*[Date – Put on Letterhead]*

*Submitted via email to:*

[*www.Regulations.gov*](http://www.Regulations.gov)

*RIN no. 1125-AA85*

*Or by mail to Lauren Alder Reid, Assistant Director*

*Office of Policy*

*Executive Office for Immigration Review*

*5107 Leesburg Pike, Suite 2616*

*Falls Church, Va. 22041*

**Re: Executive Office for Immigration Review (EOIR), Department of Justice (DOJ),** EOIR Docket No. 18-502, RIN No. 1125-AA85, A.G. Order No. 4515-2019, 84 FR 4453, Effective 8/26/2019

Dear EOIR:

I am writing on behalf of [organization name if applicable] in opposition to the DOJ EOIR’s interim rule, effective immediately with request for comment, “Organization of the Executive Office for Immigration Review.” We oppose elimination of the Office of Legal Access Programs (OLAP) and the dissolution of the OLAP Director’s authority.

The Assistant Director of EOIR’s Office of Policy has been appointed as head of what remains of OLAP’s programs, in direct contradiction to the 2016 regulations. We oppose the transfer of OLAP’s current functions to the Office of Policy, which was created in 2017 without regulatory or statutory authority, lacks legal legitimacy and has no expertise in the mission of OLAP to foster access to legal representation in immigration cases. This move violates the intent and the specific requirements of the 2016 rule that moved the Recognition and Accreditation Program (the R & A program) to OLAP, which also housed similar legal access programs promoting representation of underserved immigrants.[[1]](#footnote-1)

We also oppose the delegation of Board of Immigration appeal decisions to the Director of EOIR, a de facto political appointee who is an administrator, not a judge. We oppose the rule’s limitation of the functions and authority of the Office of General Counsel, as well. We are filing these comments by the deadline of October 25, 2019.

[INSERT paragraph describing your organization and why this is particularly urgent to you, plus the expertise that you have on issues raised. If you are a DOJ recognized program with accredited representatives, describe your organization, its mission and the reasons that fair and impartial adjudications by OLAP are essential to the functioning of your program, and to the efficient operation of the immigration system.

 If you are an immigration legal services provider, consider describing the following:

* a few of the client stories that demonstrate how essential it is to have representation, and how your organization can fill that gap by providing knowledgeable accredited representatives.
* If your organization works with the legal orientation program or the legal orientation program for custodians, describe your interaction with OLAP.
* If your organization has a long history and was accredited under the Board of Immigration Appeals (BIA), include that information.
* If you have specific data on the populations you serve, include it. Describe the types of applications or petitions that most of your clients file with the assistance of accredited representatives.
1. **Background on the functions of the OLAP and the R & A Program.**
* **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.**

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.

OLAP operates the R & A program, a function that has resided with DOJ for over 60 years**.[[2]](#footnote-2)** 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.[[3]](#footnote-3) 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.”[[4]](#footnote-4)

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….”[[5]](#footnote-5)

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.[[6]](#footnote-6) 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 mandated by court order from the 9th 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, both of which are now funded by specific congressional appropriations; and the immigration help desk, which assists individuals who are representing themselves in immigration court.

1. **The Office of Policy that is taking over recognition and accreditation and other 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…” which effectively eliminates OLAP. The rule is dismantling programs within EOIR that are supported by regulation,[[7]](#footnote-7) court order,[[8]](#footnote-8) and specific congressional appropriations.[[9]](#footnote-9)

The Office of Policy awards the top position 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. Structurally, 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 that performs its functions as described in the 2016 regulations. 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: are decisions to be made by the immigration judges, or by the Office of Policy?

The Office of Policy released the asylum ban to 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 that they transited through en route.[[10]](#footnote-10) This office also released a regulation encouraging streamlined review by the BIA, reducing due process in appeals.[[11]](#footnote-11) 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.

The rule attempts to justify these 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 when, in fact, there was a long history of internal and external debate that led to that decision and to the transfer of the R & A program into OLAP.

1. **The publication of the rule as an interim final rule violates the Administrative Procedures Act because it failed to provide prior notice and comment to the public of a substantive program change that impacts thousands of immigrants and the non-profit programs that represent them.**
* **Despite EOIR’s characterizing the rule as a mere internal “reorganization,” it fundamentally impacts the legal access programs that the public has been invested in for more than sixty years. The rule should have been published as a proposed rule with prior notice and comment under the Administrative Procedures Act.**

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.[[12]](#footnote-12) 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’s placing 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.[[13]](#footnote-13) 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 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 representation rates for detained individuals is 30% or lower, a cause for concern.[[14]](#footnote-14) EOIR was unable to provide reasonable justification for ending the program. The current rule also lacks any reasonable justification.

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 and failing to publish this 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.

1. **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). 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 is arbitrary and violates due process, as review is curtailed to a minimum and is allotted 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 rule also delegates decision-making power to the EOIR Director of various matters previously handled by the office of general counsel at EOIR. It gives the EOIR Director the ability to weigh in on adjudication of any individual cases, yet general counsel may not do so. This is an extraordinary consolidation of powers in one individual who is not a judge and who is supposed to serve as an office administrator.

**Conclusion**

[NOTE: We encourage you to summarize here the overall impact that it would have on your program and your clients if you are unable to continue as a recognized program with accredited representatives, if you cannot participate (if you do currently) in legal orientation or legal orientation for custodians programs, or if decisions on R & A become politicized and are assigned to officers who have no background in this area. If your program was unable to accredit representatives, what percent of your work for immigrants would have to be cut back?

We urge EOIR rather than implement this rule to withdraw it. It will have an adverse impact on legal access programs and the thousands of immigrants who they serve.

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.

Sincerely yours,

[Insert name and contact information]

1. The 2016 regulation that finalized OLAP’s authority over the R & A program was the product of years of internal discussion at EOIR and extensive engagement with the public. See 60 Fed. Reg. 57200 (Nov. 14, 1995)(requesting public comment on possible changes in the R & A program); 77 Fed. Reg. 9590 (Feb. 17, 2012) (notice of two public meetings on possible changes with R & A program); R & A Program Comments, 80 Fed. Reg. 59514-01, 2015 WL 5723105 (Oct. 1, 2015) where 64 public organizations and individuals concerned with recognition and accreditation offered extensive comments to the proposed rule, which were analyzed and incorporated into the final rule, 81 Fed. Reg. 92346 (Dec. 19, 2016). [↑](#footnote-ref-1)
2. 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). [↑](#footnote-ref-2)
3. 81 Fed. Reg. 92346 (Dec. 19, 2016). [↑](#footnote-ref-3)
4. EOIR, *Recognition of Organizations and Accreditation on Non-Attorney Representatives*, 80 Fed. Reg. 59514 (Oct. 1, 2015). [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. 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>. [↑](#footnote-ref-6)
7. EOIR, *Recognition of Organizations and Accreditation on Non-Attorney Representatives*, 80 Fed. Reg. 59514 (Oct. 1, 2015). [↑](#footnote-ref-7)
8. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx) (C.D. Cal.) (Feb. 27, 2015). [↑](#footnote-ref-8)
9. Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, H.R. 3401, 116th Congress (2019) providing $10,000,000 for the services and activities of the legal orientation program. [↑](#footnote-ref-9)
10. 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). [↑](#footnote-ref-10)
11. 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). [↑](#footnote-ref-11)
12. Administrative Procedures Act, 8 U.S.C. §553. [↑](#footnote-ref-12)
13. 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. [↑](#footnote-ref-13)
14. 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>. [↑](#footnote-ref-14)