

Public Comments from I-290B Second 60-day FRN

December 6, 2019 through February 4, 2020

84 FR 66924

Regulations.gov Comment ID	Matrix ID Number	Commenter	Comment	USCIS Response
USCIS-2008-0027-0078	1.1	Jean Publieee	take away any right of appeal for foreigners. americans in america shoudl have a right of appeal but i see no reason at all why we are allowing this to foreigners. they should have one hearing. that is it. we are wasting millions on allowing appeal after appeal after appeal when america alredy takes in endless refugees, endless lottery winners, endless investors and eneless 25 million sneak illegal imigrants. we dont need more foreigner here. we are in fact being beseiged. its time to make sure our govt recognizes that this is not I950. we are full up with foreigners and full up witht he immigration procdess. enough is enough. shut it down for a while, americans all over this country are pleading for all this immiggration to stop for at least a while! just stop it all.	Thank you for your comment.
USCIS-2008-0027-0080	2.1	Anonymous	I support USCIS in this effort to revise as needed per this documentation. Seems like a good idea to do.	Thank you for your comment.
USCIS-2008-0027-0079	3.1	John Flanagan, Becker & Lee LLP	I. Applying an "Abuse of Discretion" Review of Discretionary Decisions Promotes Arbitrary Decisionmaking and Violates Equal Protection. Because the BIA applies "de novo" review to discretionary decisions, USCIS should not	After further consideration, DHS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to changing the current standard of review for discretionary decisions.

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		<p>violate equal protection principles by changing its standard of review in AAO matters. See 8 C.F.R. 1003.1(d)(3).</p> <p>Moreover, USCIS matters are conducted either in secret or only in the presence of the applicant(s), as opposed to immigration judge proceedings that are open to the public by default. Forcing the AAO to functionally rubber-stamp decisions by individual USCIS officers, who may not even be lawyers, would undermine the goal of creating a uniform discretionary standard across all USCIS components.</p> <p>Furthermore, applying a standard of review that usually applies to trial management issues fails to recognize that discretionary decisions on immigration benefits are often dispositive and can lead to denial of benefits to otherwise eligible. For example, USCIS could find that a waiver applicant meets and "extreme hardship" standard and still deny on discretion for a single minor criminal offense that occurred more than 10 years ago.</p> <p>Finally, discretionary decision are generally completely insulated from federal court review. Therefore, applying a highly deferential standard to discretionary decisions in administrative appeals essentially denies the applicant the right to appeal.</p>	
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<p>USCIS-2008-0027-0079</p>	<p>3.2</p>	<p>John Flanagan, Becker & Lee LLP</p>	<p>II. Deemed Unraised Issues to Be Failed Promotes Mechanistic Jurisprudence, Disadvantages Pro Se Applicants, and Allows the AAO to Ignore Obvious USCIS Error.</p> <p>Immigration practitioners have noticed a marked increase in USCIS RFE's, which are often boilerplate, conclusory, and incorrectly recite the facts of the case. In instances where those RFE's lead to denials, the AAO would be compounding this error by dismissing appeals that fail to point out patent errors. Federal courts generally apply generous waiver analysis to pro se litigants, and the AAO should not unfairly disadvantage non-citizens by doing differently in the USCIS context.</p>	<p>Thank you for your comment. A denial of an immigration benefit must contain a written explanation of the specific reasons for the unfavorable decision. <i>See</i> 8 C.F.R. § 103.3(a)(1)(i). The affected party's subsequent appeal must identify specifically at least one error in the decision. <i>See</i> 8 C.F.R. § 103.3(a)(1)(v). The AAO reviews the record of proceedings and determines whether the unfavorable decision contains one or more erroneous conclusions of law, applications of policy, findings of fact, or exercises of discretion. The proposed form instructions advise affected parties that if their appeal does not address a ground of ineligibility identified in the unfavorable decision, the issue may be deemed waived. Requiring the affected party to address all grounds of ineligibility stated in the unfavorable decision is appropriate in the context of administrative appeals to the AAO as it permits USCIS to fully consider all challenges to its decisions, and also consider arguments that its policies or legal interpretations should be changed. <i>See, e.g., Matter of M-A-S-</i>, 24 I&N Dec. 762, 767 n.2 (BIA 2009); <i>Rizk v. Holder</i>, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived).</p> <p>However, the AAO may exercise its discretion to address an issue <i>sua sponte</i> despite the affected party's failure to raise it on appeal. In that case, the issue is not waived. <i>See, e.g., Lizama v. Holder</i>, 629 F.3d 440, 448-49 (4th Cir.</p>
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				<p>2011). Such discretion might be exercised, for example, when an unfavorable decision does not coherently identify the grounds of the unfavorable decision. Therefore, DHS does not agree with the commenter that this proposed form instruction unfairly disadvantages non-citizens or <i>pro se</i> parties.</p>
<p>USCIS-2008-0027-0079</p>	<p>3.3</p>	<p>John Flanagan, Becker & Lee LLP</p>	<p>III. USCIS Should Not Insulate Arbitrary Adam Walsh Act Decisions from Review.</p> <p>The application of the Adam Walsh Act implicates important family rights, as it has the potential to deny long-rehabilitated citizens the right to petition for family members. Allowing individual USCIS officers to make often inconsistent and conclusory decisions with no avenue for administrative appeals arguably violates due process.</p>	<p>Section 402(a) of the Adam Walsh Child Protection and Safety Act of 2006, (AWA), Pub. L. 109-248, amends section 204(a)(1)(B)(i) of the Immigration and Nationality Act (Act) to prohibit U.S. citizens and lawful permanent residents who have been convicted of any “specified offense against a minor” from filing a family-based immigrant petition on behalf of any beneficiary, unless the Secretary of Homeland Security determines, in his or her sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary. In addition, section 402(b) of the AWA amends section 101(a)(15)(K) of the Act to bar U.S. citizens convicted of these offenses from filing nonimmigrant visa petitions to classify their fiancé(e)s, spouses, or minor children as eligible for “K” nonimmigrant status, unless the DHS Secretary determines, in his or her sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary.</p> <p>DHS has determined that the AAO lacks appellate jurisdiction over AWA “no risk” determinations and the proposed form</p>

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				<p>instructions clarify this conclusion. USCIS has also previously updated this guidance on its website and its decision notices to remove any further inconsistencies.</p> <p>DHS does not agree with the commenter’s unsupported claim that the proposed form instructions clarifying the AAO’s lack of jurisdiction on this issue violate a party’s due process rights. Further, an affected party may generally re-file a benefit request or file a motion to reopen or a motion to reconsider an adverse “no risk” determination by a USCIS immigration officer.</p>
USCIS-2008-0027-0083	4.0	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the	<p>[link to full PDF]</p> <p>The American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center submit the following comment in response to the proposed revisions to U.S. Citizenship and Immigration Services (“USCIS”) Form I-290B, which were published in the Federal Register on December 6, 2019. See USCIS, Agency Information Collection Activity; Revision of Currently Approved Collection: Notice of Appeal or Motion, 84 Fed. Reg. 66,924 (Dec. 6, 2019) (“proposed revisions” or “Notice”). Although the proposed revisions take the form of changes to the Form I290B and its instructions,</p>	Thank you for your comment.

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		Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	they make substantial and substantive changes to the USCIS motions and appeals processes. For the reasons below, we urge USCIS to immediately withdraw the proposed revisions and instead dedicate its efforts to ensuring that individuals have full access to the administrative review to which they are entitled. I. Interest of the Commenters [commenter provides background on the purpose and mission of the organizations on whose behalf the comment is submitted. See PDF for full text.]	
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USCIS-2008-0027-0083	4.1	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>II. The Proposed Revisions Should be Withdrawn</p> <p>The proposed revisions are not merely discrete form changes, but rather constitute a structural overhaul of post-decision processes. In other words, the proposed revisions would fundamentally change how a record is built, how the I-290B appeal is reviewed at both USCIS decision making offices and the Administrative Appeals Office (“AAO”), and the very role of the AAO. As discussed elsewhere in these comments, a change of this magnitude requires notice and-comment rulemaking, not merely the announcement of revisions to form instructions. For the reasons that follow, we urge the withdrawal of the Notice.</p> <p>A. Under Governing Regulations, the Initial Field Review Process Is Mandatory and May Not Be Waived</p> <p>USCIS is proposing a revision to Form I-290B that would allow affected parties to waive the Initial Field Review (IFR) process. This is inconsistent with the governing regulation. Under 8 CFR § 103.3(a)(2), the IFR process is mandatory. The regulation provides that “[t]he official who made the unfavorable decision being appealed”—or an official in a jurisdiction to which the appealing party has moved—“shall review the appeal” before it reaches the AAO.¹ For all timely-filed appeals, the regulation further provides that “[t]he reviewing official shall decide whether or not favorable action”—e.g., the grant of a motion to reopen or</p>	<p>After further consideration, DHS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to the ability to waive the “initial field review” process for appeals.</p>
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			<p>reconsider and approval of the underlying request—“is warranted.”² And if the officer decides that “favorable action is not warranted, that official shall promptly forward the appeal” to the AAO.³ For untimely appeals, meanwhile, USCIS must determine whether the appeal meets the requirements of a motion to reopen or a motion to reconsider, and if so, the appeal must be treated as a motion, and a decision must be made on the merits of the case.⁴ USCIS itself has acknowledged that the IFR process is mandatory.⁵ Nevertheless, the proposed revisions permit affected parties to waive the IFR process. Specifically, an affected party may opt out of the process by checking Item 1.b in Part 2 of the revised form I-290B, as follows:</p> <p>We question the legality of this proposal to permit affected parties to waive the IFR process. The IFR process is required by regulation. USCIS has provided no legal authority in the Notice supporting the agency’s ability to permit affected parties to waive a process that is mandated by regulation. We are also concerned about how this proposed change would impact affected parties, especially those who file an untimely appeal. The IFR process requires USCIS to determine whether an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider. If it does, the appeal must be treated as a motion, and a decision</p>	
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			<p>must be made on the merits of the case. Under the proposed revisions, however, if a party checks the box to waive IFR, USCIS will reject the appeal without first determining whether the appeal meets the requirements of a motion to reopen or a motion to reconsider.⁶ This change will negatively impact affected parties who file an untimely appeal, as it would result in an automatic rejection of the appeal rather than a determination by a USCIS official as to whether or not it meets the requirements of a motion. Such rejections would directly violate the regulatory requirement that an untimely appeal that satisfies the requirements for a motion to reopen or a motion to reconsider must be treated as a motion and a decision must be made on the merits of the case.⁷</p>	
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USCIS-2008-0027-0083	4.2	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>B. The Proposed Restrictions on the Use of New Evidence in Appeals and Motions to Reopen Conflict With Current Policy, Regulations, and Due Process Requirements</p> <p>The proposed revisions would reverse a longstanding USCIS policy -- in place since 1998 -- providing the option to submit new evidence to the AAO on appeal and would also impose restrictions on the submission of new evidence on a motion to reopen.</p> <p>Under current policy, a party who files a notice of appeal from an adverse USCIS decision has a thirty-day period to submit a brief and any additional evidence in support of the appeal.⁹ Under the proposed revisions, the AAO would not consider “for any purpose” evidence submitted for the first time on appeal where (1) the affected party was “put on notice of the evidentiary requirement”; (2) the party was “given a reasonable opportunity to provide the evidence” before the unfavorable decision; and (3) the evidence “was reasonably available or could have been reasonably discovered or presented in the prior proceeding.”¹⁰ Further, “if a party submits evidence for the first time on appeal that is material and does not fall into one of these three categories, the AAO will generally remand the matter to the office that issued the unfavorable decision for consideration as a motion to reopen.”¹¹ Although not stated in the proposed instructions, the Notice implies an exception from the threshold requirement for new</p>	<p>Thank you for your comment. After further consideration, DHS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to defining the term “new facts” in the context of motions to reopen. DHS has removed and/or modified the identified language in this comment relating to the treatment of evidence submitted on appeal.</p>
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		<p>evidence on appeal “in exigent circumstances and at USCIS discretion.”¹²</p> <p>The proposed revisions also limit acceptable evidence on a motion to reopen to “evidence that was not reasonably available and could not have been reasonably discovered or presented in the previous proceeding.”¹³</p> <p>As with other aspects of the proposed revisions, the proposed evidentiary limitations would work sweeping structural changes across post-decision processes. And as discussed elsewhere in these comments, a change of this magnitude requires notice-and-comment rulemaking, not merely the announcement of revisions to form instructions. For the reasons that follow, we urge the elimination of these limitations on the submission of new evidence on a motion to reopen or appeal.</p>	
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USCIS-2008-0027-0083	4.3	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>1. The AAO’s consideration of new evidence on appeal, even on a previously identified issue, is appropriate, efficient, and necessary to fairness. The proposed revisions would limit new evidence on appeal where, among other things, the appellant was “put on notice of the evidentiary requirement.”¹⁴ In many circumstances, and even as to an issue identified earlier in the adjudication process, consideration of evidence first submitted on appeal is necessary to demonstrate that initial evidence was misconstrued, or that the issue was otherwise wrongly decided. This discussion describes just a few of the familiar circumstances in which this may be so. First, USCIS adjudicates a majority of benefits requests primarily on the papers. Even in a case where USCIS issues one or more notices in the nature of a Notice of Intent to Deny (“NOID”) or Request for Evidence (“RFE”), such notices may fail to sufficiently sharpen the issues for determination, and accordingly, the responses may not meet the officer’s expectation. As a result, an officer may conclude that the record warrants a denial, even though available evidence—which may be provided on appeal under current policy—would avoid that outcome. The proposed revisions provide for a remand on the basis of material new evidence falling outside any of the three categories specified in the form instructions, but this remand is not an adequate solution: Remand in those circumstances appears to be permitted</p>	Thank you for your comment. DHS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to the treatment of evidence submitted for the first time on appeal.
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			<p>but not required. Moreover, a remand is premised on the AAO's review of the new evidence in order to conclude that the evidence is material; and that the applicant was not on notice of the requirement, the applicant was not given an opportunity to respond to it, or the evidence was not reasonably available initially. The remand contemplated in the proposed revisions thereby injects additional delay and inefficiency into the process without guaranteeing that the new evidence will be considered.</p>	
<p>USCIS-2008-0027-0083</p>	<p>4.4</p>	<p>Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal</p>	<p>Second, in preparing an initial filing and in responding to a NOID or RFE, an applicant necessarily makes judgments about the evidence that is relevant and required to carry the burden. This is especially complicated where relief is sought on humanitarian grounds or by survivors of violence, because evidence in those cases implicates personal, sensitive, confidential, highly charged, or potentially traumatizing information. Moreover, evidence may be unavailable to an applicant due to the dynamics of domestic violence or other victimization.¹⁵ An applicant may reasonably determine that the record supports approval without particular documents or information in</p>	<p>See previous response to 4.3.</p>

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	Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	evidence. Under current policy, if a denial is based in whole or in part on the absence of the particular evidence, the applicant will have an opportunity to address the issue on appeal. Under the proposed revisions, even a pro se applicant would be bound by a choice or a misunderstanding relating to evidence not offered, with no opportunity to recover on appeal.	
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USCIS-2008-0027-0083	4.5	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>Third, under 2018 policy guidance, USCIS may issue denials without first sending an RFE or NOID to identify a perceived deficiency in the initial evidence.¹⁶ Thus, to appeal a discretionary denial, the applicant may need to present additional evidence to counter conclusions drawn in the decision. Alternatively, denials may be premised on issues or analysis not apparent in a previously issued RFE or NOID. Under the proposed revisions, the applicant would face rejection of new evidence on the basis that it may relate to a previously noticed evidentiary requirement, or may have been reasonably available previously—even if the need to submit the evidence was not reasonably foreseeable at the outset.</p> <p>An example illustrates the severe difficulties that the proposed revisions would place on humanitarian applicants. A 16-year-old child filed a special immigrant juvenile (“SIJ”) petition supported by a state court order evidencing a custody determination and other findings prerequisite to SIJ status. After the 180-day deadline for adjudicating the petition had passed, USCIS issued a NOID identifying perceived deficiencies in the state court order. Through counsel, the child timely responded. One year after the petition was filed, USCIS denied it on grounds similar to those in the NOID. The child timely moved to reopen the decision. When USCIS denied the motion, nearly two years had elapsed since the child</p>	See the previous response to 4.3.
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		<p>filed the petition, and USCIS denied the motion on the basis of issues not raised in the NOID or initial denial of the petition, including a factual matter pertaining to the child’s family history. Specifically, USCIS asserted it had “reason to believe” that a custody determination allegedly set forth in a divorce decree purportedly obtained years earlier by the child’s caregiver was incompatible with record evidence respecting custody of the child. Before the deadline for filing an appellate brief and evidence, the child’s counsel obtained records from a foreign court showing that the caregiver’s long-ago divorce petition had been dismissed for procedural reasons without issuance of any decree, much less a custody determination contrary to the record evidence. Approximately six months later, the AAO sustained the appeal, referring specifically to the newly submitted evidence that countered the facts suggested by USCIS on a “reason to believe” basis.</p> <p>It is unclear if this critical evidence would be acceptable under the proposed revisions. Even if the evidence were deemed to meet the new proposed standard, the result would, at best, be a remand for further analysis—even though that the child’s petition had already been pending two years (four times the permissible time for a SIJ adjudication) at the time the appeal was filed.</p>	
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USCIS-2008-0027-0083	4.6	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>2. The three-factor test and the “exigent circumstances” exception are ill-defined and vague and call for multi-faceted fact-finding and legal analysis</p> <p>Under the proposed revisions, new evidence would be excluded from AAO consideration on the basis of the above three-part test that itself entails determining mixed questions of fact and law: Was the applicant given notice of the evidentiary requirement? Did the applicant have an opportunity to respond? And was the new evidence reasonably available or reasonably discoverable in the prior proceeding?</p> <p>Without expressly stating as much, the proposed revisions imply that this test may be applied by USCIS either during the IFR process or if the appellant files the new evidence with the Notice of Appeal.¹⁷ In addition, where supporting evidence is later filed with the AAO, the AAO must apply the test.¹⁸ Thus, to the extent that the proposed revisions seek to avoid an appellate body making legal and factual determinations in the first instance, it fails on that count.</p> <p>Moreover, the test in the proposed revisions entails a series of overlapping, equivocal, or speculative inquiries. Those inquiries include the following:</p> <ul style="list-style-type: none">● Where an “evidentiary requirement” is not expressly set forth in statute or regulation, is it in fact an “evidentiary requirement”?¹⁹● Where notice of a purported evidentiary	See the previous response to 4.3.
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		<p>requirement was given in a form instruction, RFE, NOID, or Notice of Intent to Revoke, did that notice unambiguously indicate the evidence sought to be newly offered?20</p> <ul style="list-style-type: none">● Was the available opportunity for providing the evidence “reasonable” for the particular applicant and the particular evidence?● What steps would have been entailed in obtaining or discovering the evidence prior to the adverse decision?● Would those steps be “reasonable” for the applicant? <p>The SIJ case discussed above, involving the petitioner who submitted new evidence to the AAO in an appeal from the denial of a motion to reopen, illustrates the vague and speculative nature of these questions. Had the appeal been pursued under the proposed revisions, it is not clear whether the proposed instructions would have precluded the submission of the new evidence on appeal or whether the child petitioner could possibly understand whether new evidence would be accepted. It is not clear how, or whether, the child was placed on notice of any requirement to prove that the caregiver’s divorce petition had not resulted in a custody determination that contradicted other facts in the record. It is not clear whether USCIS would have deemed years-old court records of a divorce proceeding to have been “reasonably available” or “reasonably discoverable” prior to “the time” they were</p>	
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			<p>purportedly “supposed to have been submitted.”²¹ And it is not even clear when USCIS believes that such evidence was supposed to have been submitted.</p>	
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USCIS-2008-0027-0083	4.6	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>To take another example, starting around 2017, USCIS issued numerous RFEs, NOIDs, and denials to SIJ petitioners on the basis that a predicate state court order was insufficient to establish eligibility absent evidence of the court’s authority to restore the child to the custody of a parent with whom the court had found reunification non-viable. No such “evidentiary requirement” is found in the relevant statute or regulations. Accordingly, it would have been reasonable for a petitioner responding to such notices and denials to conclude that such evidence was not legitimately required. Thus, after receiving a denial on that basis, a petitioner might have offered evidence of the court’s authority to make such determinations for the first time on appeal. Under the proposed revisions, a petitioner would presumably have been unable to do so—even though USCIS later reversed course and adopted AAO decisions expressly disavowing a requirement for the evidence described.</p> <p>The “exigent circumstances” exception included in the Notice²²—but not discussed in the proposed instructions—is similarly vague. The Notice provides no definition, description, or examples of “exigent circumstances,” and it does not explain whether the term is equivalent to the exigent circumstances that pertain or have pertained to virtually all applicants for T or U visas, relief under the Violence Against Women Act (“VAWA”), or SIJ status. The Notice</p>	See the response to 4.3 above
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			<p>also fails to clarify the scope of “USCIS discretion” in such an exception.²³ Worse still, the Notice provides no information on how such an exception is recognized or what it triggers. The Notice does not state whether the applicant must bring the exigent circumstances to the AAO’s attention with a request to consider new evidence. The Notice does not clarify what the effect of a finding of exigent circumstances would be. It does not make clear whether the AAO will directly consider evidence under the exception, obviating the use of remand.²⁴</p>	
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USCIS-2008-0027-0083	4.7	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>3. The rationale for not considering new evidence on appeal at the Board of Immigration Appeals is not applicable to AAO appeals. The DHS regulations concerning appeals to the AAO do not prohibit the submission of new evidence on appeal. As the Notice acknowledges²⁵, the Instructions to Form I-290B have permitted the submission of new evidence for the past 28 years. This policy flows from the unique design of appeals to the AAO, under which the immigration officer who made the unfavorable decision “may treat the appeal as a motion to reopen or reconsider and take favorable action” or may forward the appeal to the AAO.²⁶</p> <p>The AAO has long exercised authority to accept additional evidence as provided by the instructions to Form I-290B.²⁷ In addition, the quarterly AAO processing time reports refer to the need to consider new evidence. The reports state that “[t]he AAO strives to complete its appellate review within 180 days from the time it receives a complete case record after the initial field review. Some cases may take longer than 180 days due to factors beyond the AAO’s control. For example, additional documentation may be needed to complete the record, or the case may be more complex and require additional review.”²⁸</p> <p>As justification for changing this long-standing policy, the AAO points to the Board of Immigration Appeals (“BIA”), which does not consider new evidence on appeal other than for</p>	See the previous response to 4.3.
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		<p>purposes of deciding whether to remand the case to the decision-maker below. BIA appeals, however, primarily concern decisions made in removal proceedings, which include contemporaneous discussion, arguments, and testimony regarding evidence and applicable law.</p> <p>In this context of hearings in immigration court, the adjudicator may identify close questions or outcome-determinative issues, and may ask one or both parties to address these, in person or by supplementing the record. As structured, then, the hearing is intended to allow for a full development of the issues and evidence while the case proceeds, with each party aware of the points of contention and able to address them. In contrast, cases reviewed by the AAO do not necessarily include a full development of the issues and evidence. Appeals to the AAO are from unfavorable decisions issued after adjudication of a paper application and supporting documents, such that the applicant and advocate may not know how the adjudicator is construing the evidence until a final decision is made. While RFEs issued during an adjudication may shed some light on issues of concern to an adjudicator, the absence of live testimony in the application process means that the applicant may not know the adjudicator's concerns or what the adjudicator did not understand until the final decision is received.</p>	
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USCIS-2008-0027-0083	4.7	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>As an example, in denying an adjustment of status application based on a U visa, an adjudicator misconstrued the applicant’s criminal record. The applicant had responded fully to a previously issued RFE regarding his arrest record with additional documents in support of a favorable exercise of discretion. Until the decision was received, however, the applicant and his counsel had no way to know that the adjudicating officer was confused about the meaning of the documents submitted or that the officer would characterize an arrest without a conviction as a significant negative factor. While this decision clearly presented legal arguments to raise on appeal, the case was favorably resolved with the presentation of new evidence on appeal that clarified the applicant’s criminal record and further documented the favorable discretionary factors in his case.</p> <p>In short, given the nature of the USCIS application adjudication process, a full record cannot be developed in a way that compares to the development of the evidentiary record in the adversarial hearing context present in immigration court. For this reason, the analogy to the BIA in the proposed revisions is misplaced, and the option of submitting new evidence, including evidence related to issues already identified, is critical to ensuring an AAO appeal process that provides a meaningful opportunity to contest an unfavorable decision.</p>	
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USCIS-2008-0027-0083	4.8	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>4. The proposed restrictions on new evidence for a motion to reopen are inconsistent with existing regulations</p> <p>The proposed instructions to Form I-290B would also limit acceptable evidence on a motion to reopen to “evidence that was not reasonably available and could not have been reasonably discovered or presented in the previous proceeding.”²⁹ This significant change, which is not discussed or even identified in the Notice, is completely unsupported by any text in the motion to reopen regulations at 8 CFR § 103.5. In fact, the only express limitation on evidence submission with respect to motions to reopen relates to motions addressed to cases denied based on abandonment.³⁰ In that limited situation, the regulation requires the moving party to establish that the decision was in error because (i) the requested evidence was not material; (ii) the required initial evidence was submitted with the application or in response to a request to submit it; or (iii) the request for additional information was not sent to the proper address. Apart from this limited circumstance, the motion to reopen regulation simply states, without condition, that the “motion must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.”³¹</p> <p>Implementation of the proposed revisions would lead to draconian outcomes for even innocent mistakes. Under current USCIS policy,</p>	After further consideration, USCIS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to the definition of “new facts” for motions to reopen.
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		<p>an applicant for an immigration benefit who inadvertently fails to submit an “initially required document” will not receive an RFE and faces application denial without an opportunity to correct the record. The current rules of motion to reopen practice allow for errors of this nature to be resolved by filing a motion to reopen with the missing document. Strictly applied, the proposed revisions would preclude USCIS from accepting a missing initially required document that had been previously available. While some applicants in this situation may potentially re-apply for the benefit with the missing documentation, others may face an eligibility bar preventing reapplication, and may also face issuance of a Notice to Appear commencing removal proceedings as a consequence of the denial.</p> <p>Finally, the proposed restrictions in the Notice instead seem to be drawn from the regulations governing motions to reopen in immigration court. Those regulations, promulgated by the Executive Office for Immigration Review, specify that a motion to reopen an immigration court decision will not be granted “unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been offered or presented at the former hearing.”³² As discussed above, however, the rationale for imposing restrictions in post-hearing proceedings before the immigration courts is not applicable to USCIS adjudications that are</p>	
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			<p>limited to review of document submissions. Further, the codification of this limitation underscores that full notice and comment under the Administrative Procedure Act (“APA”), rather than an amendment to form instructions, is the appropriate vehicle for proposing substantive changes to the rules on motions to reopen.³³</p>	
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USCIS-2008-0027-0083	4.9	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>5. The proposed restrictions on new evidence will be particularly onerous for applicants for humanitarian relief</p> <p>By definition, individuals seek humanitarian relief—including U and T visas, relief under VAWA, and SIJ status—on the basis of serious harm they have experienced. That harm often results in trauma, and for many survivors, ongoing vulnerability in their living situations, mental and physical health or economic status will raise obstacles that may delay the gathering, evaluation, and selection of evidence to support their applications. So, too, will difficulties in accessing counsel. For many who now hold status through humanitarian relief, the current rules on evidence have provided a necessary final opportunity to support and clarify the case.</p> <p>This opportunity reflects the fact that an applicant’s burden is “clear and convincing” evidence, and that it is thus neither necessary nor advisable for an applicant to submit for review all evidence that is conceivably relevant and obtainable. Accordingly, applicants must make reasoned choices about the quantum of evidence necessary to carry their burden.</p> <p>Where the choice does not match the expectations of the adjudicator—who has expertise in applying the law but lacks full familiarity with the applicant’s facts—a denial may result, often without the benefit of clarification through an RFE or NOID. Therefore, particularly in light of USCIS’ 2018 policy on</p>	See the response to 4.3
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			<p>RFEs and NOIDs,³⁴ a motion to reopen or appeal to the AAO may actually be the first opportunity to address the adjudicator’s determination that particular evidence is required.</p> <p>Relatedly, the psychological or emotional consequences of past harm may impair the applicant’s ability to make strategic choices, particularly during earlier stages of the case. The applicant may become prepared to confront particular facts of his or her history of harm only after the passage of time. Foreclosing reasonable opportunities to supplement following an adjudicator’s initial determination disregards the pressures that applicants face as a practical matter in the selection of evidence.</p> <p>Moreover, the proposed revisions create new tensions with existing evidentiary rules. Where evidence lies within the control of a person who perpetrated harm on the applicant, it would be reasonable for the applicant to forego seeking that evidence except as a last resort (e.g., on appeal). This approach is supported by current policy against compelling a victim of domestic violence or child abuse to contact the perpetrator for evidence. And the proposed revisions would also conflict with the policy that any credible evidence must be accepted in support of a request for a T or U visa or relief under VAWA.³⁵</p>	
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USCIS-2008-0027-0083	4.9	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	An example again illustrates the point. In connection with a petition for SIJ status or a U visa, predicate evidence may be supplied through state court or administrative proceedings. Hypothetically, a state body might have considered evidence of a physical assault on the public record and considered evidence of a sexual assault in camera. The state official might forego placing the fact-finding on sexual assault in the record or proceedings, or might seal that portion of the record, and could issue findings legally sufficient to support the application without that evidence. Accordingly, the applicant might choose to base his or her application to USCIS on only the portion of the facts reflected in the court record. This presents the potential for USCIS, at an advanced stage of the process, to deem evidence of the sensitive, off-record information essential to the case. Under the proposed revisions, the petitioner might be forced either to immediately disclose this incredibly sensitive, previously sealed information to USCIS or to pursue an application solely on the basis of the public portions of the record.	
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USCIS-2008-0027-0083	4.10	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>6. Different policies for the submission of new evidence in connection with the same form will lead to widespread confusion for pro se applicants and practitioners alike. The proposed changes to the I-290B form instructions on the submission of evidence will likely cause confusion for practitioners and adjudicators alike. Because of the differing rules on evidence submission depending on whether the form is submitted as a motion to reopen, an appeal with IFR, or an appeal without IFR, the individual completing the form must navigate the instructions to try to determine which rules apply to his or her case. And while the instructions detail the limitations on submission of evidence in connection with appeals, those who are also seeking initial field officer review within the AAO appeal process review may reasonably think that these restrictions do not apply.</p> <p>As an example, assume that Client A files Form I-290B to reopen a denial of a VAWA self-petition. Along with her motion she submits new evidence without regard to the new evidence limitations that affect appeals. Client B, meanwhile, files Form I-290B in order to appeal the denial of a VAWA self-petition. Because Client B also wants the benefit of consideration of a motion to reopen, she submits new evidence, some of which was previously available and known to her but which she had not considered it necessary to submit. The proposed instructions do not make</p>	USCIS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to defining the term “new facts” in the context of motions to reopen as well as the proposed change relating to the submission of evidence for the first time on appeal.
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		<p>clear whether the adjudicating officer can consider the new evidence in the context of a motion to reopen even though it falls within the category of evidence generally excluded from consideration by the AAO. They also do not make clear whether the AAO evidence rules apply even though the initial field officer review is tantamount to consideration of a motion to reopen.</p> <p>The lack of clarity will make it challenging for an affected party to elect the appropriate remedy. Individuals who receive unfavorable decisions on USCIS applications have a short window of time to file an appeal or motion, gather new evidence if necessary and available, and prepare a supporting memorandum or brief. The creation of different rules for consideration of new evidence when filing the same form will predictably cause tremendous confusion and error both in the election of remedies and in the submission of evidence that will be accepted on appeal. And this confusion will further reduce access to review of adverse decisions for vulnerable populations, such as applicants for U visas, T visas, SIJ status, and VAWA relief, who may not have the resources to identify which rules apply to their case and submit a timely filing.</p>	
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<p>USCIS-2008-0027-0083</p>	<p>4.11</p>	<p>Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center</p>	<p>C. The Proposed Revisions Contradict the Long-Standing Use of The De Novo Standard of Review for Discretion The APA affords administrative agencies like the AAO plenary power to review each appeal on a de novo basis. The statute provides, “on appeal from or review of the initial decision, 15 the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”³⁶ The AAO has historically utilized the de novo standard of review in its adjudications. The origins of the AAO date back to 1983, when the former Immigration and Naturalization Service (INS) established the Administrative Appeals Unit (AAU). The AAO has traditionally been viewed as “independent” of the field offices, service centers, and other offices that adjudicate immigration benefits. Because of this independence, the AAO reviews all issues (fact, law, policy, and discretion) that come before it anew. ³⁷ The AAO has undertaken de novo review of discretionary decisions for decades and it is a standard long recognized by federal courts.³⁸ Nearly 15 years ago, in response to a CIS Ombudsman Recommendation, the AAO affirmed that this de novo authority was “pursuant to Second and Ninth Circuit Court of Appeals decisions.”³⁹ At the time, the AAO was seeking to promulgate an proposed interim rule to affirm "the AAO reviews de novo any question of law, fact, discretion, or any other</p>	<p>Thank you for your comment. USCIS is withdrawing the proposed change to Form I-290B and the accompanying instructions relating to changing the standard of review for discretionary decisions.</p>
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			<p>issue that may arise in an appeal that falls under its jurisdiction."⁴⁰</p> <p>The supplementary information to the proposed interim rule noted "the term de novo means that the AAO reviews a case as if the original decision never took place. In a de novo review, the AAO is not required to give deference to or take notice of the findings made in the original decision."⁴¹ Thus, the AAO saw its de novo authority as grounded in and recognized by several federal courts, and sought to promulgate a rule to confirm and provide greater transparency to the public. In addition, as USCIS recognizes in the Notice, the AAO has acknowledged its de novo authority in its precedent decisions, which are jointly approved by the Secretary of the Department of Homeland Security (DHS), the Board of Immigration Appeals and the Attorney General, both within the Department of Justice.⁴² For example, in the 2016 precedent decision <i>Matter of Dhanasar</i>, which revises the framework for the discretionary national interest waiver, the AAO engages in a de novo review of the applicant's equities, reversing the Director.⁴³ Thus, the authority of the AAO to review discretionary determinations de novo has already been recognized and approved by the two agencies that have adjudicative authority over immigration benefits applications. ⁴⁴ Thus, AAO has a long-established history of de novo review of discretionary determinations.</p>	
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			<p>USCIS has provided no indication, no information, that this standard has yielded erroneous results or what benefit changing the standard of review would have to the agency or to applicants. In fact, as we will discuss more below, the proposed revisions would have the opposite effect, and be an incredible, unjustifiable burden to applicants and petitioners, to service providers, and to AAO adjudicators.</p>	
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USCIS-2008-0027-0083	4.12	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>1. De Novo Review of Discretionary Determinations is the Appropriate Standard of Review</p> <p>The AAO’s current standard of review for discretionary determinations is appropriate because its use is common practice in immigration proceedings. First, applying the de novo standard of review to discretionary decisions is already common practice in the immigration adjudication context.⁴⁵ For an example of this, we need go no further than examining the practice of the other appellate body in immigration law, the Board of Immigration Appeals. The BIA applies a de novo review of immigration judge discretionary decisions and legal conclusions and only reserves the more deferential “clear error” review for factual findings and credibility determinations.⁴⁶ In addition, all review of DHS officer decisions is de novo.⁴⁷ The BIA reviews a litany of immigration applications such as adjustment of status, asylum, cancellation of removal and certain waivers, and proceedings before the immigration judge, which are adversarial in nature and lead respondents and fact witnesses testify. Nevertheless, the BIA reviews IJ discretionary determinations de novo as is customary in administrative adjudications before the Executive Office for Immigration Review (EOIR).</p> <p>In addition, within EOIR, immigration judges can review applications that were previously denied by USCIS such as the I-485 – Adjustment of</p>	See the response to 4.11.
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			<p>Status Application and I-589 – Application for Asylum, Withholding of Removal and Relief under the Convention against Torture. When these applications are not approved by a USCIS officer, noncitizens are typically placed in removal proceedings and their applications are reviewed de novo. Notwithstanding the fact that immigration officers who adjudicate these petitions may have conducted in person, face to face interviews of noncitizen applicants, immigration judges consider legal conclusion, factual findings, and most importantly discretionary decisions de novo once the applicant is in removal proceedings.</p>	
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USCIS-2008-0027-0083	4.13	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	2. Applying the Most Deferential Standard of Review for AAO appeals of Discretionary Determinations Is Inappropriate Departing from past practice and precedent, and raising the standard of review to “abuse of discretion” from de novo review of discretionary decisions is inappropriate for several reasons. While administrative appeals of employment-based petition denials are not required before filing suit in federal district court, the Notice raises concerns as to the continued viability of an AAO appeal. Issues often arise as to the Service Center’s application of the requirements for a particular visa classification to the evidence presented. It is unclear how petitioners can be assured that this new exception to de novo review for “discretionary” decisions will not derail what should be a de novo review of whether the evidence is sufficient, under a preponderance of the evidence standard, to meet the visa classification criteria. Without notice and comment rulemaking, where USCIS considers concerns about how it intends to draw the line in practice, AAO appeals may be further complicated by a petitioner’s perceived need to address as a threshold matter why AAO review of its denial is de novo. USCIS indicates that it “questioned” whether use of the de novo standard is appropriate given “the initial adjudicator’s role in developing the record, identifying the discretionary factors, and	See the response to 4.11.
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		<p>ultimately weighing the [applicant's] conduct, character, relationships and other humanitarian factors.”⁴⁸ However, USCIS has not provided any justification why AAO review of discretionary determinations should be held at the most deferential standard of review, when established regulation and case law has long upheld the use of de novo review in immigration matters in which a judge or adjudicator has evaluated a case after formally taking testimony and argument from the parties. Yet, the nature of the adjudications the AAO reviews are generally paper adjudications where no live testimony is taken. The AAO is not given the advantage of an immigration officer's impressions or decisions based upon a face-to-face interview with the noncitizen applicant, thus a de novo standard of review is appropriate. First, the “abuse of discretion” standard of review is the most deferential standard of review and inappropriate for review of immigration officer discretionary decisions. The proposed revisions rely on a legal dictionary's definition of abuse of discretion; yet the actual term is in fact extremely complex and multifaceted, and can depend on the jurisdiction.⁴⁹</p> <p>The nature of the adjudications before the immigration officers, such as T visa or U visa adjustments or inadmissibility waivers, are typically adjudicated without an interview and decisions are made solely on the paper record before the officer. The AAO only benefits from</p>	
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			<p>the officer notes and limited analysis in the underlying decision upon appeal. Thus, the de novo standard of review is appropriate for the legal and factual analysis, but most importantly for the discretionary determinations where there is no testimony or reliable record for which to base the discretionary finding. Applying the most deferential standard of review to these discretionary decisions is incorrect.</p> <p>It is confusing and inefficient to have two vastly different standards for legal and factual conclusions and discretion. As the AAO is required to review all of the legal and factual determinations “anew” upon appeal, it would be inapposite for it to then give unfettered discretion to the USCIS officer’s discretionary determination in the same case. If, upon applying de novo review, the AAO makes new factual findings or legal conclusions, is the AAO then required to defer completely to the USCIS officer’s discretionary determination in the same case? The Notice offers no justification for allowing for the highest, most deferential standard of review to be applied to immigration officers’ discretionary determinations, while other forums, such as the BIA and IJ, do not apply such deferential standard of review of discretionary determinations.</p>	
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USCIS-2008-0027-0083	4.14	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>3. The Proposed Revisions Will Significantly Increase Administrative Burdens and Burdens on Stakeholders</p> <p>Two central purposes of the Paperwork Reduction Act of 1995 (PRA) codified in the statute are to reduce the burdens of individuals, small business, educational and nonprofit organizations...resulting from the collection of information by or for the Federal Government,⁵⁰and to ensure the greatest possible public benefit from and maximize the utility of information collected by or for the Federal Government.⁵¹ In its evaluation of the proposed revisions under the PRA, we call on USCIS to withdraw the information collection as it will dramatically increase the burden for individual applicants, as well as the service providers who assist them.⁵² Further, the proposed revisions diminish the public benefit from Form I-290B by creating stricter requirements which restrict access to and appropriate review of critical protections.”⁵³</p>	USCIS has analyzed the new information being collected on this revised information collection and determined that it represents the least burdensome alternative available and is useful for both a motion and an appeal. Therefore, the revisions do not violate the Paperwork Reduction Act.
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USCIS-2008-0027-0083	4.15	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>a. Burden on Applicants</p> <p>Changing the standard of review for discretionary determinations will diminish the public benefit of Form I-290B and the AAO appeals process. The proposed revisions disproportionately harm applicants who already face barriers to full access to immigration relief, including survivors of crime, applicants without legal representation, applicants with low English proficiency, among others. As noted above, a majority of discretionary denials are not subject to review on appeal, but there are several critical discretionary benefits that fall under the AAO’s jurisdiction, including critical humanitarian benefits such as Petitions for Qualifying Family Members of a U-1 Nonimmigrant, adjustment of status applications based on U visa or T visa relief, Temporary Protected Status, as well as critical waivers of inadmissibility that are often utilized in humanitarian cases.</p> <p>The de novo review of questions of law, fact, and discretion ensures that these applicants have a uniform framework in which the AAO will consider the appeal of their cases, and provides clarity that the AAO will review all elements of their case with fresh eyes to eliminate potential errors of fact, law, discretion, or any combination thereof. Further, the AAO’s complete de novo review of questions of law, fact, and discretion can often result in survivors receiving a just and appropriate outcome of their cases. Take for</p>	See the response to 4.11.
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			<p>example, a survivor of domestic violence with no criminal history whose appeal of her I-601 waiver was sustained helping her to heal from the years of domestic violence she endured from her abusive spouse. The ability to both provide new information and de novo review of the District decision can often make the critical difference in these and other matters.</p>	
<p>USCIS-2008-0027-0083</p>	<p>4.16</p>	<p>Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network,</p>	<p>b. Burden on Service Providers The Notice represents a significant departure from prior motions and appeal practice, and so it will greatly increase the time, effort and financial resources to comply with the proposed new requirements. All of the undersigned organizations provide resources, technical assistance, and training opportunities to thousands of advocates and attorneys nationwide, many of whom are at non-profit agencies with limited resources. Should the proposed revisions become finalized, we will face the additional burdens of having to update our advisories, training curricula, and resources in order to share accurate information about the proposed revisions. In addition, many of our organizations</p>	<p>See the response to 4.11.</p>

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		Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	will spend our limited resources providing additional individual technical assistance on the proposed revisions to attorneys and advocates serving survivors and other applicants.	
USCIS-2008-0027-0083	4.17	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the	c. Administrative Burdens on USCIS The proposed revisions will also cause undue burden to AAO adjudicators who now have to receive the proper training and supervision on implementing two different standards of review. This will alone result in added costs for USCIS. As USCIS provides no information, apart from a legal dictionary definition, on how it will consider “abuse of discretion,” the proposed revisions 20 will undoubtedly yield inconsistent results for applicants. These disparate results will mean that advocates will need to bring additional federal court actions against the agency, which in effect eliminates the usefulness of the AAO as an appellate body. USCIS creates unnecessary inconsistency among the agencies to create different standards that contradict long-standing and established	See the response to 4.11.

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		Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	practices among the appellate bodies adjudicating immigration application. To maintain consistency and avoid confusion among applicants, advocates, and DHS and DOJ personnel, de novo review of discretionary determinations should remain the practice with the AAO.	
USCIS-2008-0027-0083	4.18	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the	<p>III. The Notice Is Subject to Notice and Comment Under the Administrative Procedure Act</p> <p>USCIS is proceeding with these proposed revisions to the I-290B Notice of Appeal or Motion under the Paperwork Reduction Act (PRA) of 1995, as if they were simply a technical form change.⁵⁴ This is not the case. Rather than promulgate a rule, the proposed revisions are significant and substantive policy changes disguised as form and instructions revisions.</p> <p>The Notice incorrectly states that the changes it proposes are exempt from the notice and comment procedures in the APA.⁵⁵ In particular, although the Notice argues that it is either a “procedural rule” or an “interpretive” rule within the meaning of 5 U.S.C. § 553(b)(3)(A), it is neither.</p>	<p>DHS disagrees with the commenter and maintains that the proposed revisions fall within the definition of a procedural rule, even more so following the previously-addressed withdrawn sections. Specifically, the proposed revisions do not change the substantive standards by which USCIS evaluates appeals. <i>See JEM Broad. Co.</i>, 22 F.3d at 327; <i>see also Am. Hosp. Ass’n v. Bowen</i>, 834 F.2d 1037, 1055 (D.C. Cir. 1987).</p> <p>To the extent the proposed revisions are not procedural, they are still exempt from notice-and-comment rulemaking because they are, at most, “interpretive.” <i>See Mora-Meraz v. Thomas</i>, 601 F.3d 933, 940 (9th Cir. 2010) (“[A]gencies issue interpretive rules to clarify or explain existing law or regulations so as to</p>

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	Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center		<p>advise the public of the agency's construction of the rules it administers.”)</p> <p>The regulations at 8 CFR 103.3 and 103.5 set forth the requirements for appeals and motions. These revisions clarify regulatory requirements and do not change substantive standards for appeals and motions, just the procedural steps and evidence for filing.</p> <p>Further, considering that these changes are procedural and at most interpretative, even if rulemaking were conducted, DHS could implement them using a proposed rule with a 30-day comment period, respond to comments, and issue them with a final rule. For USCIS publish a proposed rule and final rule in the Federal Register, instead of a 60-day notice and a 30-day notice and provide comment responses in RegInfo would be elevating form over function.</p>
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<p>USCIS-2008-0027-0083</p>	<p>4.19</p>	<p>Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center</p>	<p>A. The Notice Is Not a Procedural Rule “In general, a procedural rule does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.”⁵⁶ Further, because “[t]he distinction between substantive and procedural rules is one of degree,” the classification of a rule often “depend[s] upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.”⁵⁷ Those policies encompass both the “need for public participation in agency decisionmaking” and the need “to ensure the agency has all pertinent information before it when making a decision.”⁵⁸ Because of the importance of those policies, “[t]he exception” to the APA’s notice and comment process “for procedural rules is narrowly construed and cannot be applied where the agency action trenches on substantial private rights and interests.”⁵⁹ Under that test, the provisions of the Notice are uniformly substantive, and therefore subject to notice and comment, rather than procedural. In fact, the D.C. Circuit has concluded that the announcement of “a new standard of review . . . would surely require notice and comment.”⁶⁰ That conclusion directly applies to the portion of the Notice that alters the standard of review applied by the AAO to discretionary decisions. And the Notice’s pronouncement that the AAO cannot review “no risk” determinations under</p>	<p>See the answer to 4.18</p>
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			<p>the AWA similarly affects the “rights or interests of parties”⁶¹ by removing a previously available appellate process. Contrary to the assertion in the Notice, the agency’s determination as to AWA appeals does “change substantive standards” related to those appeals—by precluding them altogether.⁶²</p>	
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USCIS-2008-0027-0083	4.19	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>Two of the other changes in the AAO cannot be seen as procedural rules because they impose “a ‘new substantive burden’” on those seeking AAO review⁶³ and “set the bar for what” filers “must do to obtain approval.”⁶⁴ Specifically, the AAO’s newfound refusal to consider fresh evidence on appeal places a new burden on filers to anticipate and submit all evidence that might become relevant, even if that relevance is not immediately apparent. The requirement that all grounds of inadmissibility be raised on Form I-290B—a requirement that has, in our experience, never existed in the context of AAO appeals—likewise imposes a new burden on filers.⁶⁵ That change also removes a filer’s preexisting right to limited review. Moreover, as shown above, both of these burdens will be significant and difficult to satisfy, especially for individuals proceeding pro se before the agency.</p> <p>The change allowing filers to waive the IFR process raises additional concerns. That change effectively seeks to amend an existing regulation, codified at 8 C.F.R. § 103.3(a)(2), that makes IFR mandatory.⁶⁶ This regulation went through the APA’s notice and comment process before they took effect.⁶⁷ The APA requires that “agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”⁶⁸</p> <p>Furthermore, although permitting filers to waive IFR might not create a significant new</p>	
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		<p>burden, it does “substantively affect[]” filers “to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking.”⁶⁹ After all, the IFR process may cure agency errors more quickly, and if it does, the continuation of automatic IFR will be of substantial value to the public. It is also the public, not the agency, that will have the most relevant information concerning that process. The change to IFR, like all of the other changes announced in the Notice, is therefore not a procedural rule exempt from notice and comment under the APA.</p> <p>The cases cited in the Notice do not support a contrary conclusion. The D.C. Circuit held that policies at issue in <i>American Hospital Association v. Bowen</i> were procedural because they were “merely hortatory” and “not binding” and because they did no more than “carefully replicate[] the substantive standards” of the governing statute.⁷⁰ The changes in the Notice, by contrast, are binding and do not even purport to be drawn from statutory language. The policy at issue in the D.C. Circuit Court case <i>Jem Broadcasting Co. v. FCC</i> is likewise distinguishable.⁷¹ Among other things, the policy at issue there, unlike the policies announced in the Notice, did not significantly alter the rights of, and burdens on, parties who appeared before the agency.⁷² The Notice therefore identifies no good reason to believe that its changes are exempt from notice and</p>	
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			comment because they are procedural rules within the meaning of 5 U.S.C. § 553(b)(3)(A).	
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USCIS-2008-0027-0083	4.20	Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center	<p>B. The Notice Is Not an Interpretive Rule</p> <p>The Notice also fails to identify any persuasive reason to believe that it is exempt from notice and comment because its changes are “interpretive” rather than legislative. An interpretive rule is one that interprets something, which is to say one that “construe[s] . . . language in a relevant statute or regulation.”⁷³ Furthermore, it is not enough for an agency simply to assert that a rule interprets an existing statute or regulation. Rather, “[t]o fall within the category of interpretive, the rule must derive a proposition from an existing document whose meaning compels or logically justifies the proposition,” and “[t]he substance of the derived proposition must flow fairly from the substance of the existing document.”⁷⁴ The sole relevant case cited by the Notice applies essentially the same test.⁷⁵</p> <p>The Notice, however, does not interpret any statute or regulation. To be sure, the Notice asserts that all of its changes interpret 8 C.F.R. §§ 103.3 and 103.5.⁷⁶ But that assertion is simply wrong. Nothing in either § 103.3 or § 103.5 even begins to speak to two of the changes in the Notice. The regulations are silent as to the standard of review that the AAO will apply. And they are equally silent on the question of the AAO’s jurisdiction over AWA “no risk” determinations.</p> <p>As to those changes, the Notice seeks to make significant, freestanding policy changes rather than interpret an existing regulation. As shown</p>	See the answer to 4.18
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		<p>above, the regulations do speak to whether the IFR process can be waived— and they directly foreclose that change. Section 103.3(a)(2), a legislative rule promulgated following notice and comment, makes the IFR process mandatory. By instead making IFR optional, the Notice contradicts that regulation, and its change therefore cannot be characterized as interpretive.⁷⁷</p> <p>Finally, although the regulations contain provisions that are tangentially relevant to the remaining two changes in the Notice, the Notice cannot plausibly be seen as providing a gloss on those provisions. Although 8 C.F.R. § 103.3(a)(1)(v) speaks to the specification of issues for appeal, it states only that an appeal will be summarily dismissed if it does not specify any “erroneous conclusion of law or statement of fact.” That provision cannot reasonably be interpreted to mean that Form I-290B must address every ground of inadmissibility. Similarly, the fact that § 103.3(a)(2)(vi) expressly allows a brief to be filed as part of an appeal cannot reasonably be read to mean that evidence may not be filed. And a party’s ability under § 103.5(a)(2) to submit evidence in support of a motion to reopen also does not speak to whether the AAO may consider such evidence as part of an appeal.</p> <p>In short, the Notice is procedurally defective because all of its changes must undergo full</p>	
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			notice and comment under the APA before they take effect.	
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<p>USCIS-2008-0027-0083</p>	<p>4.21</p>	<p>Wendy Wylegala on behalf of American Immigration Council, the American Immigration Lawyers Association, ASISTA Immigration Assistance, the Catholic Legal Immigration Network, Inc., the Immigrant Legal Resource Center, Kids in Need of Defense, and the Tahirih Justice Center</p>	<p>IV. Conclusion USCIS' proposed revisions to the I-290B Form and Instructions are not just about changes to a form or instructions, but go to the very core of an individual's ability to receive proper administrative review of their case. For the reasons listed above, we call on USCIS to withdraw the Notice immediately as it contains significant changes which contravene long established policy, harms an applicant's access to administrative review, and was not issued under the proper legal framework under the APA. Respectfully submitted, The American Immigration Council Immigrant Legal Resource Center The American Immigration Lawyers Association Kids in Need of Defense ASISTA Immigration Assistance The Tahirih Justice Center The Catholic Legal Immigration Network, Inc.</p>	<p>Thank you for your comment.</p>

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	5.0	Diane Rish, The American Immigration Lawyers Association (AILA)	[link to full PDF] The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to the above-referenced 60-day notice and request for comments on proposed revisions to Form I-290B, Notice of Appeal or Motion and its instructions published in the Federal Register on December 6, 2019. ¹ This comment supplements a joint comment that AILA submitted on February 4, 2020, alongside the American Immigration Council, ASISTA Immigration Assistance, Catholic Legal Immigration Network, Inc. (CLINIC), the Immigrant Legal Resource Center (ILRC), Kids in Need of Defense (KIND), and the Tahirih Justice Center. This supplemental comment offers feedback on the agency’s proposed change to the treatment of requests to appeal Adam Walsh Child Protection and Safety Act “no risk” determinations to the Administrative Appeals Office (AAO). While the joint comment mentioned above briefly touches on the agency’s proposed change to the treatment of Adam Walsh Act risk determinations, this supplemental comment is provided by AILA to further expand on that specific proposal. AILA is a voluntary bar association of more than 15,000 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	Thank you for your comment.
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			<p>regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form I-290B and its instructions, and believe that our members' collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.</p>	
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	5.1	Diane Rish, The American Immigration Lawyers Association (AILA)	<p>Comments on the AAO’s Appellate Jurisdiction Over “No Risk” Determinations Under the Adam Walsh Act</p> <p>By way of background, section 402(a)(2) and (a)(3) of the Adam Walsh Act Child Protection and Safety Act of 2006 (AWA) bars approval of family-based petitions filed by U.S. citizens and lawful permanent residents (LPRs) who have been convicted of a specified offense against a minor unless the Secretary of Homeland Security, in his or her “sole and unreviewable discretion,” determines that the U.S. citizen or LPR poses “no risk” to the beneficiary of the petition.²</p> <p>In the Federal Register notice, USCIS claims that the AAO does not have appellate jurisdiction over “no risk” determinations under the AWA.³ As justification for why USCIS believes that the AAO does not have appellate jurisdiction over such determinations, USCIS states in the notice that the DHS Secretary has not “yet” delegated appellate authority over AWA “no risk” determinations to the AAO by revising the Delegation 0150.1(U) or through other means provided by 8 CFR 2.1.4 Yet for years, the AAO has been exercising appellate jurisdiction over AWA “no risk” determinations. In fact, since at least 2010, USCIS has accepted appeals by affected parties of AWA risk determinations, and the AAO, in turn, has exercised appellate jurisdiction and issued non-precedent decisions over such AWA risk determinations.⁵ USCIS has published and maintained several of such non-</p>	<p>Thank you for your comment. As explained in the Federal Register Notice, DHS has determined that the AAO lacks appellate jurisdiction over AWA “no risk” determinations, and the proposed revision to the form instructions clarify this conclusion. USCIS has previously updated this guidance on its website, AAO Practice Manual, and its decision notices to remove any further inconsistencies.</p> <p>The purpose of this language is to prevent further confusion caused by inconsistent USCIS guidance on this issue. USCIS is making no changes to the final version of the revised Form I-290B in response to this comment.</p>
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		<p>precedent decisions on its public-facing website. 6 In addition, USCIS’s website has publicly stated since as far back as 2017 that the AAO has appellate jurisdiction over AWA risk determinations. As an example, please see below a screen shot of the USCIS’s AAO website from 2017 which publicly proclaims the AAO’s appellate jurisdiction over these determinations and states that such authority is based on a delegation to USCIS from the Secretary of the Department of Homeland Security (DHS): [see linked PDF for referenced screen shot and Exhibits]</p> <p>A complete copy of this 2017 screen shot, as well as a similar screen shot from the agency’s website in 2018 is attached as Exhibit A. Furthermore, the AAO Practice Manual, which is publicly posted on the USCIS website, has long stated that the AAO has jurisdiction for Adam Walsh Act risk determinations, including those arising out of Form I-129F and Form I-130. Please see a screen shot of Chapter 1 of the AAO Practice Manual taken on July 6, 2018. A complete copy of Chapter 1 of the AAO Practice Manual from 2018 is attached as Exhibit B.</p>	
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	5.1	Diane Rish, The American Immigration Lawyers Association (AILA)	<p>Over the course of nearly a decade, by accepting appeals of AWA risk determinations, reviewing such appeals and issuing appellate decisions, sharing such decisions with the public on its public facing website, and informing stakeholders of the AAO’s appellate jurisdiction through its website and practice manual, USCIS has established a pattern and practice of accepting and adjudicating appeals of AWA “no risk” determinations.</p> <p>USCIS has also created a serious reliance interest in such appellate jurisdiction among U.S. citizens and LPRs impacted by AWA as well as their qualifying foreign relatives who have been, or are being sponsored, through the family-based visa petition process. Since at least 2010, the AAO has issued dozens of appellate decisions on AWA risk determinations. In situations where the AAO sustained the appeal and overturned an unfavorable AWA risk determination, U.S. citizens or LPRs have relied on that decision to complete the immigration process for their foreign spouse, fiancé(e), unmarried child, unmarried son or daughter over 21 years of age, parent, etc. In some cases, this has involved uprooting their family member(s) from abroad to immigrate to the United States based on a reliance that the immigration process has been successfully completed for their foreign relative.</p>	
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	5.1	Diane Rish, The American Immigration Lawyers Association (AILA)	<p>Starting in the spring/summer of 2018, USCIS began quietly scrubbing from its public-facing resources reference to the AAO’s appellate jurisdiction over AWA risk determinations, such as from the AAO website and AAO Practice Manual. In addition, USCIS started preventing affected parties from submitting an appeal of an AWA risk determination to the AAO by rejecting such appeals. In a comment AILA submitted to USCIS in October 2019, AILA expressed deep concerns about these agency actions, in particular, the agency’s lack of public notice and comment regarding what appeared to be an attempt by USCIS to eliminate the AAO’s appellate jurisdiction over AWA risk determinations. 7</p> <p>USCIS is now attempting to eliminate the AAO’s appellate jurisdiction over AWA risk determinations through the Paperwork Reduction Act (PRA) process, by way of proposing revisions to Form I-290B and its instructions, as if this change is simply a technical form change. 8 This is not the case. The proposed revision is a significant and substantive policy change disguised as a form and instruction revision. The Federal Register notice incorrectly states that this proposed change is exempt from the notice and comment procedures under the Administrative Procedure Act (APA). 9 Although the notice claims that the proposed change is either a “procedural rule” or an “interpretive” rule within the meaning of 5 USC §553(b)(3)(A), it is neither. The notice’s</p>	
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			<p>pronouncement that the AAO does not have appellate jurisdiction over AWA “no risk” determinations is substantive as it substantially affects the “rights or interests of parties”¹⁰ by removing a previously available appellate process. Such an appellate process is particularly crucial to U.S. citizens and LPRs impacted by the AWA given that some federal courts have held that AWA risk determinations are not reviewable by federal courts.¹¹ Contrary to the assertion in the notice, the agency’s determination as to AWA appeals does “change substantive standards” related to those appeals—by precluding them altogether.</p>	
	5.1	Diane Rish, The American Immigration Lawyers Association (AILA)	<p>The change that USCIS is proposing would also undo nearly a decade of established USCIS pattern and practice, which has engendered serious reliance interests, in particular among individuals who are subject to the AWA and the qualifying foreign relatives who have been, or are being sponsored, through the family-based immigration process. U.S. citizens and LPRs who have received a favorable appellate decision from the AAO on an AWA risk determination have relied on that decision in order to complete the immigration process for their foreign relative. USCIS has failed to provide a reasoned analysis or explanation for the agency’s substantial departure from nearly a decade of an established pattern and practice of accepting appeals from affected parties and</p>	<p>The Form I-290B revision contains an explanation of the AAO’s lack of appellate jurisdiction over Adam Walsh Act “no risk” determinations in order to correct a legal error in the agency’s prior practice. USCIS has provided a 60-day notice of this procedural change, is responding to public comments and will publish a 30-day Federal Register notice requesting additional comments. Thus we are providing more notice and public input than the commenters are requesting we provide in a notice and comment rulemaking. USCIS disagrees that a petitioner would have any reliance interest because they would not have had to take any actions to conform their behavior to comply with the previous practice of allowing such appeals. In other words, a</p>

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			<p>exercising appellate jurisdiction over such determinations, particularly as this pattern and practice has engendered serious reliance interests that must be taken into account.¹² In short, the Federal Register notice is procedurally defective because the agency's proposed changes to the AAO's appellate jurisdiction over AWA risk determinations must undergo full notice and comment under the APA before it takes effect. For further discussion regarding why this proposed change is subject to notice and comment under the administrative Procedure Act, please see Section III of the joint comment that AILA and 6 other organizations submitted to USCIS on February 4, 2020.</p>	<p>petitioner who has certain traits that may make him or her be determined by a USCIS officer to be a risk to a beneficiary could not be said to rely on that determination being appealable to the AAO when they decided to file their petition. Thus, no reliance interest can be said to have engendered to affected parties and USCIS is not required to engage in notice and comment rulemaking to implement this change.</p>
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	5.2	Diane Rish, The American Immigration Lawyers Association (AILA)	<p>USCIS Should Provide a Grace Period to Allow Individuals Who have been Harmed by its Failure to Provide Notice and Comment and its “Inconsistent” AWA Information to Resubmit Form I-290B.</p> <p>Until USCIS completes the proper rulemaking procedure to effectuate this proposed change, the AAO should continue exercising appellate jurisdiction over such appeals. For USCIS stakeholders who have had their Form I-290B appeal of an AWA risk determination rejected by USCIS, based on the agency’s purported claim that the AAO lacks appellate jurisdiction over such matters, USCIS should provide these stakeholders with a grace period to resubmit their Form I-290B appeal request to the AAO.</p> <p>13</p> <p>Assuming arguendo that the AAO lacks appellate jurisdiction over AWA risk determinations and that DHS has met its notice-and comment rulemaking requirements for this proposed change, points that AILA does not concede, at a minimum, USCIS should provide impacted stakeholders a grace period to re-submit any appeals that are or were rejected prior to the finalization of this form revision as a request for a motion to reopen or reconsider. USCIS acknowledges in its notice that it has “posted inconsistent information on the USCIS website” regarding its AWA jurisdiction. Since at least 2018, USCIS stakeholders have been negatively impacted by the “inconsistent information” posted by USCIS, as this</p>	See the answer to 5.1
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		<p>information has led some stakeholders to submit requests for an appeal of an AWA risk determination to the AAO, only to have such appeal rejected by USCIS, on the basis that it lacks jurisdiction. To make matters worse, stakeholders who have had their appeal rejected have often been foreclosed from the opportunity to request a motion to reopen/reconsider as often the 30-day window for filing such a motion has lapsed by the time USCIS rejects and returns the appeal request to the affected party. Based on considerations of fundamental fairness, USCIS should provide stakeholders who relied on USCIS’s demonstrated past practice and “inconsistent” AWA information and who had their appeal rejected by the AAO, a grace period to re-submit Form I-290B directly to USCIS as a motion to reopen or reconsider. USCIS should also provide such a grace period to stakeholders who have received erroneous instructions from USCIS in denial notices instructing those seeking to file an appeal of the AWA risk determination to appeal the decision to the Board of Immigration Appeals (BIA) using Form EOIR-29. AILA has provided specific case examples of this issue to the CIS Ombudsman and previously raised this issue to the USCIS in a comment that AILA submitted to USCIS in October 2019.14</p>	
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		Diane Rish, The American Immigration Lawyers Association (AILA)	Conclusion We appreciate the opportunity to comment on the agency's proposed revisions to Form I-290B and instructions and look forward to a continuing dialogue with USCIS on these issues. Sincerely, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION	Response not needed.
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