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**Re: Department of Justice, Executive Office for Immigration Review, EOIR Docket No. 18-502, RIN No. 1125-AA85, A.G. Order No. 4515-2019, 84 FR 44537, Organization of the Executive Office for Immigration Review -Public Comment Opposing the Interim Rule**

Dear EOIR:

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) in opposition to the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) Interim rule, Organization of the Executive Office for Immigration Review, RIN No. 1125-AA85, published in the Federal Register on August 26, 2019. We believe that the reorganization will have a detrimental impact on the capacity-building goal of the legal access programs, and we view the delegation of BIA decision-making to the EOIR director as an unlawful delegation of powers that will undermine the authority of the Board of Immigration Appeals (BIA).

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. Much of the training and technical assistance we provide is utilized by accredited representatives in DOJ recognized programs. We serve the community of organizations that are most impacted by this rule.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. As the lead organization for the campaign, ILRC receives and re-grants substantial philanthropic dollars to local immigration service providers across the United States who help lawful permanent residents apply for naturalization. Our local partners, who are more than sixty percent DOJ recognized programs, have helped more than 420,000 permanent residents apply for naturalization.

We have extensive experience with recognized programs operating under EOIR's Office of Legal Access Programs (OLAP)'s Recognition and Accreditation Programs (R & A Programs) which offer legal services to low-income immigrants through offices with qualified non-lawyer accredited representatives that perform legal representation before USCIS and EOIR. Many of these programs are also providers of OLAP's legal orientation programs. These programs have helped hundreds of thousands of lawful permanent residents with the naturalization process, family petitions, and humanitarian applications to USCIS. ILRC is also a leader in VAWA, U, and T immigration relief for victims of domestic violence, crime or trafficking. The recognized programs and their accredited representatives that we assist are leaders in these types of applications, as well.

Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain representation in applying for immigration benefits or naturalization. We know that representation in immigration matters before USCIS and the EOIR is a too scarce resource for low-income people. The legal access programs under OLAP are essential to building capacity for representation by extending recognition to programs and accreditation to qualifying paralegals.

We oppose the current rule because it places OLAP within a policymaking office that has no legitimacy until this rule makes its establishment official. The Office of Policy is an arm of a political appointee, the Attorney General, that was created in 2017 to advance the policy agenda of the current administration. The Office of Policy has promoted a restrictive immigration agenda since its inception. Structurally, we believe that it is nonsense to have an Office of Policy housed in the EOIR, which is the office in charge of administering the immigration courts and is responsible for adjudications. It creates the appearance of impropriety, and the risk of actual conflict, for an office created under the court administrator to interfere with the decisions of the courts and the BIA. Under rule of law, the precedent decisions of the BIA should establish policy. This power may not be usurped by one individual and the policy office that the Attorney General recently created within EOIR.

- 1. Background on the functions of the OLAP and the R & A Program: An office and program dedicated to increasing legal representation for immigrants**
  - **OLAP, the program office eliminated by the rule, has almost twenty years of expertise and experience in operating programs promoting increased legal representation of immigrants.**
  - **The R & A program has existed for more than sixty years and was placed under OLAP after years of internal and external discussion as well as formal notice and comment because it harmonized with OLAP's other programs which promoted access to legal representation.**

In its interim rule, the DOJ EOIR professes to rectify a structural anomaly by reorganizing EOIR operations. This false justification for the reorganization masks what must be rightly understood as a motivation to advance a policy agenda hostile to immigrants by reducing access to legal representation. OLAP oversees several long-standing programs of DOJ and is not an "anomaly" as described in the rule. The EOIR Office of Policy that purports to take it over is the anomaly, as it was created in 2017 by the then Attorney General and had no regulatory authority until this rule attempts to give it some. The reorganization is nothing less than a power grab, which, far from being a mere restructuring, has far-

reaching, substantive implications for long-standing programs. As such, it required compliance with the Administrative Procedures Act.

OLAP operates the R & A program, a function that has resided with DOJ for over 60 years.<sup>1</sup> The 2016 rule moved the R & A program into OLAP within EOIR because that office was already handling several legal access programs designed to promote increased representation of low-income immigrants.<sup>2</sup> The purpose of the R & A program is “to promote the effective and efficient administration of justice before DHS and EOIR by increasing the availability of competent non-lawyer representation for underserved immigrant populations.”<sup>3</sup>

For more than six decades, the R & A program has addressed the problem of “the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases...”<sup>4</sup> The R & A program extends the ability of low-income immigrants to obtain legal representation because it allows non-profit organizations, after proving their charitable purpose and expertise in the field of immigration law, to be “recognized” by the Department of Justice. These recognized programs can also request that their qualified paralegals become “accredited representatives” to enable them to file immigration applications and represent clients before immigration agencies and in immigration court. There are currently 823 recognized non-profit organizations nation-wide, with 1,986 accredited representatives. Most are faith-based organizations that have been serving in this area for decades. Many university and law school clinics are in the R & A program, as well.<sup>5</sup> These programs represent the most vulnerable immigrant populations, including victims of domestic violence filing petitions under the Violence Against Women Act, victims of crime filing for U visas, asylum seekers, refugees, and juveniles. In addition, the recognized programs assist naturalization applicants and immigrants filing petitions to reunite their families.

Within the office of EOIR Director, OLAP has been responsible since 2000 for running several programs that foster legal representation in immigration: the national qualified representative program, which is

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<sup>1</sup> Among the first recognized legal services programs under the R & A program was the Connecticut Institute for Refugees and Immigrants in 1958, which continues to deliver legal services today for immigrants with a six person staff of accredited representatives. EOIR, Recognition and Accreditation roster, <https://www.justice.gov/eoir/page/file/942301/download>. R & A was initially operated by the Board of Immigration Appeals within the Justice Department. In 2000, OLAP (then known as the legal orientation and pro bono programs) was established in the Office of the EOIR Director, administering programs that promoted legal representation for immigrants in removal proceedings by offering legal education on rights and responsibilities by pro bono legal services providers. In 2016, after more than five years of notice and comment procedures it was decided to move the R & A program under OLAP and away from the Board of Immigration appeals. 81 Fed. Reg. 92346 (Dec. 19, 2016). See 77 Fed. Reg. 9590 (Feb. 17, 2012) (notice of two public meetings on possible changes with R & A program).

<sup>2</sup> 81 Fed. Reg. 92346 (Dec. 19, 2016).

<sup>3</sup> EOIR, *Recognition of Organizations and Accreditation on Non-Attorney Representatives*, 80 Fed. Reg. 59514 (Oct. 1, 2015).

<sup>4</sup> *Id.*

<sup>5</sup> Among the long-established charitable providers of immigration legal services in the R & A program are more than 200 Catholic organizations, at least a dozen Lutheran organizations, as well as groups that represent Quaker, Jewish, Muslim, Episcopal, Evangelical, Anglican, Mennonite and Baptist faiths. There are dozens of university legal clinics, legal services offices, refugee groups, and other charitable non-profits who are in the R & A program. EOIR, *Recognition and Accreditation roster*, <https://www.justice.gov/eoir/page/file/942301/download>.

mandated by court order from the 9<sup>th</sup> Circuit and provides funded counsel for individuals in removal proceedings who are deemed mentally incompetent; the maintenance of the list of pro bono attorneys that is required to be distributed in immigration courts to persons in removal proceedings; the operation of the legal orientation program and the legal orientation program for custodians of unaccompanied minors, which are now funded by specific congressional appropriations; and the immigration help desk, which assists individuals who are representing themselves in immigration court.

**2. The Office of Policy that is taking over recognition and accreditation and other legal access functions of OLAP is an anomaly created by the administration two years ago that has no expertise or interest in fostering legal representation.**

The interim rule makes sweeping changes to the programs run by OLAP by placing them under a political office established at EOIR in 2017, called the Office of Policy, which has been responsible for implementing a series of restrictive immigration measures. The interim rule “transfers OLAP’s responsibilities to a division in the Office of Policy and removes references in the regulations to OLAP and the OLAP Director...,” thereby placing the responsibilities of OLAP with the Office of Policy. In doing so, this rule is impacting programs within EOIR that are supported by regulation,<sup>6</sup> court order,<sup>7</sup> and specific congressional appropriations.<sup>8</sup>

The Office of Policy awards the top position of leading OLAP under the new rule to itself, as the Assistant Policy Director would be replacing the Director of OLAP as the head of the functions of the former OLAP. It is irrational to put an Office of Policy in charge of a program that runs legal access programs. The current OLAP is an administrative office overseeing legal access programs. OLAP does not have any policy functions.

The Office of Policy describes itself as a body which promotes quality and consistency in adjudications throughout EOIR. It has communications functions for EOIR. In fact, it is known within DOJ and by the public that the Office of Policy was created by the current administration in 2017 to implement the restrictive anti-immigrant agenda and to ensure the compliance of EOIR in that mold. The existence of a policy program in an office that is supposed to manage the business of the immigration courts is an anomaly, begging the question: are decisions to be made by the immigration judges and the BIA or by the Office of Policy? The mere existence of such ambiguity demonstrates the problem.

The Office of Policy announced the asylum ban for individuals who entered the United States across the southern land border who are unable to show that they applied for asylum protection in every country through which they transited en route.<sup>9</sup> This office also released a regulation encouraging “streamlined”

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<sup>6</sup> EOIR, *Recognition of Organizations and Accreditation on Non-Attorney Representatives*, 80 Fed. Reg. 59514 (Oct. 1, 2015).

<sup>7</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx) (C.D. Cal.) (Feb. 27, 2015).

<sup>8</sup> Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, H.R. 3401, 116<sup>th</sup> Congress (2019) providing \$10,000,000 for the services and activities of the legal orientation program.

<sup>9</sup> Department of Homeland Security, Department of Justice, EOIR, U.S. Citizenship and Immigration Services, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019).

review by the BIA, which in reality meant reducing due process in appeals.<sup>10</sup> The Office of Policy has no demonstrated expertise in running the R & A program, nor in running the court-mandated national qualified representative program, nor the congressionally funded orientation programs. Nor does its policy agenda align, in any way, with doing so.

The rule attempts to justify these far-reaching structural changes by referencing the “official EOIR organizational chart” approved by the Attorney General. The chart being referenced was created by the current administration’s then Attorney General in 2017, who had little interest in any programs that provided increased legal representation for low-income immigrants. The rule claims that “no justification was provided” as to why OLAP should be an entity within the Office of the Director. This is patently untrue: in fact, there a long and well-documented process of internal and external debate led to the decision to house OLAP within the Office of the Director and to the transfer of the R & A program into OLAP.

**3. The publication of the rule as an interim final rule violates the Administrative Procedures Act because it failed to provide prior notice and the opportunity to comment to the public on a matter involving a substantive program change that impacts thousands of immigrants and the non-profit programs that represent them.**

This rule was published as an interim rule effective immediately, on the pretense that it merely deals with rules of internal agency organization and is therefore exempt from the requirement that rules that impact the public must be published as proposed with opportunity for prior notice and comment.<sup>11</sup> But it is obviously not the case that the rule involves a mere internal reorganization. The rule should have been published as a proposed rule for public notice and comment because it makes major changes in the substance of the legal access programs by placing them in a political office, possibly eliminating them entirely. The rule ignores years of rulemaking from 2012 and beyond that culminated in the 2016 rule that placed the R & A program in OLAP, and completely refuses to acknowledge the enormous stake that the public has in the programs run by OLAP, including the R & A program, legal orientation, and the national qualified representative program.

This is not the first time that this administration has aimed to eliminate OLAP’s programs. EOIR announced a similar plan to eliminate OLAP’s legal orientation programs in spring of 2018, but after protests from the Senate Appropriations Subcommittee, the programs were restored by then Attorney General Sessions.<sup>12</sup> The Attorney General and the EOIR Director were both witnesses in hearings where they were challenged on the termination of the OLAP orientation program, and they reversed their decision after the committee’s opposition. The committee members, quoting EOIR’s own materials, pointed out that legal orientation programs aid court efficiency, making it possible for cases to be completed faster, resulting in fewer court hearings and less time spent in detention, and that the

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<sup>10</sup> Department of Justice, EOIR, *Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, 84 Fed. Reg. 31463 (July 2, 2019).

<sup>11</sup> Administrative Procedures Act, 8 U.S.C. § 553.

<sup>12</sup> Department of Justice, *Opening Statement of Attorney General Jeff Sessions Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies*, (April 25, 2018), [justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee](https://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee).

representation rates for detained individuals is 30% or lower, a cause for concern.<sup>13</sup> A statistical performance study of the legal orientation program found that the program assisted the immigration courts in increasing the total number of case completions, and doing so in less time than cases that had no legal orientation, thus helping to reduce the massive backlog in the immigration courts. The study also showed that legal orientation reduced the number of *in absentia* removal orders by educating persons who were in removal proceedings about their rights and responsibilities in immigration court.<sup>14</sup> EOIR was unable to provide reasonable justification for ending the program. In this most recent volley, the DOJ is again issuing a rule that lacks any reasonable justification, and its movement of OLAP's programs into a policy office that promotes restrictive immigration policies will have a harmful and sweeping impact on the educational and capacity-building goals of OLAP's programs.

The rule impacts almost 2000 accredited representatives and the 800 non-profit programs that employ them, in addition to the thousands of immigrants who those programs represent. The public has not been consulted on this change despite its major stake in these programs. Failing to publish the changes as a proposed rule is a violation of due process and the Administrative Procedures Act, which requires prior notice and comment if the public will be adversely impacted. Consequently, the rule is improper and cannot stand.

**4. The Board of Immigration Appeal's authority and the responsibilities of the Office of the General Counsel are being unlawfully delegated to the EOIR Director, an administrator who is being given the role of chief judge and principal counsel for the agency.**

The rule also allows the Director of EOIR to decide appeals filed at the Board of Immigration Appeals if adjudication exceeds time limits of 90 days (for single Board member cases) or 180 days (if a three-member panel is assigned). There is no supporting study or data in the interim rule to support the need for this extraordinary delegation of power. There is no showing that the BIA with any regularity exceeds the 90/180-day time limits prescribed in 8 C.F.R. § 1003.1(e)(8) or that they might have an unwieldy backlog. Even if there were such a problem, resourcing the BIA to decide appeals in a timely manner would be the logical way to address it. Instead, the interim rule engages in a below-the-radar delegation of power to the Director of the EOIR. The Director of EOIR is an office administrator for the court system of EOIR, not a judge. This re-assignment of the BIA's authority to a non-judge is arbitrary and violates due process, as it curtails review to a minimum and allots decisive authority to an individual who is not part of the Board of Immigration Appeals and has not been qualified to be a judge for that body.

The EOIR Director and the BIA are separate offices for a reason: it gives at a minimum the appearance of impropriety, and has a high likelihood of actual abuse of power, if the decision-making powers of the BIA are interfered with by an immigration court administrator, the EOIR Director, who answers to a political appointee, the Attorney General. The independence of the BIA's decisions is the bedrock of the Board's integrity. This rule utterly undermines that integrity by giving quasi-judicial responsibilities to an administrator who is responsible to a political appointee. Under the rule, the EOIR director could even

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<sup>13</sup> Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, *Strengthening and Reforming America's Immigration Court System, Questions for the Record*, (April 18, 2018) <https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Responses%20to%20QFRs.pdf>.

<sup>14</sup> Vera Institute of Justice, *LOP Case Time Analysis for Performance Indicators*, (September 14, 2018).

issue precedent decisions, an insult to the credibility of the BIA and to the rule of law. This is impermissible and must not be allowed to stand.

### **Conclusion**

The ILRC understands the consequences of this rule and the profoundly negative impact it will have on our organization, given the substantial work in which we engage serving organizations and individuals recognized and accredited through the R & A program. Even more importantly, the rule will undermine R & A programs and harm the low-income immigrants they represent.

The rule will have an adverse impact on all legal access programs and the thousands of immigrants whom they serve, as well as on the integrity of adjudications in the immigration courts. We urge EOIR not to transfer OLAP into the Office of Policy. We further urge that EOIR not delegate authority from the BIA to the EOIR Director, a move that will erode due process and deliberative review of appeals. We urge EOIR to withdraw this rule at once and cease all implementation.

Sincerely yours,



Melissa Rodgers  
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