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U.S. Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

Submitted via: PAO.EOIR@usdoj.gov

Re: Comments on Public Meetings Related to the Regulations Governing the EOIR Recognition and Accreditation Program, 8 CFR 1292 [EOIR Docket No. 176]

Dear Ms. Alder-Reid:

The American Immigration Lawyers Association (AILA) submits the following in response to the request for public comment on issues related to EOIR's Recognition and Accreditation Program ("R&A Program"). We welcome EOIR's commitment to engaging the public in this area.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws. We applaud EOIR's commitment to the R&A Program, and appreciate the opportunity to offer comments on how it could be improved. We believe that our members' collective experience and our efforts to combat "notario fraud" make us particularly well-qualified to offer views on this matter.

AILA supports the continued development and success of EOIR's R&A Program. We have supported the program since its inception and have never perceived it as a system that displaces attorneys. But the program in its current incarnation is flawed. This stems primarily from its lack of funding and oversight. AILA urges EOIR to address this lack of resources before any consideration of program expansion.

AILA is aware that the unmet legal needs of low-income immigrants have reached crisis proportions. Far too many individuals, particularly in removal proceedings, are unable to afford representation. The problem for detained individuals in proceedings is even more acute, with approximately 80% forced to represent themselves. Although AILA has a strong pro bono tradition and

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its members participate in a wide variety of pro bono initiatives across the country, we recognize that pro bono services cannot fully meet the need for low-income representation.

We hope that our comments will be helpful as the agency considers amendments to the existing regulation. EOIR's goal in reviewing the program should be to maximize competence as well as capacity. With the following revisions and necessary funding and staffing increases, the R&A Program will expand representation while still protecting low-income immigrants from unscrupulous individuals and organizations.

Recognition of Organizations

Building additional safeguards into the recognition process would help EOIR expand representation, combat program-related fraud, and enhance the quality of immigration services for low-income individuals without unduly burdening legitimate organizations that seek recognition. Specifically, we encourage EOIR to strengthen the initial documentation required for recognition; require organizations to reapply for recognition every three years; compel organizations to report key information annually to EOIR, and ensure that organizations provide legal services for free or at low cost to low-income persons. We also encourage EOIR to develop clear procedures for the withdrawal of an organization's recognized status.

Required Documentation to Establish Eligibility for Recognition

We recommend that EOIR require additional documentation to establish an organization's eligibility for recognition. Under the current regulation, an organization need only be a "non-profit religious, charitable, social service, or similar organization."¹ We urge EOIR to revise the regulation to require organizations to submit proof of tax-exempt, 501(c)(3) status and recommend that the regulations require organizations to submit a copy of each of the materials currently listed on Form E-31.

We further recommend that EOIR require organizations to go through the recognition process every three years to ensure that they are continuing to provide competent legal services to low-income individuals. Under the current regulation, an organization's recognition does not expire. As a result, a recognized organization could change considerably – for example, it could close or change its fee structure, leadership, staff expertise, access to resources, budget, or goals – and still hold itself out to be a BIA recognized organization. This policy is especially problematic when coupled with weak complaint mechanisms and withdrawal procedures, which make it very difficult to have an organization removed from the list of recognized organizations. If an organization fails to submit updated versions of the required documentation every three years, it would be automatically withdrawn from the program.

In addition, we propose that EOIR require every recognized organization to submit a simple report or form to EOIR annually. The report/form would include a list of accredited representatives associated with the organization, an acknowledgement that its fees are in compliance with EOIR's requirements, a staff list, the number and types of cases opened and closed by accredited representatives that year, and individual attestations from each accredited representative acknowledging that they have completed the

¹ 8 C.F.R. 1292.2.

required annual training proposed below. We further propose that EOIR compile that data and utilize it to analyze and evaluate the R&A Program's effectiveness.

Fraud Prevention

We applaud EOIR's commitment to fraud prevention, and believe that requiring organizations to reapply for recognition every three years and report key information annually to EOIR is critical to deterring abuse of the R&A Program. We also note that there are widespread anecdotal reports of accredited representatives leaving their recognized organizations and either joining a non-recognized organization or opening an immigration consulting service, while continuing to hold themselves out as accredited representatives. AILA urges EOIR to take affirmative steps to eliminate this practice, and suggests that the revised regulation include a requirement that recognized organizations notify EOIR of the departure of any individual accredited representative no later than 30 days after termination of his or her employment.

Additionally, it is important to give low-income individuals information about the R&A Program so that they can protect themselves from organizations that seek to exploit or misuse their recognized status. For example, EOIR should provide posters listing the recognition requirements to display in immigration courts, USCIS field offices, and offices of recognized organizations. EOIR should also issue certificates of recognition to recognized organizations which include the expiration date of the three-year recognition period. Recognized organizations should be required to display the certificate in a conspicuous location in their offices, and EOIR should record the organization's three-year recognition period on the current list of EOIR-recognized organizations.

Another way EOIR could help prevent fraud is to publish documents related to an organization's recognized status to its website to allow for public review and transparency.

Nominal Fees

AILA is aware that many legitimate recognized organizations have found the current "nominal fee" limitation makes their participation in the program difficult if not impossible. We believe that a change in language from "nominal fees" to "reasonable fees" would not address the problem. First, either phrase is subject to a wide-ranging interpretation and provides very little guidance as to a fee level that would be permissible. Moreover, many jurisdictions provide that "reasonable fees" are what attorneys must charge, which could lead to confusion about whether recognized organizations can or should be charging fees essentially equivalent to those charged by private attorneys.

AILA recommends a system under which EOIR verifies that all or most of a recognized organization's legal services are provided either free or at low cost to indigent or low-income persons, and that a meaningful part of the organization's budget comes from non-fee revenue, such as grant funding or charitable contributions.

We strongly discourage EOIR from changing the regulation to allow recognized organizations to charge a "reasonable fee" for their services. Attorneys are prohibited by ethics rules from charging

unreasonable fees.² If recognized organizations are permitted to charge a “reasonable fee,” low-income individuals may not be able to afford these higher rates, leaving them without any representation. Or worse, they may be forced to pay private attorney rates for services from someone who is less qualified than an attorney. The entire rationale behind allowing non-attorneys to practice before EOIR is to ensure that low-income individuals have access to representation at less than attorney market rates. Allowing accredited representatives and organizations to charge “reasonable” as distinct from “nominal” fees will introduce uncertainty, if not confusion, and would be completely at odds with the rationale for the expansion of the R&A Program.

If EOIR decides to permit organizations to charge a “reasonable fee,” we would urge it to implement an extensive community education program to explain why an individual should only seek representation from an attorney or BIA accredited representative. The community education program would continue the consumer education efforts of the multi-agency UPIL initiative, and focus on the differences between attorneys, BIA accredited representatives, and notarios. In addition, we suggest that EOIR require that no more than a specific percentage of the organization’s total budget be derived from fees.

Withdrawal of Recognition

Finally, we believe updated procedures for withdrawal of recognition would help combat fraud and abuse of the recognition program. The current withdrawal procedures are cumbersome, unclear, and rarely used. Because it is so difficult for an organization to be withdrawn from the program, the list of recognized organizations may contain non-operational organizations and organizations that are no longer qualified for BIA recognition. Indeed, it seems that it is far easier for an attorney to be prevented from practicing before EOIR than an accredited representative. We believe that a three-year recognition period, in which an organization’s recognition status is automatically withdrawn at the end of three years if it is not re-recognized by the BIA, is an effective method to combat this problem.

However, in addition to establishing automatic withdrawal procedures for organizations that fail to qualify for re-recognition, EOIR should develop clear procedures for the withdrawal of recognition for an organization that abuses its recognition status or wishes to be withdrawn from the EOIR list of recognized organizations during the three-year period. EOIR should expand the current process to allow requests for withdrawal to come from immigration judges, members of the bar, or the public. After appropriate screening and investigation, EOIR staff at the R&A Program should be permitted to initiate withdrawal proceedings on their own initiative.

Definition of “Low-Income”

The definition of low-income is an important and complex determination. AILA recognizes a distinction between indigent and low-income, and realizes that in many cases neither population may be able to pay an attorney’s fees for removal defense. Some, particularly those with large families, may even have difficulty paying for the preparation of immigration benefits applications.

AILA believes that 125% of the federal poverty guidelines is a very restrictive threshold and would preclude many in need of low cost services from accessing assistance. In some geographic areas, the

² See MODEL RULES OF PROF’L CONDUCT R. 1.5(a).

125% level would be more problematic than in others. For example, the D.C. Bar Pro Bono Program utilizes a 200% threshold as its cut-off for eligibility for services, and even then makes allowances for extraordinary medical or other expenses.

We also note that proof of income among a population that may lack employment authorization and may not have pay stubs, tax returns, or other documentation provides an additional layer of practical difficulty in calculating household income. We encourage EOIR to address this issue by strengthening the integrity of the organizations and accredited representatives participating in the program, rather than placing undue emphasis on income verification of the program's potential clients.

Accreditation of Individuals

AILA appreciates the opportunity to provide comments on the accreditation process for individuals. Training, education, and accountability are key components of improving the current program and ensuring its continued success.

Training for Accredited Representatives

We encourage EOIR to require training and ongoing education for BIA Accredited Representatives to maintain at least minimal competency in the fast-changing world of immigration law. Toward this end, we recommend that EOIR develop an exam on the fundamental concepts of immigration law and court procedures that accredited representatives would be required to pass. BIA recognized agencies could be responsible for administering the exam and certifying to EOIR that the candidate passed.

AILA is mindful that any training requirements can impose a burden, both in terms of time and cost, on the organizations and individuals seeking accreditation. However, this burden is not unmanageable and is necessary for public confidence in the integrity of the program as a whole. Because ongoing education is an important component of ensuring the R&A Program's success, AILA recommends that EOIR require each accredited representative to participate in a minimum of two trainings on immigration law, totaling 12-15 hours, each year. Each accredited representative would report fulfillment of this requirement via an attestation to be included in the recognized organization's annual report to EOIR.

In order to guarantee that this training requirement does not place an undue burden on recognized organizations, EOIR should develop a process for certifying immigration training providers. Once certified, training programs offered by these providers would not need to be reviewed by EOIR, and providers would be given flexibility in order to meet the educational needs of accredited representatives. Standards are already in place for similar CLE certified providers through the Association for Continuing Legal Education (ACLEA). Although AILA does not recommend that these required trainings be CLE certified, the ACLEA standards could be used as a benchmark for EOIR to determine the certification requirements and standards. Certification would also provide nonprofit organizations with an additional funding stream and the potential to offset the costs associated with training individual representatives.

Fraud Prevention

We appreciate EOIR's desire to increase capacity while maintaining the integrity of the R&A Program. Requiring individuals to reapply for accreditation every three years and report training hours annually to EOIR is critical to deterring abuse of the R&A Program, and ensuring that accredited representatives provide competent representation to their immigrant clients.

We encourage EOIR to put in place new procedures for reaccreditation, which should continue to occur every three years, as is stated in the current regulations. However, we urge EOIR to utilize the basic knowledge and skills exam described above as a tool during the reaccreditation process. In addition to its usefulness in testing basic knowledge of immigration law, the administration of this exam would help ensure that any individuals attempting to fraudulently become accredited would be prevented from doing so.

AILA also encourages the development of procedures that ensure individuals are not holding themselves out as accredited representatives after they become separated from their recognized organizations. EOIR should consider issuing identification badges or cards to accredited representatives, which would ensure that only attorneys and accredited representatives appear in immigration court. No longer would judges or detention center personnel be forced to accept the assertions of accredited representatives that they are, in fact, accredited. Such a card would provide these authorities a basis for confirming accredited status and protecting immigrants from unscrupulous imposters. The card should have an expiration date of three years to coincide with the representative's reaccreditation, list the organization with whom the representative is affiliated, and include language stating that the accredited representative is "permitted to practice immigration law by the Executive Office for Immigration Review; not a licensed attorney." The accredited representative could also receive a sticker for his or her card for each year of reported training to demonstrate compliance with the ongoing education requirements. These proposed safeguards would help prevent victimization of vulnerable immigrants by unscrupulous individuals. AILA also suggests that the same language on the accredited representative card, "permitted to practice immigration law by the Executive Office for Immigration Review; not a licensed attorney" be included on the business cards of accredited representatives and on any correspondence between accredited representatives and their clients.

By contrast, AILA does not support the issuance of individual certificates to accredited representatives since such credentials are easily duplicated and may wrongly suggest to immigrant consumers that the person with whom they are working is a licensed attorney. An accredited representative card would be more difficult to duplicate, and would provide accredited representatives who are providing skilled legal services with recognizable identification to help them better serve their clients.

AILA believes that it is incumbent upon EOIR to develop a clear complaint mechanism for accredited representatives which the public can easily access and use, in the same way that there is a similar mechanism for attorneys who are not providing competent representation. Such complaints should be received and reviewed by EOIR, and forwarded to the recognized organization with which the accredited representative is affiliated. In this way, the organization will be given notice of potential issues with its staff and can work to correct any problems internally.

In addition, standards of misconduct and discipline should be applied equally to everyone who appears before EOIR, whether attorney for the respondent, government, or an accredited representative. Ensuring that removal proceedings are conducted in a professional manner, as contemplated by the proposed standards for misconduct, requires that the standards be applied to all representatives appearing before EOIR. The same standard of diligence, communication, and competence must be maintained for all having a professionally responsible role in the proceedings.

Supervision of Accredited Representatives

Finally, AILA believes that it is always best for a recognized organization to have an attorney on staff. However, we understand that this is not always possible and, if required, would diminish some organizations' abilities to provide much needed services to low-income immigrants, particularly in geographic areas where few immigration attorneys are available. If the organization does not have an attorney on staff, it should be required to submit a contract or Memorandum of Understanding (MOU) with an experienced immigration lawyer committed to providing appropriate legal guidance to the organization as part of the recognition and reaccreditation process. This relationship should include ongoing access to legal information about the practice of immigration law through an established and continuing relationship with an attorney training network, such as the Catholic Legal Immigration Network (CLINIC) or Lutheran Immigration and Refugee Service (LIRS). We also urge EOIR to require organizations to notify EOIR within 30 days of any change in the supervising attorney(s) on staff, and that a new contract or MOU be submitted within 30 days if the relationship with the outside lawyer terminates or changes.

We urge EOIR to ensure that individual accredited representatives are assigned only to those cases appropriate to their level of skill and experience. We believe that the only way to accomplish this is to hold recognized organizations accountable for the work of their representatives coupled with an increase in training and education.

Conclusion

In conclusion, we thank EOIR for taking important steps to engage the public on issues surrounding the R&A Program and its continued development and success. We appreciate the opportunity to make suggestions for the R&A Program's improvement and look forward to a continuing dialogue with EOIR during the regulatory review process. However, we cannot express enough that none of these suggested changes to the program will be effective unless EOIR is authorized to devote the funding and resources required to provide effective oversight. It is not enough to put additional requirements or metrics in place without regulation. AILA would rather see the expansion of the R&A Program deferred temporarily so that EOIR can address these needs first. We implore EOIR to be circumspect in broadening the program to increase capacity without appropriate supervision and active management of this program.

Sincerely,
THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION