AMERICAN IMMIGRATION LAWYERS ASSOCIATION

November 30, 2015

Ms. Jean King
General Counsel
Office of the General Counsel
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

**Submitted via: www.regulations.gov**

**Re: RIN 1125–AA72, EOIR Docket No. 176**
**Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Federal Register 59514 (Oct. 1, 2015)**

Dear Ms. King:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the proposed rule, "Recognition of Organizations and Accreditation of Non-Attorney Representatives" (R&A Program), published in the Federal Register on October 1, 2015.

AILA is a voluntary bar association of more than 14,000 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 in response to this notice of proposed rulemaking. We believe that our members' collective experience and our efforts to combat the unauthorized practice of law make us particularly well-qualified to offer views on this matter.

**Transfer of R&A Program from BIA to Office of Legal Access Programs (OLAP)**

**Proposed 8 CFR §1003.0(f)(2)** would vest the Office of Legal Access Programs (OLAP) with the sole authority to recognize organizations and accredit representatives to appear on behalf of clients before the Immigration Courts, the Board, and/or DHS, thus transferring this authority from the Board of Immigration Appeals (BIA). Whereas the purpose and primary mission of OLAP is "to improve access to legal information and counseling and increase the level of representation for immigrants appearing before the Immigration Courts and Board of Immigration Appeals," it logically follows that this same office should be charged with

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monitoring the quality of and accessibility to authorized legal service providers and representatives. The proposal to transfer administration of the R&A Program from the BIA to OLAP is well-placed and appropriate. We support this change.

**Recognition Standards**

In line with transferring the administration of the R&A program to OLAP, setting new and improved standards for the recognition and accreditation process is necessary to ensure that access to representation is responsibly achieved and given proper oversight. Toward this end, we commend EOIR's efforts to strengthen the documentation requirements for obtaining and maintaining recognition.

**Proposed 8 CFR §1292.11(a)(1)** would require an organization to demonstrate that it is a "non-profit, Federal tax-exempt religious, charitable, social service, or similar organization established in the United States." AILA supports this change and notes that it is in line with the recommendations we outlined in 2012.[1] However, we also acknowledge that not all qualified organizations may be designated as tax-exempt under 26 USC §501(c)(3), and thus appreciate the proposal to allow organizations to demonstrate tax-exemption under other sections of the Federal tax code, and to recognize that this requirement can be satisfied where a request for tax-exempt status is pending at the time of the initial application. We also appreciate the acknowledgment that 501(c)(3) status by itself is not sufficient for accreditation, and thus, such organizations would also have to demonstrate a non-profit, religious, charitable, or similar purpose. The granting of 501(c)(3) status does not make an organization impervious to issues involving the unauthorized practice of immigration law. Thus, we appreciate the fact that the new recognition standards will help filter out organizations whose practices might undercut the mission of OLAP to improve access to quality legal representation.

**Proposed 8 CFR §1292.11(a)(2)** would require the organization to "have at least one employee or volunteer of the organization approved as an accredited representative" to be recognized and to maintain such recognition. We support this proposal, which would ensure that organizations seek accreditation only when necessary (i.e., apply only when they employ non-attorney staff), and that such non-attorney staff members are indeed qualified and eligible for accreditation.

**Proposed 8 CFR §1292.11(a)(3)** would eliminate the "nominal charges" requirement and replace it with a requirement that a substantial amount of the organization's budget be derived from sources other than client fees. **Proposed 8 CFR §1292.11(a)(4)** would further require that the organization serve primarily low-income or indigent persons. Taken together, these provisions create a better threshold to awarding recognition. Understanding that funding

[1] AILA Comments on EOIR's Recognition and Accreditation Program, *published on* www.AILA.org at Doc. No. 12040644 (*posted* 4/6/12).

structures of organizations vary widely, we recognize the difficulty in prescribing a formulaic standard for defining what would constitute a "substantial amount" of non-client fee revenues, and appreciate the fact that the regulation does not include a specific percentage. However, we are concerned that the reference in the Supplementary Information to 25 percent or less may unintentionally exclude some legitimate and well-qualified organizations from recognition.[2] To the extent that OLAP is accorded flexibility in reaching these determinations and organizations are invited to submit documentation validating their non-profit status and proof that they serve the intended populations, we support these changes.

**Proposed 8 CFR §1292.11(d)(3)** would permit a public interest waiver of the "substantial amount" requirement for some qualifying organizations. According to the Supplementary Information:

> *"Public interest" factors to be considered include: The geographic location of the organization; the manner in which legal services are to be delivered; the types of immigration legal services offered; and the population to be served. The history and reputation of the organization in its community and the qualifications of its staff may also be considered in the assessment. Organizations likely to be considered for the waiver may be, for example, operating in an underserved area, such as a remote detention facility, or providing assistance to vulnerable or economically disadvantaged populations, such as mentally incompetent persons, unaccompanied minors, or adjustment of status self-petitioners under the Violence Against Women Act (VAWA).*

We appreciate the inclusion of this public interest waiver provision and though we note that it is intended to be used in "limited circumstances," we hope that EOIR will utilize it in a manner generous enough to ensure that reputable organizations are not unnecessarily excluded from recognition.

**Proposed 8 CFR §1292.11(a)(5)** would require an organization to have "adequate knowledge, information and experience" in order to be recognized. Although this requirement places an additional burden on the organization, the benefit and assurance to the individuals served is significant. Further, it encourages the organization to maintain an adequate level of training and competency in the delivery of legal services.

[2] 80 Fed. Reg. 59514, 59518 (Oct. 1, 2015). "The proposed rule would require OLAP to review the organization's funding sources. In doing so, the rule does not identify a specific formula or percentage to be used to measure a ''substantial'' amount. Rather, under the proposed rule, OLAP would make a determination looking at the totality of the organization's circumstances. For example, an organization with an annual immigration legal services budget funded by either no immigration client fees, membership dues, or donations, or with a quarter (or less) of its annual immigration legal services budget provided by such funding would likely meet the ''substantial amount'' requirement."

Lastly, we agree with proposed **8 CFR §1292.11(a)(6)**, which requires the organization to designate an authorized officer to act on behalf of the organization and facilitate communication with OLAP. We hope that this will have the added benefit of providing consistency in maintaining information on the accreditation process in the face of the inevitable turnover of organization employees.

**Accreditation Standards**

**Proposed 8 CFR §1292.12(a)(1)** would require the individual to "have the character and fitness to represent clients before the Immigration Courts and the Board, or DHS, or before all three authorities. Character and fitness includes, but is not limited to, an examination of factors such as: Criminal background; prior acts involving dishonesty, fraud, deceit, or misrepresentation; past history of neglecting professional, financial, or legal obligations; and current immigration status." While we generally support the concept of a character and fitness requirement, we take issue with a couple of points.

First, aside from comparing the process to the "standards and principles of fitness that state bars apply to applicants for admission," it is unclear what the character and fitness assessment will involve.[3] The Supplementary Information states that additional documentation may be submitted in support of the applicant's character and fitness, though no actual standards beyond the signatures of the organization and applicant are detailed.[4] Additional guidance in this area would be welcomed by both new applicants and existing accredited representatives.

Second, we strongly oppose any consideration of an accredited representative's immigration status in the character and fitness determination and object to the inclusion of this language. The Supplementary Information states:

> *An individual's current immigration status is also a separate factor in the fitness determination because of the inherent conflict in having accredited representatives represent individuals before the same immigration agencies before whom they are actively appearing in their personal capacities. Moreover, an individual's immigration status may affect whether immigration practitioners can continue their representation of clients throughout the pendency of their clients' immigration matters.*

We are very concerned that the addition of a "status" requirement will unnecessarily discriminate against many potential accredited representatives who may have a valid work authorization document that has been issued in accordance with the DACA program, deferred action, parole in place, an order of supervision, or otherwise. In addition, this requirement would undoubtedly have a chilling effect on the ability of recognized organizations to secure critical volunteer talent,

[3] 80 Fed. Reg. at 59519.
[4] *Id*. at 59520.

even though work authorization is not required in the volunteer context. Therefore, we strongly encourage EOIR to remove the reference to "immigration status" in the regulation setting forth the character and fitness requirement.

**Proposed 8 CFR §1292.12(a)(6)** would require the applicant to possess "broad knowledge and adequate experience in immigration law and procedure." While this burden could be significant, we believe that training and ongoing education is a necessary component of the accreditation process given the inherent complexity of the practice of immigration law and the constantly shifting procedural changes.

**Application Process**

**Proposed 8 CFR §1292.13(a)** would require submission of the application for recognition or accreditation on OLAP, with service of a copy of the request to each USCIS district director in the jurisdictions in which the organization offers or intends to offer legal services. The proposed regulation eliminates the separate requirement that ICE also be served with a copy of the application. This change makes sense and we support it.

The proposed regulation also states that OLAP "may review any publicly available information, or any other information that OLAP may possess about the organization … or the proposed representative …." in making its decision. Though we understand the need to carefully vet all applicants for recognition and accreditation, and note that organizations will be given a "reasonable opportunity to respond" to such information, we urge EOIR to provide at least 90 days to respond in this and other situations that may require clarification.

**Extending Recognition and Accreditation to Multiple Offices or Locations of an Organization**

**Proposed 8 CFR §1292.15** would, upon approving a request for recognition, or a renewal request, or at any other time, allow the OLAP director to "extend the recognition of an organization to any office or location where the organization offers services." We applaud EOIR for making the process more efficient and less burdensome for organizations with multiple offices that have essentially the same "staff, structure, mission, and tax status." This will be especially important for offices in underserved locations, which often operate as satellite locations rather than as the organization's "main" office.

It appears that EOIR strikes the correct balance by requiring an organization to conduct regular inspections and provide supervision and control of the representative at each office. In addition, the fact that OLAP would have the discretion to extend recognition and accreditation in these circumstances will provide an adequate case-by-case determination of when it is appropriate.

**Conditional Recognition**

**Proposed 8 CFR §1292.11(f)** recognizes a two-year "conditional recognition" period for organizations not previously recognized and organizations who previously lost recognition but have been reapproved. Though we support this proposal, we are concerned that two years may be too long for an organization to enjoy the benefits of recognition without being subject to further review. This is particularly true given that the standard renewal period is three years – only one year longer than the conditional period. Therefore, we believe an 18-month period of conditional recognition may be more appropriate.

**Reporting, Recordkeeping and Posting Requirements**

**Proposed 8 CFR §1292.14** imposes a number of reporting, record keeping, and posting requirements on recognized organizations. For example, organizations would be required to report certain changes, such as changes in the organization's contact information or material changes to a recognition or accreditation application or supporting documentation to OLAP no more than 30 days from the date of the change. Moreover, OLAP may require organizations to post public notices regarding the organization's recognition and accreditation status, and the means to file a complaint. We support these provisions and believe that they will help keep the community informed as to the validity of an organization's recognition status. In addition, the implementation of a 6-year record keeping element for each office or location will assist in deterring unscrupulous organizations from participating in the program.

**Sanctions**

**Proposed 8 CFR §1003.110** sets forth provisions for sanctions that are generally consistent across recognized organizations, accredited representatives, and attorneys. We welcome this effort. These provisions set forth three seemingly straightforward grounds for sanctions, namely: (i) providing false or misleading information in applying for recognition or accreditation of the organization's representatives; (ii) providing false or misleading information to clients or prospective clients regarding the scope of authority or the services provided by the organization or its accredited representatives; and (iii) employing, receiving services from, or affiliating with an individual who performs an activity that constitutes the unauthorized practice of law or immigration fraud. The proposed rule also introduces grounds for sanctions against an organization for "failing to adequately supervise accredited representatives," but does not require EOIR disciplinary counsel to share information about warning letters, informal admonitions, and agreements in lieu of discipline with the organization. However, it is unclear whether EOIR disciplinary counsel and OLAP have a mandatory duty to provide notice to an organization regarding conduct that could lead to disciplinary action for failing to adequately supervise, and to provide a reasonable opportunity for the organization to cure such behavior before sanctions may be imposed. Although the proposed rule indicates that the continuation of the conduct after

notice to the accrediting organization is grounds for discipline, the mandatory requirement for such notice can be and should be more fully spelled out.

The proposed rule also lists three types of sanctions against a recognized organization, namely revocation, termination, and any other sanction, other than a suspension that an adjudicating official of the Board deems appropriate.[5] However, the rule is silent in terms of the standards governing the application of each of these forms of discipline, thus suggesting that the choice between these sanctions, each of which has different consequences, is entirely discretionary. Since this is a penalty scheme, the proposed rule should set forth basic standards for the application of each of these forms of discipline.

**Proposed 8 CFR §1003.111** introduces an emergency remedy of "interim suspension" of certain accredited representatives if, by a preponderance of the evidence, it is shown that they pose a substantial threat of irreparable harm to clients or potential clients. In cases involving imminent harm to the public, it is critical that a speedy remedy be available. In addition, though the proposed regulation provides for notice to the accredited representative and a 30 day time period to respond to a petition for interim suspension, it does not address a time period for rendering the final decision on interim suspension.[6] In the interest of due process, we suggest that EOIR set forth a reasonable, but specific time period for rendering a decision on the interim suspension petition.

**Reinstatement**

**Proposed 8 CFR §1003.107** sensibly permits EOIR and DHS disciplinary counsel to raise relevant evidence to OLAP during reinstatement proceedings and object to reinstatement where a practitioner failed to comply with the terms of a suspension. This will ensure that reinstatement decisions are based upon a full and transparent hearing. In addition, the rule would preclude reinstatement of an accredited representative that was disbarred.[7] As disbarment with no opportunity for reinstatement is an extreme sanction, we note that it will be important that accredited representatives receive adequate notice of these new consequences of disbarment.

**Recognition and Accreditation before DHS**

We welcome the simplification of the recognition and accreditation process with EOIR only applying the standards set forth at 8 CFR §1292 (and not 8 CFR §292) as of the effective date of the final regulations. We also welcome the amendment of the DHS regulations so that they are consistent with the EOIR regulations. However, it is unclear what purpose, if any, the DHS regulations will serve since it appears that OLAP will ultimately be responsible for all

[5] Proposed 8 CFR §1003.110(a)(iii).
[6] Proposed 8 CFR §1003.111(a)(3) and (b).
[7] Proposed 8 CFR §1003.107(c)(2).

recognition and accreditation, including partial accreditation before DHS. Therefore, the Supplementary Information to this proposed rule, or the forthcoming proposed rule amending the DHS regulations, should clarify the continuing purpose of the DHS regulations.

**Conclusion**

We appreciate the opportunity to offer these comments on the proposed R&A Program rules and look forward to continuing to engage with EOIR on this important issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION