issued regulations that govern the conduct of removal proceedings, including the regulations (8 C.F.R. Part 1003) that are the subject of this Petition. WLF is submitting this Petition to EOIR's Office of General Counsel because we understand that the OGC – in light of its assigned role in coordinating the development of agency regulations and the review of proposed legislation – has primary responsibility for initiating any proposed revisions to the regulations at issue. If you and/or

others within DOJ nonetheless conclude that this Petition should be handled by some other entity within DOJ, we ask that you transfer the Petition to that entity as soon as possible and inform WLF of that transfer.

III. Statutes/Regulations Governing Removal Proceedings and Motions to Reopen

In general, 8 U.S.C. § 1229a details procedures to be followed when the federal government seeks to remove an alien from the United States. The statute provides that removal proceedings are to be conducted by an immigration judge (IJ) under the auspices of EOIR, § 1229a(a) & (b), and provides for appeals to the Board of Immigration Appeals. Following entry of a final order of removal, the rights of an alien to move to reopen proceedings are governed by 8 U.S.C. § 1229a(c)(7).

Prior to adoption of IIRIRA in 1996, the immigration laws included no mention of motions to reopen. Nonetheless, DOJ regulations since at least 1959 have contemplated reopening of completed immigration proceedings. *See* 23 Fed. Reg. 9115, 9118-19 (1958), final rule codified at 8 C.F.R. § 3.2 (1959) ("The [BIA] may on its own motion reopen or reconsider any case in which it has rendered a decision" upon a "written motion."). The BIA regularly entertained motions to reopen, and imposed no limits on the timing or frequency of such motions. *See Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 2315 (2008).

In 1990, Congress adopted legislation expressing its concern that deportation proceedings were being unnecessarily prolonged by aliens who were abusing their right to file motions to reopen. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), directed the Justice Department to address its concerns:

> [T]he Attorney General shall issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations shall include a limitation on the number of motions that may be filed and a maximum time period for the filing of such motions.

Immigration Act of 1990 at § 545(d), 104 Stat. at 5066. In explaining the intent of § 545(d), the Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess., stated:

> Unless the Attorney General finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider.

H.R. Conf. Rep. No. 955 at 133.[1]

The Department of Justice responded by adopting regulations that for the first time imposed limitations on the number and timing of motions to reopen. Those regulations, which became final in April 1996, have undergone very few changes in the ensuing 14 years; the current version of the regulation imposing limitations on the number and timing of motions to reopen, 8 C.F.R. § 1003.2(c)(2) & (c)(3), is substantially similar to the version adopted in 1996. *See* 61 Fed. Reg. 18900 (Apr. 29, 1996). In particular, the 1996 regulations and the current regulations are identical in providing that: (1) a party may file only one motion to reopen; (2) that motion must be filed within 90 days of the final administrative action in the proceeding sought to be reopened; and (3) the time and numerical limitations do not apply to motions to reopen proceedings for the purpose of reapplying for asylum or withholding of deportation. *See* 8 C.F.R. § 3.2(c)(2) & (c)(3) (1996).[2]

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[1] The Supreme Court has explicitly recognized that "a principal purpose" of the Immigration Act of 1990 was "to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions." *Stone v. INS*, 514 U.S. 386, 400 (1995). The Court noted that the Act "directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file." *Id.*

[2] The current regulations governing reopening of proceedings in which the BIA has rendered a decision provide, in relevant part:

(c) Motion to Reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted . . .

(2) . . . Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen removal proceedings (whether before the [BIA] or the [IJ]) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) . . . The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

* * *

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.

Congress responded five months later by adopting IIRIRA in September 1996. That legislation for the first time codified the practice of granting motions to reopen immigration proceedings following issuance of a final order of removal. 8 U.S.C. § 1229a(c)(7). IIRIRA accepted the general rule adopted by the DOJ regulations with respect to time and numerical limitations: one motion to reopen, which must be filed within 90 days. 8 U.S.C. § 1229a(c)(7)(A) & (C)(i). However, with respect to motions to reopen for the purpose of seeking to apply for asylum or withholding of removal, IIRIRA provided that the numerical limitation on motions (*i.e.,* the no-more-than-one-motion-to-reopen rule) could not be waived.[3]

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8 C.F.R. § 1003.2(c).

If the matter sought to be reopened was last before an IJ, the regulations provide:

(b) Before the Immigration Court.

(1) In general. An Immigration Judge may upon his own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the [BIA]. Subject to the exceptions of this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. . . . A motion to reopen must be filed within 90 days of the date of entry of a final administrative order or removal . . .

* * *

(4) Exceptions to filing deadlines – (i) Asylum and withholding or removal. The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the [INA] or withholding of removal under section 241(b)(3) of the [INA] or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding.

8 C.F.R. § 1003.23(b).

[3] Section 1229a(c)(7) reads, in relevant part:

Motions to Reopen.

(A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv) [creating special rules

DOJ extensively revised its immigration regulations following the adoption of IIRIRA. But there is no indication that, in the course of the revision process, DOJ gave any thought to the apparent conflicts between its April 1996 regulations (regarding motions to reopen) and the IIRIRA provisions that addressed the same subject. *See* 62 Fed. Reg. 444 (Jan. 3, 1997) (proposing revised regulations); 62 Fed. Reg. 10312 (Mar. 6, 1997) (adopting interim regulations effective April 1, 1997). Nor is WLF aware of any subsequent DOJ document evidencing DOJ awareness of the apparent conflicts and/or a DOJ determination that the April 1996 regulations could remain because they could be reconciled with IIRIRA.

IV. Section 1229a(c)(7) Can Only Be Understood as Barring Waiver of the Numerical Limitation for Asylum Seekers

The only plausible interpretation of 8 U.S.C. § 1229a(c)(7) is that, with respect to aliens seeking asylum based on changed country conditions, Congress adopted the DOJ regulations' exception to the *time* limitation on motions to reopen, but not the exception to the *numerical* limitation on such motions.

Section 1229a(c)(7) creates a single exception from its numerical limitation, but that exception is inapplicable here. The exception waives the numerical limitation for certain "battered spouses, children, and parents." *See* 8 U.S.C. § 1229a(c)(7)(C)(iv) (setting forth a "special rule for battered spouses, children, and parents" and providing that "[a]ny limitation" set forth in § 1229a "shall not apply" to the filing of motions to reopen by such individuals); § 1229a(c)(7)(A) (providing that the numerical limitation on motions to reopen "does not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)"). A motion to reopen for the purpose of seeking asylum or withholding of removal is not one to which § 1229a(c)(7)(C)(iv) applies.

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for "battered spouses, children, and parents"].

* * *

(C) Deadline.

(i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum. There is no time limit on the filing of a motion if the basis of the motion is to apply for relief under section 208 [asylum] or 241(b)(3) [withholding of removal] and is based on changed country conditions arising in the country of nationality or country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

In contrast, the provision that directly addresses motions to reopen based on claims for asylum and withholding of removal waives the *time* limitation but not the *numerical* limitation. It states, "There is no time limit on the filing of a motion to reopen if the basis for the motion is to apply for" asylum or withholding of removal, § 1229a(c)(7)(C)(ii), but the provision makes no mention of waiver of the numerical limitation. The inclusion of an express waiver of the numerical limitation in (C)(iv) but the omission of such a waiver in (C)(ii) makes plain that Congress intended to bar second motions to reopen when based on a claim for asylum or withholding of removal. That conclusion is strengthened by the fact that Congress clearly considered asylum claims when creating its list of exceptions, yet the exceptions potentially available to asylum seekers does not include an exception from the numerical limitation. When Congress establishes a general rule and then lists specific exceptions to the rule, the proper inference "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Williams v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007); *id.* at 333 ("where Congress 'includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Clay v. United States*, 537 U.S. 522, 528 (2003)); *Kucana*, 130 S. Ct. at 838 (identical quotation).

Indeed, in a recent decision regarding the filing of motions to reopen immigration proceedings, the Supreme Court explicitly recognized that Congress, through its enactment of IIRIRA, imposed "significant" limits on the filing of motions to reopen, including limits on the number of motions an alien may file. *Dada v. Mukasey*, 128 S. Ct. 2307, 2315-16 (2006). The Court noted that both IIRIRA and regulations adopted by DOJ limited an alien facing removal to only "one motion to reopen." *Id.*

The first sentence of § 1229a(c)(7)(A), which provides for the filing of "one motion to reopen proceedings," cannot plausibly be interpreted as creating a floor instead of a ceiling on the filing of such motions. In the very next clause, the provision refers to the "one motion to reopen" language as a "limitation." If Congress had intended the provision to authorize the filing of motions to reopen without intending simultaneously to bar the filing of a second or subsequent motion, it would not have used the word "limitation." Indeed, the federal appeals courts are unanimous in interpreting § 1229a(c)(7) as imposing (subject to statutory exceptions) a one-motion limit on the filing of motions to reopen. *See, e.g., Sabhari v. Mukasey,* 522 F.2d 842, 844 (8th Cir. 2008).

Nor is there any basis for asserting that § 1229a(c)(7) is ambiguous with respect to whether it permits exceptions to be granted to asylum seekers from the one-motion rule. Whether or not a word or a phrase used in a statute is ambiguous is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (citing *Estate of*

Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); *McCarthy v. Bronson,* 500 U.S. 136, 139 (1991). Nothing regarding the context in which the § 1229a(c)(7) language appears or the broader context of the INA as a whole suggests that § 1229a(c)(7)'s language should not be read literally. A strict reading of § 1229a(c)(7)'s one-motion rule is fully consistent with IIRIRA's major objectives, which (as noted above) included imposing "significant" limits on the filing of motions to reopen. *Dada*, 128 S. Ct. at 2315-16.

V. The DOJ Regulations Must Be Amended Because They Are Not a Reasonable Interpretation of the Statute and, Indeed, There Is No Evidence That They Reflect Any Sort of Interpretation

DOJ regulations create an exception from the numerical limitation when the alien seeks to reopen proceedings for the purpose of seeking asylum or withholding of removal based on changed country conditions. 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4)(i). As explained above, that exception is flatly inconsistent with the statute, which imposes a one-motion limit on motions to reopen and creates no exception from that numerical limitation for asylum seekers. Accordingly, WLF urges the OGC to initiate regulatory changes that would amend the two regulations in question to make clear that the listed exceptions apply to the time limitation only, and not to the numerical limitation. An agency regulation is invalid when it cannot be deemed a reasonable interpretation of the statute it is designed to implement. *Williams v. Gonzales,* 499 F.3d at 330 (striking down a DOJ regulation that was inconsistent with IIRIRA).[4]

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[4] The legislative history at issue in *Williams* was strikingly similar to the legislative history leading to IIRIRA's adoption of a numerical limitation on motions to reopen. Prior to the adoption of IIRIRA, DOJ for many years had had in place a regulation providing that a motion to reopen deportation proceedings could not be filed or maintained after an alien had departed the United States. 8 C.F.R. § 3.2 (1962). In 1996 in connection with its adoption of IIRIRA, Congress repealed a previous *statutory* bar to judicial review of deportation orders in cases in which the alien had departed the country – presumably because Congress wanted to reduce the incentive for federal judges to grant stays-of-removal-pending-appeal as a means of ensuring that their cases would not be rendered moot by a mid-case removal. *Williams*, 499 F.3d at 330. Despite that repeal, DOJ left in place its regulation barring departed aliens from initiating or maintaining motions to reopen. 8 C.F.R. § 1003.2(d). The Fourth Circuit struck down the provision as inconsistent with IIRIRA, reasoning:

> § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country. This is so because, in providing that "an *alien* may file," the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words, "an alien."

Where a federal regulation's interpretation of a federal statute is called into question, any consideration of its validity must begin with consideration of whether "Congress has directly spoken to the precise question" at issue. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984). If so, then the inquiry is complete, and the unambiguous intent of Congress must be given effect; under those circumstances, no deference is due the federal agency's interpretation of the statute. *Id.* The preceding analysis of § 1229a(c)(7) demonstrates unequivocally that Congress intended thereby to limit aliens to no more than one motion to reopen removal proceedings, and that no exceptions to that limitation were to be afforded aliens seeking to file a new asylum claim.[5] Particularly given that motions to reopen are "especially" disfavored in the context of immigration proceedings because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS v. Doherty*, 502 U.S. 314, 323 (1992), there is no reason to defer to a DOJ regulatory interpretation of federal law that permits an exception to the one-motion rule that is inconsistent with both the statutory language and IIRIRA's legislative history.

Id. at 332. Just as *Williams* faulted DOJ for failing to revise 8 C.F.R. § 1003.2(d) in the face of a contradictory provision in IIRIRA, so too can it be faulted for failing to revise 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4)(i) in the face of the contradictory provisions of 8 U.S.C. § 1229a(c)(7).

[5] The history leading up to inclusion of § 1229a(c)(7) in IIRIRA serves only to strengthen the clearly expressed anti-exception policy. As noted in Section III above, in adopting the Immigration Act of 1990, Congress expressed its concern that decisive steps were needed to streamline deportation proceedings because, Congress found, they were being unnecessarily prolonged by aliens who were abusing their right to file motions to reopen. The Act directed the Attorney General (unless (s)he found "reasonable evidence to the contrary") to adopt regulations that "limited [aliens] to one motion to reopen" and made no mention of creating any exceptions to that limitation. H.R. Conf. Rep. No. 955 at 133. In response to that mandate, the Attorney General adopted final regulations in April 1996 that imposed a one-motion limitation on motions to reopen but created an exception for aliens seeking asylum or withholding of removal based on changed country conditions. 61 Fed. Reg. 18900. Congress in turn responded five months later by including in IIRIRA a provision that endorsed the Attorney General's one-motion limitation but pointedly omitted changed-country-conditions asylum seekers from its list of aliens entitled to an exception from the one-motion rule. 8 U.S.C. § 1229a(c)(7). In light of that history, IIRIRA's failure to include changed-country-conditions asylum seekers on the exception list could not have been an oversight. When Congress carefully examined the issue and then wrote a statute that was wholly inconsistent with regulations issued just five months previously while remaining 100% faithful to its 1990 statute, one can only conclude that Congress intended § 1229a(c)(7) as a rejection of the Attorney General's exceptions policy.

Deference is also inappropriate for a more fundamental reason: DOJ did not adopt the regulations at issue as part of a good-faith effort to interpret § 1229a(c)(7)'s mandate. *Chevron* deference is appropriate when a federal agency adopts a reasonable interpretation of a federal statute that it has been charged by Congress with implementing. But the regulations at issue – 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) – were adopted in April 1996 (five months before adoption of § 1229a(c)(7) as part of IIRIRA), so they could not possibly represent a DOJ effort to interpret § 1229a(c)(7). Nor is there any indication in the subsequent regulatory history that DOJ has re-examined the regulations at issue in light of § 1229a(c)(7) and determined that the regulations constitute a reasonable interpretation of the statute. Indeed, as noted above in Part III, DOJ undertook detailed regulatory proceedings in 1997 for the purpose of implementing IIRIRA, but there is no indication in those proceedings that DOJ was even aware of the inconsistency between the regulations at issue and § 1229a(c)(7). *See* 62 Fed. Reg. 444 (Jan. 3, 1997) (proposing revised regulations); 62 Fed. Reg. 10312 (Mar. 6, 1997) (adopting interim regulations effective April 1, 1997). Nor is WLF aware of any subsequent DOJ document evidencing DOJ awareness of the conflicts and/or a DOJ determination that the April 1996 regulations could remain because they could be reconciled with IIRIRA. Quite obviously, there is no reason to even consider deferring to 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) as *reasonable* interpretations of § 1229a(c)(7) when they were not *any* sort of interpretation of the statute.

In sum, 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) are invalid regulations because they directly contradict federal statutory law. WLF urges DOJ to initiate proceedings to repeal the regulations at the earliest available opportunity.

VI. Elimination of the Unauthorized Exceptions to the One-Motion Rule Represents Sound Immigration Policy

DOJ should not be reluctant to repeal 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) based on a fear that doing so would somehow undermine U.S. asylum policy. It is, of course, the well-considered policy of this country not to remove aliens to countries where they are likely to face persecution. But repealing the regulations at issue would not create any significant danger that removable aliens would be sent to countries where they would be persecuted. Rather, its principal effect would be to reduce the ability of aliens to "game the system," *Wang v. BIA,* 437 F.3d 270, 274 (2d Cir. 2006), by filing multiple motions to reopen for the purpose of delaying removal indefinitely.

WLF notes initially that, if removal proceedings were operating in the streamlined manner dictated by Congress, there would be no realistic possibility that a removable alien would remain in this country long enough to be in a position to file a second motion to reopen a final order of removal. Once an order of removal has been issued, in the normal course of events the alien will have left the country within a matter of months. While some aliens may desire to

remain in this country while they seek judicial review of the removal order, both Congress and the Supreme Court have made clear that stays of removal pending appeal will be granted only in exceptional cases. *See, e.g., Nken v. Holder*, 129 S. Ct. 1749 (2009).[6] Thus, while the alien is likely to be in the country long enough to file an initial motion to reopen in the days immediately following issuance of a removal order, it is highly unlikely that he will be in the country throughout the pendency of that motion and its denial, and for a sufficient period thereafter to file a second motion.

More importantly, assuming that ICE ensures that aliens are not permitted to linger in this country following issuance of a final order of removal, it is difficult to imagine a situation ever arising in which an asylum candidate whose first and second applications were denied (in connection with his initial removal proceeding and his first motion to reopen) would immediately thereafter discover that he is likely to face persecution if removed. It is, perhaps, a theoretical possibility that country conditions might change dramatically during that brief interval. But such sudden upheaval is sufficiently unlikely that there is no policy justification for adopting a rule allowing a second motion to reopen based on a changed-country-conditions claim. If a sudden upheaval occurs, it is almost certain to come to the attention of immigration authorities, and under those circumstances they remain free to exercise their authority to reopen proceedings *sua sponte. See, e.g., Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (*en banc*). The existence of that authority provides a safety valve applicable to the truly exceptional cases in which reopening is warranted, while at the same time ensuring that if the BIA chooses not to exercise that authority the alien will have no right to appeal that decision to the federal courts. *Id.*

On the flip side, the current, statutorily-unauthorized regulation encourages the filing of insubstantial claims designed for the sole purpose of delaying removal. *Kucana* well illustrates that danger. The alien in that case was a citizen of Albania who entered the country in 1995 on a 90-day non-immigrant business visitor visa. He failed to leave the country as required in October 1995. His asylum application was denied, and he was ordered removed in 1997. His first motion to reopen was denied in 1998. He nonetheless remained in the U.S. When ICE agents tracked him down, he filed a second motion to reopen in 2002. He invoked 8 C.F.R. § 1003.2(c)(3)(ii) in support of his claim that he was exempt from the numerical limitation on motions to reopen, asserting that he should be permitted once again to seek asylum based on material changes in the Albanian political situation since his initial asylum application. Although the changed-

[6] While in the past, some federal appeals courts routinely granted stays pending appeal of removal orders despite IIRIRA's disapproval of the practice, that practice should be coming to an end in light of *Nken*'s clear indication that stays are inappropriate in most cases.

conditions claim was frivolous on its face,[7] Mr. Kucana was able to parlay the claim into an additional eight-year delay (and still counting) of his removal – procedural issues involving the frivolous changed-conditions claim were litigated all the way to the Supreme Court in *Kucana v. Holder,* 130 S. Ct. 827 (2010). The existence of § 1003.2(c)(3)(ii) provides removable aliens with an opening to file additional motions to reopen, an opening that many will use (without regard to the underlying facts) in an effort to delay removal. Sound public policy dictates elimination of this delay-inducing loophole.[8]

In sum, quite apart from the fact that 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) are inconsistent with IIRIRA, they should be repealed because they do not represent sound public policy.

VII. The Arguments Raised by the Solicitor General in Support of the Regulations Are Without Merit.

WLF raised the issue of the invalidity of 8 C.F.R. §§ 1003.2(c)(3)(ii) in the Supreme Court, in an *amicus curiae* brief it filed in the *Kucana* case. In her reply brief filed on behalf of the Attorney General, the Solicitor General defended the validity of the regulation. *See* Reply Brief for the Respondent Supporting Petitioner, *Kucana v. Holder*, No. 08-911 (November 2009) at 23 n.18.[9] The arguments raised by the Solicitor General in support of the regulation are

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[7] No one other than Mr. Kucana seriously argued that his changed-conditions claim was anything but frivolous. His assertion that changed conditions in Albania increased the likelihood that he would face persecution if removed was based on his past association with one of the major political parties in Albania. As the IJ and the BIA held, that claim was absurd because a member of Mr. Kucana's party was elected Prime Minister in the most recent national election in Albania.

[8] Some within the Department of Justice have contended that the filing of serial motions to reopen and for reconsideration has not been a cause of delay in removing aliens. But it is Congress that establishes the procedures by which removal cases are to be adjudicated, and Congress quite clearly *did* believe that serial motions were a significant source of delay. Indeed, a desire to eliminate such delays provided a principal impetus for passage of both IIRIRA and the Immigration Act of 1990.

[9] The Solicitor General also argued that the regulation's validity was not properly before the Court, noting that the United States (which before the Supreme Court declined to defend its victory in the Seventh Circuit) had not raised the issue in the appeals court. The Solicitor General was correct: the United States had not raised the issue below, and Mr. Kucana (not surprisingly) did not raise the issue in his certiorari petition. Most likely because

without merit.

The Solicitor General asserted, "[T]he Attorney General has long interpreted [8 U.S.C. § 1229a(c)(7)(A)] to permit a second motion to reopen to seek asylum or withholding of removal based on changed conditions in the country of removal." *Id.* That assertion is incorrect. As noted above, the regulation was promulgated five months before the statute was adopted as part of IIRIRA, so it could not possibly have been adopted as the product of a DOJ effort to interpret the statute. Moreover, there is no evidence that the Attorney General ever subsequently undertook a formal analysis § 1229a(c)(7) and stopped to ponder whether the pre-existing regulation properly reflected congressional intent. WLF urges DOJ to undertake such an analysis without further delay.

In support of her argument that § 1003.2(c)(3)(ii) "reasonably interprets the statutory text," the Solicitor General stated further, "The statutory assurance that an alien 'may file one motion to reopen' does not foreclose the Attorney General from interpreting Section 1229a to permit a further motion in certain special circumstances." The Solicitor General could make that statement only by ignoring the remainder of the sentence from which she quoted. The entire sentence reads, "An alien may file one motion to reopen proceedings under this section, except that *this limitation* shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv) [relating to "battered spouses, children, and parents]." (Emphasis added.) The clause not cited by the Solicitor General makes plain that "one motion to reopen" serves as an absolute "limitation" on the number of motions (except in the special circumstance of spousal and family abuse), not as a floor.

The Solicitor General added, "[G]iven that relevant regulations existed prior to Section 1229a's enactment, . . . Congress's failure to restrict the Attorney General's discretion to allow an additional motion to reopen based on changed country conditions is telling." The Solicitor General provided no support for her assertion that Congress "fail[ed] to restrict the Attorney General's discretion." As explained above, IIRIRA's statutory language indicates quite clearly that Congress did, indeed, intend to restrict the Attorney General's discretion. The Solicitor General made no effort to explain why, if Congress really had intended to authorize an exception from the one-motion rule for asylum seekers, it did not include asylum seekers in the list of exceptions set forth in § 1158(a)(2)(D)(iv); and why it did not mention the one-motion rule, in § 1229a(c)(7)(C)(ii), as one of the limitations from which asylum seekers could seek to be excepted.

In support of her assertion that "other provisions of the INA suggest that a further motion

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of the failure of any *party* to raise the issue, Justice Ginsburg's opinion for the Court in *Kucana* did not address the issue.

to reopen should be permitted in the circumstances allowed by the regulation," the Solicitor General cited 8 U.S.C. § 1158(a)(2)(D), which governs petitions for asylum. In fact, the cited statute cuts strongly against the Solicitor General's position. IIRIRA imposed several limitations on the filing of an application for asylum, including that the applicant must file within one year of arrival in the United States, and that the federal government has not denied a previous asylum application from the applicant. 8 U.S.C. § 1158(a)(2)(B) & (C). IIRIRA provided an exception to those limitations if "the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application [until after the alien had been in the United States for more than one year]." 8 U.S.C. § 1158(a)(2)(D). Some aliens subject to a final order of removal have sought to invoke the language of § 1158(a)(2)(D) as a means of avoiding the time and numerical limitations imposed by § 1229a(c)(7). The federal appeals courts have unanimously rejected such an interpretation of § 1158(a)(2)(D); they have uniformly held that aliens wishing to file an application for asylum following issuance of a final removal order must first demonstrate that they meet the § 1229a(c)(7) requirements regarding motions to reopen, and only then should the federal government consider whether they also meet the somewhat more relaxed requirements regarding eligibility for filing an asylum application. *Wang v. BIA,* 437 F.3d 270 (2nd Cir. 2006); *Hai Fan Huang v. Attorney General of the United States*, 249 Fed. App. 293 (3d Cir. 2007); *Cheng Chen v. Gonzales*, 498 F.3d 758 (7th Cir. 2007); *Subhari v. Mukasey*, 522 F.3d 842 (8th Cir. 2008); *Zheng v. Mukasey*, 509 F.3d 869 (8th Cir. 2007); *Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008). In other words, those appeals court decisions cut directly against the Solicitor General's assertion that Congress's creation (in § 1158(a)(2)(D)) of somewhat generous exceptions to restrictions on filing asylum applications reflects a congressional intent to permit creation of similarly generous exceptions to the time and numerical limitations imposed by § 1229a(c)(7) on motions to reopen. Indeed, the BIA has adopted the same position. Rejecting the Solicitor General's view, the BIA has determined that the existence of § 1158(a)(2)(D) has no bearing on the right of an alien to reopen proceedings for the purpose of filing an asylum application. *In re C-W-L*, 24 I. & N. Dec. 346 (B.I.A. 2007).

CONCLUSION

The Washington Legal Foundation respectfully requests that the Executive Office of Immigration Review initiate proceedings to amend 8 C.F.R. §§ 1003.2(c)(3)(ii) & 1003.23(b)(4) to eliminate the existing conflict between those regulations and 8 U.S.C. § 1229a(c)(7). The current regulations permit aliens to file motions to reopen immigration proceedings under circumstances prohibited by the statute.

Respectfully submitted,

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U.S. Representative Steve King
U.S. Senator John Cornyn
U.S. Senator Jon Kyl