

**DEPARTMENT OF JUSTICE****Executive Office for Immigration Review****8 CFR Parts 1001, 1003, 1103, 1212, and 1292****[EOIR Docket No. 176; A.G. Order No. 3564–2015]****RIN 1125–AA72****Recognition of Organizations and Accreditation of Non-Attorney Representatives****AGENCY:** Executive Office for Immigration Review, Department of Justice.**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the regulations governing the requirements and procedures for authorizing representatives of non-profit religious, charitable, social service, or similar organizations to represent persons in proceedings before the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS). The rule also proposes amendments to the regulations concerning EOIR's disciplinary procedures.

**DATES:** Electronic comments must be submitted and written comments must be postmarked on or before November 30, 2015. The electronic Federal Docket Management System at [www.regulations.gov](http://www.regulations.gov) will accept electronic comments submitted prior to midnight Eastern Time at the end of that day.

**ADDRESSES:** Please submit written comments to 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. You may view an electronic version and provide comments via the Internet by using the [www.regulations.gov](http://www.regulations.gov) comment form for this regulation. See Section I of the **SUPPLEMENTARY INFORMATION** section for more information.

**FOR FURTHER INFORMATION CONTACT:** Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:****I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or

arguments on all aspects of this rule. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

All submissions received should include the agency name and reference RIN 1125–AA72 or EOIR Docket No. 176 for this rulemaking. When submitting comments electronically, you must include RIN 1125–AA72 or EOIR Docket No. 176 in the subject box.

Please note that all comments received are considered part of the public record and made available for public inspection at [www.regulations.gov](http://www.regulations.gov). Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFYING INFORMATION” in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on [www.regulations.gov](http://www.regulations.gov).

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency counsel's contact information.

**II. Executive Summary**

The Executive Office for Immigration Review's (EOIR) Recognition and Accreditation (R&A) program addresses the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before Federal administrative agencies. Through the R&A program, EOIR permits qualified non-attorneys to represent persons before the Department of Homeland Security (DHS), the immigration courts, and the Board of Immigration Appeals (BIA or Board). The specially qualified non-attorneys, known as accredited representatives, must be associated with and designated by a non-profit organization, known as a recognized organization. The non-profit organization must apply to EOIR for its recognition and for the accreditation of its qualified non-lawyers. Currently, there are more than 900 recognized organizations and more than 1,600 accredited representatives nationwide.<sup>1</sup> The majority of accredited representatives are accredited to appear solely before DHS (known as “partially accredited representatives”). Less than 20 percent of the representatives are accredited to appear before DHS, the immigration courts, and the Board (known as “fully accredited representatives”).

The purpose of this proposed rule 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. The proposed rule seeks to accomplish this goal by amending the requirements for recognition and accreditation to increase the availability of qualified representation for primarily low-income and indigent persons while protecting the public from fraud and abuse by unscrupulous organizations and individuals. The legal, financial, and emotional harm and exploitation perpetrated by notarios<sup>2</sup> and other

<sup>1</sup> The numbers of recognized organizations and accredited representatives are current as of April 27, 2015. Visit the rosters of recognized organizations and accredited representatives for updated data at: <http://www.justice.gov/eoir/recognition-accreditation-roster-reports> (last visited Sept. 15, 2015).

<sup>2</sup> “In many Latin American countries, the term ‘notario publico’ (for ‘notary public’) stands for something very different than what it means in the United States. In many Spanish-speaking nations, ‘notarios’ are powerful attorneys with special legal credentials. In the [United States], however, notary publics are people appointed by state governments to witness the signing of important documents and administer oaths. ‘Notarios publico,’ are not authorized to provide [persons before EOIR and DHS] with any legal services related to immigration.” United States Citizenship and Immigration Services, *Common Scams*, <http://www.dhs.gov/immigration-services>

unauthorized individuals against vulnerable immigrant populations is well-documented.<sup>3</sup> Since June 2011, the Department of Justice (Department) has collaborated with DHS and the Federal Trade Commission in a national initiative to combat the unauthorized practice of immigration law.<sup>4</sup> Numerous private and government entities have addressed notario fraud and the unauthorized practice of law through educational Web sites, outreach to the public, legislation, and Federal and state prosecutions.<sup>5</sup> The proposed rule will assist these efforts by seeking to increase the number of recognized organizations and the availability of authorized and qualified immigration practitioners for underserved persons, which, in turn,

[www.uscis.gov/avoid-scams/common-scams](http://www.uscis.gov/avoid-scams/common-scams) (last updated Nov. 21, 2014) (emphasis added).

<sup>3</sup> See, e.g., Olivia Quinto, Note, "In a Desert Selling Water": Expanding the U-Visa to Victims of Notario Fraud and Other Unauthorized Practices of Law, 14 Rutgers Race & L. Rev. 203 (2013); Mary Dolores Guerra, *Lost in Translation: Notario Fraud—Immigration Fraud*, 26 J. C.R. & Econ. Dev. 23 (2011); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 Fordham L. Rev. 577 (2009); Anne E. Langford, Note, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 Harv. Latino L. Rev. 115 (2004).

<sup>4</sup> See Press Release, Department of Justice, *Federal Agencies Announce National Initiative to Combat Immigration Services Scams* (June 9, 2011), available at <http://www.justice.gov/opa/pr/federal-agencies-announce-national-initiative-combat-immigration-services-scams> (last visited Sept. 15, 2015).

<sup>5</sup> For example, the American Immigration Lawyers Association established a Web site to educate the public and to assist victims of notario fraud. See *Stop Notario Fraud*, <http://www.stopnotariofraud.org/>. Several states have enacted legislation to combat the unauthorized practice of law. See Travis B. Olsen, *Combatting "Notario Fraud" Locally*, 22 Berkeley LA Raza L.J. 383 (2012); Milagros Cisneros, H.B. 2659: *Notorious Notaries—How Arizona is Curbing Notario Fraud in the Immigrant Community*, 32 Ariz. St. L.J. 287 (2000). For examples of Federal and state prosecutions for fraud or the unauthorized practice of law, see Daniel M. Kowalski, *Oregon Immigration Scammers Exposed*, LexisNexis Legal Newsroom: Immigration Law (Jan. 7, 2014, 10:09 a.m.), <http://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2014/01/07/oregon-immigration-scammers-exposed.aspx>; Press Release, Department of Justice, U.S. Attorney's Office, D. Md., *Ocean City Man Sentenced for Immigration Fraud* (Feb. 26, 2014), available at <http://www.justice.gov/usao/md/news/2014/OceanCityManSentencedForImmigrationFraud.html> (last visited Sept. 15, 2015); Press Release, Department of Justice, U.S. Attorney's Office, D.N.J., *Former Atlantic City, N.J., Paralegal Charged with Mail Fraud Conspiracy* (Feb. 26, 2014), available at <http://www.justice.gov/usao/nj/Press/files/James,%20Maria%20Complaint%20News%20Release.html> (last visited Sept. 15, 2015); Press Release, Department of Justice, U.S. Attorney's office, S.D.N.Y., *Liying Lin Found Guilty of Immigration Fraud Offenses Following One Week Jury Trial in Manhattan Federal Court* (Feb. 26, 2014), available at <http://www.justice.gov/usao/nys/pressreleases/February14/LiyingLinVerdict.php?print=> (last visited Sept. 15, 2015).

should reduce the likelihood that such persons become the victims of immigration scams involving the unauthorized practice of law.

The proposed rule seeks to accomplish these objectives by clarifying the process for applying for recognition and accreditation and facilitating the ability of organizations and representatives to serve persons before EOIR and DHS. At the same time, the proposed rule balances the potential increased availability of recognized organizations and accredited representatives with greater oversight and accountability for recognized organizations and accredited representatives.

The rule proposes to transfer administration of the R&A program within EOIR from the Board to the Office of Legal Access Programs (OLAP); amend the qualifications for recognition of organizations and accreditation of their representatives; institute administrative procedures to enhance the management of the R&A roster; and update the disciplinary process to make recognized organizations, in addition to accredited representatives, attorneys, and other practitioners, subject to sanctions for conduct that contravenes the public interest.

### III. Background

With the exception of a technical amendment in 1997, the R&A regulations have remained unchanged since 1984.<sup>6</sup> In the interim, the agencies responsible for the execution of the immigration laws have been restructured. Notably, DHS was established in 2002 and the functions of the former Immigration and Naturalization Service (INS) were transferred to DHS in 2003.<sup>7</sup> Moreover, in April 2000, EOIR established the EOIR Pro Bono Program, now known as OLAP, under the Office of the EOIR Director. OLAP's mission is to improve access to legal information and counseling and increase rates of representation for persons appearing before the immigration courts and the Board.

EOIR has administered the R&A program for the past 30 years in the face

<sup>6</sup> Compare 8 CFR 292.2 (1985), with 8 CFR 1292.2 (2014).

<sup>7</sup> See Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135; 6 U.S.C. 101 *et seq.* Congress divided the functions of the INS among three new components: U.S. Citizenship and Immigration Services (USCIS), which generally is responsible for the administration of benefit applications; Immigration and Customs Enforcement (ICE), which generally is responsible for the enforcement of the immigration laws; and U.S. Customs and Border Protection, which is responsible for, *inter alia*, enforcement of immigration laws at and between the ports of entry.

of these structural changes in the government as well as the changing realities of the immigration system and of the ability of non-profit organizations to meet the increased need for legal representation. During this time, EOIR, in consultation with DHS, has comprehensively examined the R&A regulations in light of various issues that have arisen and solicited input from the public on how to address the developments of the past 30 years in amended regulations.<sup>8</sup> Most recently, in February 2012, EOIR invited public comment on possible amendments to the R&A Regulations, and in March and April of that year it held public meetings with interested stakeholders.<sup>9</sup> The proposed rule is the product of these internal and external deliberations.

### IV. Description of the Provisions of the Proposed Rule

#### A. Transfer of R&A Program from the Board to OLAP

Under the current R&A regulations, the Board approves or disapproves requests for recognition and accreditation, determines whether to withdraw recognition, and maintains a roster of recognized organizations and their accredited representatives.<sup>10</sup> Given OLAP's mission to facilitate access to legal information and counseling and to increase the rates of representation for persons before EOIR and DHS, the Department has determined that OLAP is best suited to administer the R&A program and therefore proposes in this rule to transfer the program's administration from the Board to OLAP.<sup>11</sup>

<sup>8</sup> See 60 FR 57,200 (Nov. 14, 1995) (requesting public comment regarding possible changes in the qualifications required of an organization to be recognized by EOIR to represent persons before INS, the Board, and the immigration courts.).

<sup>9</sup> See 77 FR 9,590 (Feb. 17, 2012) (notice of two public meetings and request for comments); EOIR, *Recognition and Accreditation Program, EOIR Public Meetings* (Mar. 14, 2012 & Mar. 21, 2012) ("R&A Public Meeting Minutes"), <http://www.justice.gov/eoir/statspub/RAPublicMeetingMinutesSpring2012.pdf> (last visited Sept. 15, 2015).

<sup>10</sup> The Board also has the authority, after the EOIR or DHS disciplinary counsel initiates disciplinary proceedings, to impose disciplinary sanctions—such as disbarment, suspension, or a censure—on accredited representatives who engage in criminal, unethical, or unprofessional conduct before the immigration courts, the Board, or DHS. Under the proposed rule, the Board maintains its authority to impose disciplinary sanctions on accredited representatives while also having new authority to impose disciplinary sanctions on recognized organizations.

<sup>11</sup> As of the effective date of this rule, the Board will no longer have authority under 8 CFR 1003.1(d)(5) to determine whether to recognize organizations and accredit representatives to

For over a decade, OLAP has been responsible for overseeing legal orientation programs and for facilitating access to pro bono representation and self-help educational materials for individuals in immigration proceedings. OLAP is best suited to administer the R&A program because it is dedicated to fostering access to legal representation in immigration cases. OLAP executes this mission primarily through programs and initiatives that facilitate access to information (including self-help materials) and that create incentives for attorneys and law students to handle pro bono immigration cases. OLAP is responsible for administering the Legal Orientation Program, the Legal Orientation Program for Custodians of Unaccompanied Alien Children, the BIA Pro Bono Project, the Model Hearing Program, and the newly created National Qualified Representative Program.<sup>12</sup> With the transfer of the R&A program to OLAP, OLAP will now manage the entire spectrum of EOIR programs designed to facilitate access to legal representation in immigration proceedings.

OLAP currently is not designated as an EOIR component in the regulations. The proposed rule would formalize OLAP's structure and function as a component of EOIR and transfer the administration of the R&A program from the Board to OLAP. Under the proposed rule, OLAP would have the authority to approve or disapprove requests for recognition and accreditation, to maintain a roster of recognized organizations and their accredited representatives, and to administratively terminate an organization or a representative.

### B. Recognition and Accreditation

As outlined below, the proposed rule would make significant changes to the process and qualifications for requesting and renewing recognition and accreditation, with the express purpose of increasing capacity while

provide representation before the Immigration Courts, the Board, and DHS, or DHS alone. Under 8 CFR 1003.0(f)(2), OLAP will have the sole authority to do so.

<sup>12</sup> In April 2013, the Departments of Justice and Homeland Security announced a nationwide policy to provide enhanced safeguards and procedural protections to unrepresented immigration detainees with indicia of mental incompetence. See Notice, *Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013), available at <http://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf> (last visited Sept. 15, 2015). These safeguards include the provision of a Qualified Representative to any unrepresented detainee found mentally incompetent to represent him- or herself in immigration proceedings.

maintaining adequate standards for recognition and accreditation.

#### 1. Recognition Qualifications

To be recognized under the current R&A regulations, an organization must: be a non-profit religious, charitable, social service, or similar organization established in the United States; make only nominal charges and assess no excessive membership dues for its services; and have adequate knowledge, information, and experience at its disposal. The proposed rule retains the non-profit requirement with the additional requirement to demonstrate Federal tax-exempt status. The proposed rule also retains the adequate knowledge, information, and experience requirement. The proposed rule replaces the nominal fee requirement with requirements that shift the singular focus from fees to the organization's other sources of revenue and whether the organization is primarily serving low-income and indigent clients. The proposed rule also requires, in contrast with the current regulations, that an organization must have an authorized officer to act on its behalf and at least one accredited representative to be recognized and maintain recognition.

##### a. Accredited Representative Required

The proposed rule would require that an organization have at least one accredited representative to be recognized, to maintain recognition, and to have its recognition renewed. Currently, the R&A regulations do not include such a requirement and, as a result, some organizations that have only attorneys (and no accredited representatives) on staff have been recognized. An organization with only attorneys on staff does not need to seek recognition because attorneys already are authorized to appear before DHS, the immigration courts, and the Board as long as they are eligible to practice law, are members in good standing of a bar, and are not under any order restricting or prohibiting their practice of law.<sup>13</sup> However, an organization with both attorneys and non-attorneys (or only non-attorneys) on staff must qualify for recognition in order for its non-attorney members to be accredited to represent persons before DHS, the immigration courts, or the Board. This proposed requirement accords with the main purpose of recognition, which is to authorize organizations to provide

<sup>13</sup> See 8 CFR 1001.1(f); see also *id.* §§ 292.1(a)(1), 1292.1(a)(1). Non-profit organizations with only attorneys on staff who provide free or pro bono legal services may apply to be on the List of Pro Bono Legal Service Providers. See 8 CFR 1003.61 *et seq.*

affordable, qualified immigration legal services to underserved immigrant populations through non-attorneys (as opposed to attorneys).

#### b. Non-Profit With Federal Tax-Exempt Status

The current regulations require organizations to demonstrate non-profit status for recognition. The proposed rule would require an organization to establish both that it is a non-profit religious, charitable, social service, or similar organization established in the United States and that it is federally tax-exempt.<sup>14</sup>

The proposed requirement to demonstrate Federal tax-exempt status provides a means of confirming that organizations requesting recognition are legitimate non-profit organizations.<sup>15</sup> Specifically, Federal tax-exempt status ensures that an organization seeking recognition has been or will be independently evaluated by the Internal Revenue Service (IRS) to confirm that it is not engaging in for-profit activities, and subjects the organization to IRS oversight if the organization does not comply with the requirements for its tax-exempt status. An organization may satisfy this requirement by submitting an IRS tax-exemption determination letter approving tax-exempt status under 26 U.S.C. 501(c)(3)<sup>16</sup> or some other section of the Federal tax code, or by submitting another document that demonstrates the organization is tax-

<sup>14</sup> Non-profit status and Federal tax-exempt status are different concepts. Non-profit status is a state law concept that allows organizations to receive benefits at the state level like tax exemptions. Organizations with non-profit status are not automatically granted Federal tax-exempt status, although most Federal tax-exempt organizations are non-profit organizations. See Internal Revenue Service, *Applying for Exemption—Difference Between Non-Profit and Tax-Exempt Status*, <http://www.irs.gov/Charities-&-Non-Profits/Applying-for-Exemption-Difference-Between-Nonprofit-and-Tax-Exempt-Status> (last visited Sept. 15, 2015).

<sup>15</sup> An organization may still be eligible for recognition if it can show that Federal tax-exempt status is not required separately for the organization. For example, an organization may show that it is part of a group exemption as a subordinate of a larger international or national tax-exempt organization.

<sup>16</sup> See 26 U.S.C. 501(c)(3) (stating that an organization is tax-exempt if it is "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual, no substantial part of [its] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation," and it "does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office").

exempt.<sup>17</sup> If an organization has not yet received an IRS tax-exemption determination letter at the time it applies for recognition, it may satisfy this requirement by submitting proof that it has applied for Federal tax-exempt status. This alternative method of demonstrating tax-exempt status will permit newly formed organizations to obtain conditional recognition and start providing services while their applications for tax exemptions are pending. However, an organization that obtains recognition in this manner should obtain a favorable tax-exemption determination letter by the time it seeks renewal of recognition. An organization's failure to do so may adversely affect its eligibility for renewal.

While classification as a 501(c)(3) federally tax-exempt organization may be sufficient to show that an organization is a non-profit religious, charitable, social service, or similar organization for tax purposes, the proposed rule neither presumes that 501(c)(3) organizations have non-profit religious, charitable, social service, or similar purposes for recognition purposes, nor limits recognition to organizations that are tax-exempt under section 501(c)(3). Organizations that apply for or obtain Federal tax exemptions under section 501(c)(3) or other sections of the Federal tax code may only receive recognition if they also show that they are non-profit religious, charitable, social service, or similar organizations providing free or reduced-cost immigration legal services to primarily low-income and indigent persons.<sup>18</sup> Consistent with current agency guidance, an organization may do so with its charter, by-laws, articles of incorporation, or similar documents that show its religious charitable, social service, or similar mission.<sup>19</sup>

<sup>17</sup> Organizations currently may submit, based on agency guidance, a tax determination letter to demonstrate eligibility for recognition. EOIR, *Recognition and Accreditation (R&A) Program*, <http://www.justice.gov/sites/default/files/pages/attachments//2015/05/13/randafaqsprintableversion.pdf> (last visited Sept. 15, 2015).

<sup>18</sup> The legitimacy of a non-profit organization would be particularly scrutinized in circumstances where, for example: (1) A commercial enterprise or for-profit business, such as a travel, insurance, real estate, or tax business, is operated at the same location as the non-profit organization seeking recognition; (2) the non-profit organization receives funding from a for-profit business operated at the same location as the non-profit; or (3) the proposed representative or other employees of the non-profit organization also work for, or are closely associated with, a for-profit business. See *Matter of St. Francis Cabrini Immigration Law Center*, 26 I&N Dec. 445, 447 (BIA 2014).

<sup>19</sup> EOIR, *Recognition and Accreditation (R&A) Program*, <http://www.justice.gov/sites/default/files/>

#### c. Elimination of Nominal Charges Requirement

The proposed rule would eliminate the "nominal charges" requirement contained in the current regulations.<sup>20</sup> The purpose of that requirement had been to ensure that organizations are in fact charitable or similar social services organizations; they are serving low-income or indigent clients; and they are not representing clients for profit.<sup>21</sup> However, the nominal charges requirement has been repeatedly criticized over the years as a barrier to affordable, quality legal services to vulnerable populations.<sup>22</sup> Commenters have asserted that some well-qualified organizations do not apply for recognition because of the restriction, and that others are unable to meet the demand for their services due to the financial constraints it imposes. They have stated that the assessment of more than nominal fees in some cases is necessary because charitable grants and private funding can be unreliable and because, for example, organizations in rural versus urban areas have distinct needs and expenses that create a need for more than nominal fees. Furthermore, they claim that different cases may require higher fees because of their complexity or because they include the provision of both legal and social services.<sup>23</sup>

At the same time, a commenter expressed concern about allowing organizations that charge more than

[pages/attachments//2015/05/13/randafaqsprintableversion.pdf](http://www.justice.gov/sites/default/files/pages/attachments//2015/05/13/randafaqsprintableversion.pdf) (last visited Sept. 15, 2015).

<sup>20</sup> See 8 CFR 1292.2(a)(1) (requiring that an organization demonstrate that it "makes only nominal charges and assesses no excessive membership dues for persons given assistance"). In applying the standard, the Board has not defined "nominal charges" in terms of specific dollar amounts but stated that it refers to "something existing in name only as distinguished from something real or actual." *Matter of Ayuda*, 26 I&N Dec. 449, 450 (BIA 2014) (quoting *Matter of American Paralegal Academy, Inc.*, 19 I&N Dec. 386, 387 (BIA 1986)).

<sup>21</sup> 60 FR 57,200, 57,200 (Nov. 14, 1995); see *Matter of Ayuda*, 26 I&N Dec. at 450 ("The fees must be consistent with the purpose and spirit of the recognition and accreditation program, which is to provide competent immigration services to low-income and indigent persons.").

<sup>22</sup> 60 FR at 57,200; R&A Program Comments at 2, 58 (Mar. 14, 2012 & Mar. 21, 2012) (on file with EOIR; forthcoming on [www.regulations.gov](http://www.regulations.gov) with proposed rule); American Immigration Lawyers Association, *Comments on Public Meetings Related to the Regulations Governing the EOIR Recognition and Accreditation Program*, 8 CFR 1292, at 3-4 (Apr. 4, 2012) ("AILA Comments"), available at <http://www.aila.org/File/DownloadEmbeddedFile/37635> (last visited Sept. 15, 2015).

<sup>23</sup> 60 FR at 57,200; R&A Public Meeting Minutes at 2; R&A Program Comments at 3, 8-9, 34-35, 37, 47, 53, 58, 66-67, 77-78; AILA Comments at 3.

nominal fees to obtain recognition.<sup>24</sup> Higher fees may place organizations in competition with members of the bar for clients that can afford legal services, which would contravene the R&A program's goal to serve primarily low-income and indigent clients.<sup>25</sup> Higher fees could also lead unscrupulous organizations and individuals to seek recognition and accreditation so that they could profit from exploiting clients.

Recognizing the concerns with the nominal fees requirement, and to increase the number and sustainability of recognized organizations able to provide immigration legal services to indigent and low-income persons before EOIR and DHS, the Board recently updated and clarified its interpretation of the "nominal charges" requirement in *Matter of Ayuda*, 26 I&N Dec. 449 (BIA 2014). The Board stated that the "nominal charges" requirement requires an individualized assessment of the organization, including its geographic location, the services provided, and the manner of delivery of services, to determine whether its fee structure comports with the goal of providing low-cost legal services, rather than simply serving the interests of the organization.<sup>26</sup> The proposed rule adopts a similar approach to assessing each organization, but proposes to shift the focus away from an organization's fee levels to the organization's funding sources and budget while still requiring that organizations serve the neediest of persons. Under the proposed rule, there is no longer a "nominal charges" requirement and organizations have greater flexibility in assessing fees.

#### d. Substantial Amount of Budget Is Not Derived From Client Charges

The proposed rule would generally require an organization to demonstrate that a "substantial amount of the organization's immigration legal services budget is derived from sources other than funds provided by or on behalf of the immigration clients themselves (such as legal fees, donations, or membership dues)." This proposed requirement reflects the fact that a legitimate non-profit organization providing immigration legal services to low-income and indigent clients generally supports its operations through various sources of outside funding and not solely or entirely

<sup>24</sup> AILA Comments at 3; R&A Program Comments at 58.

<sup>25</sup> AILA Comments at 3-4; R&A Program Comments at 58-59.

<sup>26</sup> *Matter of Ayuda*, 26 I&N Dec. at 451, 452-53.

through charges of the clients themselves.<sup>27</sup>

To satisfy the “substantial amount” requirement under the proposed rule, an organization must submit its annual budget for providing immigration legal services for the current year and, if available, its annual budget for providing immigration legal services for the prior year. If both such budgets are unavailable, the organization must submit its projected annual budget for providing immigration legal services for the upcoming year. The organization’s budget, whether actual or projected, should identify its revenue and expenses attributable to immigration legal services. The revenue should include the amount of fees, membership dues, and donations<sup>28</sup> received or expected from the organization’s immigration clients for immigration legal services and the sources and amounts of grants and monetary and in-kind donations, such as documented donations of office space, equipment, or volunteer services. The organization should also identify its investment and fundraising income, real estate, and other assets.

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. Similarly, an organization may demonstrate that it has no need for client fees, membership dues, or donations from its immigration clients to support its organization because, for example, it is a religious organization that receives in-kind donations of office space, equipment, and supplies and relies on volunteers or members of a religious congregation who provide

legal services at little cost to the organization.

On the other hand, the greater the amount of funding an organization derives from fees, membership dues, or donations provided by or on behalf of immigration clients, the more likely the organization will not be able to meet the “substantial amount” requirement. For instance, an organization whose legal services budget is based on unreliable funding sources, such as projected revenue from small special events (e.g., bake sales or garage sales, as opposed to an annual gala) would likely be impermissibly dependent on immigration client fees. Similarly, an organization that has high salaries, rent, and other expenses, is more likely to be overly dependent on immigration client fees, membership dues, or donations and would be unlikely to satisfy the substantial amount requirement.

In limited circumstances, the proposed rule would authorize OLAP to grant a waiver of the “substantial amount” requirement where an organization persuasively demonstrates that the waiver is in the public interest. “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).

#### e. Serving Primarily Low-Income and Indigent Persons

In order to avoid recognizing organizations with for-profit motives and to advance the requirement that organizations have a religious, charitable, social service, or similar purpose, the proposed rule would require an organization to establish that it provides immigration legal services primarily to low-income and indigent clients. Neither the term “primarily” nor the term “low-income” is defined in the proposed rule. Most commenters following the March 14, 2012, stakeholder meeting eschewed a proposed rule defining “low-income.” They stated that organizations need

flexibility in deciding which clients they serve because organizations are often unable to verify the income of clients.<sup>29</sup> They also expressed a concern that an income restriction may limit the client populations served and prevent recognized organizations from serving a set of individuals in need of legal services but unable to afford an attorney.<sup>30</sup> As a result, the proposed rule does not define low-income or indigent in terms of a specific amount of income or limit eligibility for recognition to organizations that exclusively serve low-income and indigent persons.

Organizations, however, have the burden of demonstrating that they provide immigration legal services “primarily” to “low-income and indigent” persons. While income and expenses for clients will vary nationwide and each organization should have flexibility to determine which clients are “low-income and indigent” and eligible for services, each organization nevertheless should have guidelines for determining whether clients are “low-income and indigent” so that OLAP may assess whether the organization’s guidelines reasonably ensure that its services will be primarily directed toward low-income and indigent persons. For example, an organization may use a particular percentage from the annual Federal poverty guidelines issued by the Department of Health and Human Services as a benchmark to determine whether a person meets the threshold for free or reduced cost legal services.<sup>31</sup> An organization may also use other factors to assess whether those who receive its services are “low-income and indigent,” particularly when its clients do not have pay stubs, bank accounts, or other verifiable statements of income.

Requiring recognized organizations to serve primarily low-income and indigent clients necessarily affects the magnitude of legal fees, membership dues, or donations, if any, that an organization may charge or request. Charging or requesting excessive fees, membership dues, or donations would not be consistent with the aim of serving primarily low-income and indigent clients.<sup>32</sup> An organization that charges

<sup>27</sup> See *id.* at 453 (approving application for recognition with the acknowledgement that the “organization’s budget and funding demonstrate that it is substantially supported by grants and is not dependent primarily on client fees for its operations”).

<sup>28</sup> Not all donations an organization receives from immigration clients are donations for immigration legal services. However, to the extent that an organization conditions the provision of legal services on donations suggested or otherwise encouraged by the organization, the donations received are for immigration legal services.

<sup>29</sup> See, e.g., *AILA Comments* at 4; *R&A Program Comments* at 3, 9, 59, 68, 72–73, 79.

<sup>30</sup> *R&A Program Comments* at 9–10, 28–29, 36, 72, 79–80.

<sup>31</sup> See 80 FR. 3,236, 3,237 (Jan. 22, 2015) (Department of Health and Human Services 2015 poverty guidelines).

<sup>32</sup> Cf. 8 CFR 1292.2(a)(1) (requiring that an organization demonstrate that it “makes only nominal charges and assesses no excessive membership dues for persons given assistance”).

or requests such fees, dues, or donations would be less likely to primarily serve low-income and indigent clients, who have a limited ability to pay fees, and would be more likely to have an impermissible profit-seeking motive and prey upon vulnerable populations. Thus, while fees, dues, and donations for immigration legal services are not defined under the proposed rule, recognized organizations are expected to limit fees, dues, and donations charged or requested so that low-income and indigent clients are able to access the organization's immigration legal services. Any fees, membership dues, or donations for immigration legal services should be listed in an itemized fee schedule with a description of when and how they are waived or reduced. Organizations are required to provide their fee schedules (if any) to OLAP when applying for or renewing recognition and must otherwise make them readily available to clients and OLAP. OLAP will scrutinize any fees, membership dues, or donations charged or requested in evaluating the totality of the organization's funding and whether it is serving primarily low-income and indigent clients. Legal fees, membership dues, or donations charged or requested by a recognized organization are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area.

At the same time, the proposed rule does not prohibit a recognized organization from serving a limited number of clients regardless of income.<sup>33</sup> In serving these clients, however, a recognized organization would not be permitted to charge or request legal fees, membership dues, or donations that are greater than those that it charges or requests from low-income and indigent clients.<sup>34</sup>

#### f. Adequate Knowledge, Information, and Experience

The current R&A regulations require an organization to "ha[ve] at its disposal

<sup>33</sup> For instance, an organization may continue its representation of a previously indigent client who improves his or her financial status during the course of representation in order to provide continuity of qualified legal services. An organization may also provide legal services to a limited number of clients regardless of income if those persons are particularly vulnerable (e.g., they are illiterate, have limited English proficiency, or have little or no formal education), or if the organization is the only available and qualified provider of immigration legal services in its area.

<sup>34</sup> To be clear, the requirements of this rule would be applicable only to organizations that apply for and are approved for recognition from EOIR under this rule, and thereby elect to make themselves subject to these requirements as a condition of eligibility for recognition.

adequate knowledge, information and experience" to be recognized.<sup>35</sup> The proposed rule would maintain this requirement but also identify the proof necessary to satisfy the requirement in accord with *Matter of EAC, Inc.*, 24 I&N Dec. 556 (BIA 2008), and *Matter of Lutheran Ministries of Florida*, 20 I&N Dec. 185 (BIA 1990). Specifically, the organization must describe, among other things: The services it intends to offer; the legal resources to which it has access; its staff's qualifications and breadth of immigration knowledge; formal trainings attended by staff; and agreements with non-staff immigration practitioners or other organizations for consultations or technical legal assistance.<sup>36</sup>

Although attorney mentors are encouraged,<sup>37</sup> the proposed rule does not require an attorney on staff or attorney supervision of accredited representatives, as some commenters proposed, due to cost and feasibility concerns.<sup>38</sup> Ultimately, the organization must show that it has the resources to adequately monitor its accredited representatives as well as sufficient knowledge, information, and experience to provide competent legal assistance on immigration matters for which it provides services.

#### g. Authorized Officer

The proposed rule would require an organization to designate an authorized officer, who is empowered to act on its behalf for all matters related to recognition and accreditation. This requirement will facilitate accountability and communication between OLAP and the organization. The president, secretary, executive director, or other designated individual of the organization may serve as the authorized officer of the organization.

#### 2. Accreditation Qualifications

To be accredited under the current R&A regulations, an individual must have good moral character. The current regulations also require the organization to describe an individual's knowledge of

and experience in immigration law and procedure without specifying a minimum standard of knowledge and experience. The proposed rule replaces the good moral character requirement with a character and fitness requirement that seeks to more comprehensively examine an individual's suitability to represent clients. The proposed rule also explicitly requires that individuals be an employee or volunteer of the organization to be accredited so that they are subject to the supervision and direction of the organization. The proposed rule clarifies the amount of knowledge and experience required by adopting a broad knowledge and adequate experience standard the Board has applied. Finally, the proposed rule precludes attorneys as defined by 8 CFR 1001.1(f) and individuals who have been convicted of a serious crime or who are under an order restricting their practice of law from being accredited.

#### a. Character and Fitness

Whereas the current R&A regulations require that a proposed accredited representative be a person of "good moral character,"<sup>39</sup> the proposed rule instead would require an organization to affirm that its proposed representative possesses the "character and fitness" to represent clients before the immigration courts, the Board, or DHS. The proposed rule's character and fitness requirement allows for a more comprehensive examination of a proposed representative's suitability to represent clients, which is similar to the standards and principles of fitness that state bars apply to applicants for admission.<sup>40</sup> The character and fitness requirement is meant to ensure that an accredited representative possesses the honesty, trustworthiness, diligence, professionalism, and reliability to execute his or her fiduciary duties and professional responsibilities to clients, adversaries, and adjudicators through an examination of factors such as: criminal

<sup>39</sup> 8 CFR 1292.2(d).

<sup>40</sup> See National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2015*, at vii, 4-7, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2015\\_comprehensive\\_guide\\_to\\_bar\\_admission\\_requirements.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2015_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf) (last visited Sept. 15, 2015); Virginia Board of Bar Examiners, *Character and Fitness Requirements*, <http://barexam.virginia.gov/cf/cfreg.html> (last visited Sept. 15, 2015) (applicant for bar admission must demonstrate, inter alia, "honest demeanor" and "good moral character"); Pennsylvania Board of Law Examiners, *What are the Character and Fitness Standards?*, [http://www.pabarexam.org/c\\_and\\_ff/cffags/2.htm](http://www.pabarexam.org/c_and_ff/cffags/2.htm) (last visited Sept. 15, 2015); N.H. Sup. Ct. R. 42B(II) (character and fitness standards include proving "good moral character").

<sup>35</sup> 8 CFR 1292.2(a)(2).

<sup>36</sup> See *Matter of EAC, Inc.*, 24 I&N Dec. at 558-62.

<sup>37</sup> An organization associated with an attorney who is not on staff but who provides consultations or technical legal assistance to the organization's accredited representatives is expected to demonstrate the degree of interaction and association with the attorney, and to state if the attorney charges a fee for such assistance. Recognition should not be misused as a means for organizations to engage in for-profit referrals or fee sharing with private counsel. See *Matter of Baptist Educational Center*, 20 I&N Dec. 723, 736 (BIA 1993).

<sup>38</sup> R&A Program Comments at 13, 20, 31, 43, 51, 62, 70, 74.

background; prior acts involving dishonesty, fraud, deceit, or misrepresentation; and past history of neglecting professional, financial, or legal obligations.<sup>41</sup>

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. Therefore, the Department is seeking input from the public regarding the parameters of this factor, and is considering whether individuals seeking accreditation must, for example, have employment authorization or not be in active proceedings before DHS or EOIR.

The character and fitness requirement may be satisfied by the signatures of the organization and its proposed representative on the request for accreditation (Form EOIR-31A), attesting that the proposed representative has the requisite character and fitness. The signatures affirm that the proposed representative has, among other things, a record of honesty, trustworthiness, diligence, professionalism, and reliability. The signatures also attest that the proposed representative's work will be performed in the United States. Additional documentation, such as a favorable background check and letters of recommendation attesting to the individual's good character, may also support the character and fitness requirement for accreditation.<sup>42</sup>

#### b. Employee or Volunteer

The proposed rule would explicitly require that a proposed representative for accreditation be subject to the direction and supervision of the organization as either its employee or its volunteer.<sup>43</sup> In order to demonstrate that

<sup>41</sup> The character and fitness requirement also avoids potential confusion created by the "good moral character" requirement, which is a term of art used to establish eligibility for relief under the Immigration and Nationality Act. See 8 U.S.C. 1101(f).

<sup>42</sup> If a proposed representative has an issue in his or her record that may affect the character and fitness determination, the organization and the proposed representative should address that issue in the request for accreditation and produce any relevant documentation so that OLAP can determine whether the proposed representative satisfies the character and fitness standard.

<sup>43</sup> Under the current R&A regulations, an accredited representative's employment or connection to a recognized organization is

this requirement is satisfied, the organization and its proposed representative must sign Form EOIR-31A attesting to the employment or volunteer relationship.

#### c. Broad Knowledge and Adequate Experience

The proposed rule would require an organization to show that a proposed representative possesses "broad knowledge and adequate experience in immigration law and procedure" and that a proposed representative for whom the organization seeks full accreditation has "skills essential for effective litigation." Under the current R&A regulations, organizations are simply required to describe "the nature and extent of the proposed representative's experience and knowledge of immigration and naturalization law and procedure."<sup>44</sup> The intent of the proposed rule is to follow the Board's precedential decisions in *Matter of EAC, Inc.*, 24 I&N Dec. 563 (BIA 2008),<sup>45</sup> and *Matter of Central California Legal Services, Inc.*, 26 I&N Dec. 105 (BIA 2013),<sup>46</sup> which specified the knowledge and experience sufficient to warrant accreditation.

The proposed rule does not establish a required number of formal training hours, specific courses, or testing to show broad knowledge and experience for initial accreditation or for renewal of accreditation, although some

presumed. See 8 CFR 1292.2(d) ("Accreditation terminates . . . when the representative's employment or other connection with the organization ceases."). Under 8 U.S.C. 1324a, recognized organizations must verify that their accredited representative employees are authorized to work in the United States.

<sup>44</sup> 8 CFR 1292.2(d).

<sup>45</sup> In *Matter of EAC*, the Board explained that an accredited representative must have broad knowledge so that he or she is "able to readily identify immigration issues of all types, even in areas where no services are provided, and has the ability to discern when it is in the best interests of the aliens served to refer those with more complex immigration issues elsewhere." 24 I&N Dec. at 564. The Board, however, did not require a level of experience equal to the accredited representative's knowledge. Rather, it acknowledged that an accredited representative's experience with immigration law "need not be fully commensurate with his or her knowledge to be considered adequate." *Id.* The Board further noted that fully accredited representatives had to "possess skills essential for effective litigation," such as the ability to engage in oral and appellate advocacy, present documentary evidence and question witnesses, and prepare motions and briefs. *Id.*

<sup>46</sup> In *Matter of Central California Legal Services, Inc.*, the Board found that a successful application for accreditation must show that the proposed representative "recently completed at least one formal training course designed for new practitioners and that the training provided a solid overview of the fundamentals of immigration law and procedure." 26 I&N Dec. at 106.

commenters recommended doing so.<sup>47</sup> While such requirements would be helpful in establishing minimum standards of knowledge and experience, imposing these requirements by regulation would limit OLAP's flexibility to adapt them to the ever-changing immigration legal landscape, might result in increased costs to organizations, and could overlook the unique training needs of organizations that provide legal services to particular populations and offer specialized services.<sup>48</sup> Nonetheless, OLAP may recommend education, testing, training courses and hours, or internships that could be sufficient to satisfy the broad knowledge and adequate experience requirement for accreditation.<sup>49</sup>

#### d. No Attorneys, No Orders Restricting Practice of Law or Representation, No Serious Crimes

The proposed rule would restrict accreditation to non-attorneys and individuals who have not been convicted of a serious crime and are not subject to an order restricting their practice of law. The proposed rule also bars attorneys licensed in the United States from accreditation because accreditation is not necessary for attorneys to represent clients before EOIR or DHS, and thus granting them accreditation would serve no meaningful purpose.<sup>50</sup>

Currently, the regulations allow the Board to sanction (*i.e.*, through suspension, disbarment, censure, or otherwise) accredited representatives who are subject to a final order of disbarment of suspension, who resign while a disciplinary investigation or proceeding is pending, or who have been convicted of a serious crime.<sup>51</sup> The proposed rule largely reiterates these restrictions,<sup>52</sup> but extends the serious crime restriction to cover foreign as well as domestic serious crime convictions. This is because individuals for whom accreditation is sought may have been convicted of serious crimes while living or residing in foreign countries. The

<sup>47</sup> *R&A Public Meeting Minutes* at 4–5; *R&A Comments* at 2, 3, 10, 20–21, 24–25, 29, 49, 54, 60, 65; *AILA Comments* at 5.

<sup>48</sup> See *R&A Public Meeting Minutes* at 4–5; *R&A Comments* at 43, 49, 55, 73.

<sup>49</sup> OLAP anticipates meeting with stakeholders to develop "best practices" guidelines. In the future, OLAP may also consider undertaking a separate rulemaking process to establish certification standards for training providers.

<sup>50</sup> See 8 CFR 1001.1(f), 1292(a)(1).

<sup>51</sup> See 8 CFR 1003.101(a), 1003.102(e), (h).

<sup>52</sup> The prohibition against accrediting individuals who are subject to an order restricting their practice of law is primarily directed at preventing attorneys who have been suspended or disbarred from becoming accredited and thereby circumventing the order of suspension or disbarment.

decision to use those convictions as a disqualifying factor for accreditation is not unique, as foreign convictions are given collateral effects under Federal immigration law. *See, e.g.*, 8 U.S.C. § 1101(a)(43) (stating that the term “aggravated felony” applies to certain “offense[s] in violation of the law of a foreign country”).

In order to demonstrate that the above qualifications are satisfied, the organization and its proposed representative must sign Form EOIR–31A attesting that the representative is not an attorney licensed to practice in the United States; is not subject to an order restricting his or her practice of law or representation before a court or administrative agency; and has not been convicted of a serious crime.

### 3. Applying for Recognition and Accreditation

The proposed rule would modify the filing and review process for recognition and accreditation requests. Under the current process, organizations use Form EOIR–31 to request recognition, and the form identifies the requirements for recognition.<sup>53</sup> Organizations, however, are not required by regulation to file a form to apply for or renew accreditation of a representative. Rather, they may file a letter and supporting documentation or they may file voluntary form EOIR–31A. The proposed rule would require that organizations use Form EOIR–31A to request accreditation (or the renewal of accreditation) for their representatives. The required form should both simplify the accreditation request process for applicants by clarifying the required information and promote efficient and effective administration of the program to ensure that only qualified and competent applicants are recognized and accredited.<sup>54</sup>

The proposed rule would modify the requirements for service of requests for recognition and accreditation in two ways. First, the proposed rule requires service of a request for recognition or accreditation only on USCIS, not on both USCIS and ICE.<sup>55</sup> All accredited representatives may appear before

USCIS, and approximately eighty percent of accredited representatives and their recognized organizations provide representation solely before USCIS. Therefore, it is unnecessary for organizations to serve all requests for recognition and accreditation on ICE. If OLAP determines that it may be beneficial to obtain a recommendation or information from ICE, particularly with applications for renewal of full accreditations, OLAP may make a request to ICE for a recommendation or information.<sup>56</sup> Second, the proposed rule requires service on the USCIS district offices in the jurisdictions where the organization and its representatives offer or intend to offer services, rather than the USCIS district offices where the organization is located. The proposed rule’s service requirements with respect to USCIS will ensure involvement from the USCIS offices that are most likely to have relevant information, particularly with regard to applicants who have previously practiced before USCIS in other circumstances.<sup>57</sup>

The proposed rule also allows OLAP to gather information from new sources—other than USCIS and ICE—in evaluating requests for recognition and accreditation. OLAP may request investigations and receive information from the EOIR disciplinary counsel and the EOIR anti-fraud officer when evaluating recognition and accreditation requests. OLAP may also consider publicly available information, such as newspaper articles or other public records. Unfavorable information obtained by OLAP from these sources, or from USCIS or ICE, that may be relied upon to disapprove a recognition or accreditation request, if not previously served on the organization, will be disclosed to the organization. The organization will be given a reasonable opportunity to respond to such unfavorable information prior to any determination on the request for recognition or accreditation.

In addition, in order to minimize adverse determinations, OLAP may request additional information from an organization prior to issuing a determination on a request for

recognition or accreditation.<sup>58</sup> This process is similar to a USCIS Request for Evidence in the immigration petition or application context.<sup>59</sup> This new process will allow organizations to address concerns or questions, thereby facilitating the approval of their applications when appropriate.

Finally, similar to the current R&A regulations, which do not allow for an appeal or a motion to reopen or reconsider the Board’s final decision on recognition or accreditation issues, the proposed rule provides that OLAP’s recognition or accreditation determinations would be final (*i.e.*, there would be no appeal of an adverse determination). An organization whose request for recognition or accreditation is disapproved may submit a new request for recognition or accreditation when the organization believes it has overcome or corrected the basis for disapproval.

### 4. Extending Recognition and Accreditation

The proposed rule eliminates the requirement that organizations with multiple offices submit separate applications for recognition of each physical location,<sup>60</sup> and instead grants OLAP the discretion to approve extensions of recognition and accreditation of representatives from the headquarters or designated office of an organization to other offices or locations where the organization provides immigration legal services. This change

<sup>58</sup> The current regulations provide that the Board may hear oral argument on requests for recognition and accreditation. *See* 8 CFR 1292.2(b), (d). The proposed rule does not provide OLAP with similar authority because oral argument has rarely been used by the Board to issue a decision on a request for recognition or accreditation. Additionally, any issues that arise in relation to a request for recognition or accreditation under the proposed rule may be resolved through the request for information process.

<sup>59</sup> *See* USCIS, *Policy Memorandum 602–0085: Requests for Evidence and Notices of Intent to Deny* (June 3, 2013), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20\(Final\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20(Final).pdf) (last visited Sept. 15, 2015).

<sup>60</sup> Currently, the Board requires an organization with physically separate branch offices to request recognition for each branch office, even if another office is already recognized. *Matter of Florida Rural Legal Services, Inc.*, 20 I&N Dec. 639, 640 (BIA 1993). The Board also required organizations to file separate requests for accreditation at each branch office until recently, when it eliminated the requirement because organizations were filing duplicative applications for the same individual. *See Matter of United Farm Workers Foundation*, 26 I&N Dec. 454 (BIA 2014). The proposed rule adopts a similar approach and extends it to allow organizations with multiple branch offices to seek OLAP’s approval to extend recognition as well as accreditation to multiple locations without the need to submit a separate, largely redundant request. As a result, the proposed rule eliminates duplicative requests for both recognition and accreditation.

<sup>53</sup> The current regulations refer to the outdated INS Form G–27 application for recognition. 8 CFR 1292.2(b). Upon EOIR’s creation, EOIR re-designated the application for recognition as Form EOIR–31.

<sup>54</sup> EOIR intends to regularly make available average processing times for recognition and accreditation applications.

<sup>55</sup> The current Form EOIR–31 states that requests for recognition and accreditation must be served on the USCIS district director and the ICE chief counsel who have jurisdiction over the area in which the organization is located. *See* Form EOIR–31, OMB# 1125–0012, at 1 (Oct. 2014).

<sup>56</sup> For most initial requests for recognition or accreditation, ICE would have no information regarding an organization or its proposed representatives, unless the organization or proposed representatives were previously recognized or accredited.

<sup>57</sup> As in the current regulations, any USCIS recommendation regarding a request for recognition or accreditation will be served on the organization, which will then have the opportunity to respond to any unfavorable recommendation.



should have the effect of increasing the number of recognized organizations and accredited representatives available to provide immigration legal services to underserved immigrant populations in different areas, and better reflects the advances in technology that have improved an organization's ability to oversee its operations, supervise staff, and access legal resources as well as the changes in how organizations provide services.<sup>61</sup> It seems unnecessary and overly burdensome to require an organization with multiple offices but virtually the same staff, structure, mission, and tax status to independently apply for recognition at each location.<sup>62</sup>

To extend recognition to another office or location, the proposed rule does not require a recognized organization to fully complete a Form EOIR-31 for the new office or location. Rather, the recognized organization must simply submit Form EOIR-31 with the names and addresses of offices or locations where it intends to provide services and affirm that it conducts regular inspections, supervises and controls its accredited representatives, and provides access to adequate legal resources at each office or location where services will be provided. An organization seeking to extend recognition to an office or location must conduct periodic inspections of that office or location, but daily supervision of accredited representatives would not be expected. Once the request for extension is approved, the organization's accredited representatives may represent clients out of each of the offices or locations listed. The addresses of these offices or locations and the associated accredited representatives will be placed on the roster of recognized organizations and accredited representatives.

The proposed rule does not require OLAP to extend recognition and accreditation to all offices or locations of an organization. Rather, OLAP, in its discretion, may direct an office or location of an organization to independently seek recognition and the accreditation of its representatives. For

<sup>61</sup> For example, this provision may allow for a farm workers' organization with a mobile van to travel to rural locations in order to provide immigration legal services to its clients or for an organization to provide services via videoconferencing equipment when a client is at one office and a representative is at a second office.

<sup>62</sup> See also *Matter of United Farm Workers Foundation*, 26 I&N Dec. at 456 & n.2 (noting that elimination of "per branch" accreditation will "lessen the paperwork and costs associated with duplicative applications, and it will eliminate the unproductive need for recognized organizations to monitor multiple expiration dates for the same accredited representative").

example, if a national non-profit organization applied to extend recognition from its headquarters to a branch or affiliate office with its own non-profit organizing documents, staff, funding sources, fee schedules, and other distinct operations, the branch office would likely be required to independently seek recognition and the accreditation of its representatives.

#### 5. The Validity Period, Renewal of Recognition and Accreditation, and Change in Accreditation

##### a. Validity Period for Recognition and Accreditation

Under the current R&A regulations, recognized organizations are recognized indefinitely, unless their recognition is withdrawn. Accredited representatives, on the other hand, are currently required to request renewal of their accreditation every three years. Some commenters recommended that organizations be required to renew their recognition to address the perceived ineffectiveness of the current rule's withdrawal of recognition process and to improve oversight of recognized organizations, whereas others have recommended an annual update by the organization rather than a full re-recognition process.<sup>63</sup> Commenters also expressed concern regarding unduly burdensome requirements for renewal of recognition and have suggested up to a five-year renewal period.<sup>64</sup>

Under the proposed rule, recognition would be valid for a period of three years, unless the organization has been granted conditional recognition, which is valid only for two years, or the organization has its recognition administratively terminated or is disciplined (through revocation or termination) prior to the conclusion of its recognition period. The accreditation period of a representative would run concurrently with the organization's recognition period or, if approved separately from the organization's recognition, the representative's accreditation would expire on the same date the organization's period of

<sup>63</sup> See *R&A Public Meeting Minutes* at 2-3. Some commenters recommended that EOIR institute an annual registration or reporting process, possibly online, that would allow active organizations to update relevant information rather than go through, or in addition to, the re-recognition process. See *R&A Program Comments* at 45, 57, 64; *AILA Comments* at 2. EOIR does not have the resources at this time to create electronic records for recognition and accreditation or an online update process for organizations. EOIR also has concerns that an annual re-registration would not be sufficiently thorough to allow for meaningful oversight or address potential fraud by unscrupulous individuals.

<sup>64</sup> See *R&A Program Comments* at 8, 18, 79.

recognition ends, unless the representative is administratively terminated or the representative is disciplined (through termination, revocation, suspension, or disbarment) prior to the conclusion of the recognition period. This framework simplifies the renewal process for the organization, which must seek renewal for both itself and its representatives at the same time, and reinforces the interdependence between recognition and accreditation, as accreditation does not exist independently of association with a recognized organization.

##### b. Renewal of Recognition and Accreditation

As noted above, the proposed rule provides that, in order to retain recognition, an organization must renew its recognition along with the accreditation of its representatives every three years, or two years after a grant of conditional recognition.<sup>65</sup> For recognition to be renewed for a three-year period, the organization must have at least one representative simultaneously approved for accreditation.<sup>66</sup> Recognition of an organization and accreditation of its representatives remain valid pending a determination on the renewal requests. Organizations and representatives seeking renewal of their status, even those in pending disciplinary proceedings, are presumed to be in good standing and remain eligible to provide immigration legal services during OLAP's consideration of the renewal request.<sup>67</sup>

To renew recognition, the organization must file Form EOIR-31, establish that it continues to maintain the qualifications for recognition; submit fee schedules and annual reports compiled since its last approval of recognition; and describe any unreported changes that impact eligibility for recognition since the last approval of recognition. The new

<sup>65</sup> A renewal application must be received by the OLAP Director on or before the third anniversary date of the last decision approving the organization's recognition (or two years after an approval of conditional recognition). Given the documentation necessary to establish eligibility for renewal, an organization should generally refrain from submitting an application more than 60 days prior to its anniversary date. The proposed rule also provides OLAP with discretion to accept an application out of time.

<sup>66</sup> Accordingly, when applying for renewal, the organization must: (1) Renew accreditation of at least one current representative; (2) request accreditation for a new proposed representative; or (3) both.

<sup>67</sup> However, a representative in pending disciplinary proceedings who has received an interim suspension that precludes practice before USCIS or EOIR during the pendency of the proceedings is not presumed to be in good standing.

documentary requirements should not be unduly burdensome because organizations likely already prepare the required documents in the normal course of their operations. Furthermore, the ability to extend recognition to branch offices should reduce the number of documents required to be filed by an organization with multiple offices.

To renew accreditation, the organization must use Form EOIR-31A, establish that the accredited representative continues to maintain the qualifications for accreditation, and show that the representative has continued to receive formal training in immigration law and procedure commensurate with the services the organization provides and the duration of the representative's accreditation.

The proposed rule does not mandate testing or the type or amount of training required to renew accreditation.<sup>68</sup> Rather, similar to the Board's interpretation of the current regulations, the proposed rule imposes a formal training requirement and requires the organization to provide evidence of completed training upon applying for renewal.<sup>69</sup> The formal training courses should focus generally on recent developments in immigration law and procedure, but may concern specific areas, such as citizenship, asylum, VAWA, or criminal law and the consequences of criminal convictions in immigration proceedings, as may be relevant to the nature of the representative's casework. Case management skills, ethics, and professional responsibility training are also recommended.

In its renewal request, an organization should also show, through its annual

reports, the types and numbers of immigration applications and cases handled by the accredited representative during the accreditation period, and submit letters of recommendation from individuals who can attest to the representative's character and performance during the period. The duration of a representative's accreditation is relevant in this regard, as a representative who was accredited six months prior to the renewal date would not necessarily be expected to show the same amount of formal training and work experience as a representative who was accredited for an entire three-year period. Nonetheless, the organization would be expected to provide information regarding any training attended or cases handled by the representative during the abbreviated period of accreditation. Even an experienced representative who has been re-accredited several times should demonstrate continued formal training.

OLAP's process for evaluating recognition and accreditation renewal requests is similar to the review process for initial recognition and accreditation requests. OLAP may receive a recommendation from USCIS regarding the requests, and it may request additional information from the organization, review publicly available information, or seek an investigation and information from USCIS, ICE, the EOIR disciplinary counsel, or the EOIR anti-fraud officer. The organization will have the opportunity to respond to unfavorable information that was not previously provided to it that OLAP may use to make its renewal determination.

As in the context of initial requests, discussed in Part IV.B.3 above, the proposed rule provides that OLAP's determinations regarding recognition or accreditation renewal requests would be final (*i.e.*, there would be no appeal from an adverse determination).

For an organization whose request for renewal of recognition is disapproved, both its recognition and the accreditation of its representatives will terminate upon service of an administrative termination notice. However, the disapproved organization may submit a new request for recognition or accreditation.

#### c. Change in Accreditation

The proposed rule permits a recognized organization to request, at any time during the validity period of accreditation or at renewal, that a representative's status be changed from partial to full accreditation. A request for a change to full accreditation must

demonstrate that the representative has the skills essential for effective litigation of cases before the immigration courts and the Board, such as legal research and oral and written trial and appellate advocacy skills. If an organization requests a change from partial to full accreditation at renewal, and that request is disapproved, OLAP may renew the representative's partial accreditation provided that the representative satisfies the requirements for renewal of such accreditation.

#### d. Organizations and Representatives Recognized and Accredited Prior to the Effective Date of the Final Rule

Organizations and representatives recognized and accredited prior to the effective date of this rule when it is adopted in final form will remain recognized and accredited.<sup>70</sup> However, these organizations and representatives would be subject to the provisions of the final rule when it becomes effective, and they would be required to request renewal of recognition and renewal of accreditation for their representatives based on certain triggers, as set forth below:

- Organizations without an accredited representative would be required to renew recognition within one year of the effective date of the final rule, so that such organizations become compliant with the rule's requirement that recognized organizations have at least one accredited representative.
- Organizations submitting a request for accreditation of a new representative or a request for extension of recognition and accreditation to an additional office or location would be required to renew recognition and accreditation of all representatives at that time, so that the organization's recognition and the accreditation of its representatives remain linked and subject to renewal at the same time.
- Organizations that do not fall into either of the above categories would be required to apply for renewal of recognition within two years of the effective date of the final rule if the organization was recognized for more than ten years prior to the effective date, or within three years of the effective

<sup>68</sup> The training requirement for renewal of accreditation has been the subject of much debate, but there has been no consensus among training advocates as to the appropriate type and amount of training or who should provide the training and how it should be delivered. See *R&A Public Meeting Minutes* at 4-5; *R&A Program Comments* at 2, 10-11, 20-22, 24, 40, 43, 54, 60, 65, 68-69; *AILA Comments* at 5-6. EOIR considered but rejected including requirements in the proposed rule for mandatory testing or a specified type or amount of training. Inclusion of such requirements would necessarily increase the costs of applying for recognition and accreditation, as they would likely involve fees and added expenses for organizations. Those fees and added expenses, in turn, would likely result in increased charges for services to clients of the organization. Furthermore, EOIR currently does not have the resources to develop its own mandatory testing and training program for accredited representatives.

<sup>69</sup> In *Matter of Central California Legal Services, Inc.*, the Board noted that "[w]hen a recognized organization seeks to renew a representative's accreditation, it should provide documentation that its accredited representative has received additional formal training in immigration law since the most recent accreditation." 26 I&N Dec. at 106-07 n.3.

<sup>70</sup> At the effective date of the final rule, a pending application for initial recognition, initial accreditation, or renewal of accreditation before the Board would be transferred to OLAP to review. Organizations with such pending applications would have to meet the new requirements of the final rule to be approved for recognition or accreditation. OLAP will provide organizations with pending applications the opportunity to amend the applications, if necessary, to conform to the new requirements of the final rule. Further guidance will be provided prior to the effective date of the final rule.

date if the organization was recognized for ten years or less prior to the effective date. This will ensure that older recognized organizations that have not had their qualifications for recognition evaluated in over ten years are examined sooner than organizations that have been more recently recognized.

If the accreditation of a currently accredited representative would otherwise expire prior to the date that the organization is required to renew recognition under this rule, the representative's renewal date will be tied to the organization's renewal date. In other words, if a representative's accreditation would otherwise expire one year after the effective date of the final rule, but the organization is not required to renew its recognition until two years after the effective date, the representative's accreditation continues in effect and does not need to be renewed until year two, at which time the organization will be required to seek renewal of recognition for itself and renewal of its representatives' accreditations at the same time. If an organization timely files a request for renewal of recognition and accreditation, both the recognition of the organization and the accreditation of its representatives will remain valid pending OLAP's consideration of the renewal requests.

Except for the new eligibility requirements of the final rule,<sup>71</sup> which would not be applicable until the time of renewal, these organizations and representatives would be subject to the provisions of the final rule as of its effective date, including the new disciplinary rules and procedures and any ground of administrative termination. Thus, these organizations and representatives may have their recognition or accreditation administratively terminated or may be subject to disciplinary action for incompetence, misconduct, or other disciplinary grounds.

## 6. Conditional Recognition

The proposed rule provides for conditional recognition of organizations that have not been previously recognized or that are recognized anew after having lost recognition due to an administrative termination or disciplinary sanctions. Some

<sup>71</sup> Note that the formal training requirement for renewal specified at 1292.16(c) is not a new eligibility requirement for renewal of accreditation. See *supra* n.69 (discussing *Matter of Central California Legal Services* and the need to show continued training for renewal of accreditation). Accordingly, representatives accredited prior to the effective date of the final rule will continue to be subject to the formal training requirement when they seek renewal under the final rule.

commenters have suggested that newly recognized organizations should be subject to a probationary period to assess their capabilities as non-profit providers of immigration legal services.<sup>72</sup> Conditional recognition provides such a probationary period and requires the specified organizations to apply for renewal under the processes outlined above within two years of the date that OLAP granted conditional recognition.

For a new organization, the two-year period provides the necessary time for the organization to establish itself and demonstrate that it can maintain the qualifications for recognition. Specifically, the conditional recognition period should provide sufficient time for new organizations to submit relevant tax documents, develop their client base, and establish a track record of offering immigration legal services to the community. The two-year conditional recognition period also should facilitate informed recommendations from USCIS and others in the community as to the competence of the organization and its representatives. For a previously recognized organization that was subject to an administrative termination or disciplinary sanctions, conditional recognition places it in the same position as a "new" organization. But the two-year period allows OLAP the opportunity to review the organization at an earlier renewal date to ensure that the same issues that led to an organization's earlier termination or discipline do not resume. Once OLAP approves a conditionally recognized organization for renewal of recognition, the organization and its accredited representatives then become subject to the standard three-year renewal cycle.

## 7. Reporting, Recordkeeping, and Posting Requirements

The proposed rule would impose reporting, recordkeeping, and posting requirements on recognized organizations and permit OLAP to administratively terminate recognition if OLAP determines that such a sanction is warranted because an organization fails to comply with these requirements after being notified of the deficiencies and having an opportunity to respond. These measures are intended to promote accountability from recognized organizations and serve as deterrents against fraud and abuse by individuals seeking to exploit the recognition and accreditation process.

First, the proposed rule would clarify the scope of the duty to report set forth

<sup>72</sup> *R&A Program Comments* at 15, 77.

in the current R&A regulations and EOIR's guidance to organizations,<sup>73</sup> and identify additional changes that must be reported to OLAP, including updated email addresses and Web sites, as well as changes in non-profit or tax-exempt status. Organizations must report these changes as soon as possible, but generally not later than 30 days from the date of the change.

Second, the proposed rule would add a new recordkeeping requirement, which will provide OLAP with a means to monitor organizations and ensure their compliance with the recognition requirements. Specifically, recognized organizations would be required to compile certain records and maintain them for six years after the creation of the records,<sup>74</sup> including annual reports and fee schedules, if any, for each office or location where services are provided.<sup>75</sup> These records may be requested for inspection by USCIS or EOIR in connection with an investigation, but they are primarily necessary to apply for renewal of recognition. The recordkeeping requirement should not be unduly burdensome, as organizations likely are required to retain such information for client-file retention, tax, or other accounting purposes. Moreover,

<sup>73</sup> See 8 CFR 1292.2(b), (d); EOIR, *Recognition & Accreditation (R&A) Program*, <http://www.justice.gov/eoir/recognition-and-accreditation-program> (last visited Sept. 15, 2015). The proposed rule provides a non-exhaustive list of the types of changes for which an organization would have a duty to report, including changes to: The organization name, address, telephone number, Web site address, email address, or the designation of authorized officer of the organization; an accredited representative's name or employment or volunteer status with the organization; and the organization's structure.

<sup>74</sup> The six-year record retention requirement is consistent with some state client-file retention policies for attorneys. See, e.g., American Bar Association, *Materials on Client File Retention*, [http://www.americanbar.org/groups/professional\\_responsibility/services/ethicsearch/materials\\_on\\_client\\_file\\_retention.html](http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch/materials_on_client_file_retention.html) (last visited Sept. 15, 2015); see generally Model Rules of Prof'l Conduct 1.16(d) (regarding attorney's obligation as to client records upon termination of representation); ABA Model Code of Prof'l Responsibility DR 2-110(A)(2) (regarding attorney's obligations as to client records upon withdrawal of representation). A recognized organization at the time the final rule becomes effective would be required to begin maintaining the specified records. An organization recognized after the effective date of the final rule must maintain the records prospectively. Both such organizations may destroy or discard any such records for recognition and accreditation purposes that are outside the six-year retention period.

<sup>75</sup> The annual report should include information already gathered by the organization such as the number of clients served, the types of services provided, the number of clients who were provided services at no cost, the total amount of fees charged to and donations or dues requested from immigration clients for the services provided, and the offices or locations where accredited representatives provided legal services.

requiring organizations to maintain and provide the specified records should deter unscrupulous individuals and organizations seeking to abuse the recognition and accreditation process.

Third, the proposed rule would authorize OLAP to require recognized organizations to post certain public notices.<sup>76</sup> These limited notices would provide information to the public about the R&A program, the requirements for recognition and accreditation, and the approval period of an organization's recognition and the accreditation of its representatives.<sup>77</sup> The notices would also explain how to submit complaints about accredited representatives or organizations that exploit or misuse the R&A process.

### C. Administrative Termination of Recognition and Accreditation

The proposed rule would replace the current withdrawal-of-recognition process with administrative termination procedures in order to provide a clear and more effective mechanism for OLAP to regulate the R&A roster for administrative, non-disciplinary reasons.

As commenters have noted in public meetings and written comments, the current withdrawal-of-recognition procedures are largely ineffective and have been rarely used.<sup>78</sup> Withdrawal of recognition requires DHS to investigate whether an organization has maintained the qualifications for recognition and to initiate the withdrawal process through a notice to show cause.<sup>79</sup> The process involves a hearing before an

immigration judge,<sup>80</sup> who recommends a decision to the Board. The Board may hold oral argument, and it issues the final decision on withdrawal of recognition. The Board has issued one published decision in such proceedings and DHS (and, before it, INS) have rarely sought withdrawal of recognition in the last 20 years.<sup>81</sup> Withdrawal of recognition has proven to be too cumbersome a process to remove an organization from the R&A roster for administrative reasons. The proposed rule would eliminate this process and permit OLAP to terminate and remove organizations and representatives from the roster for administrative reasons when appropriate.

The proposed rule provides a list of administrative bases for terminating recognition or accreditation. These bases are limited to circumstances within the knowledge of the organization or representative. For instance, an organization's recognition may be administratively terminated because it voluntarily requested termination, because it did not request renewal of recognition,<sup>82</sup> or because its renewal request was disapproved. Recognition of organizations and accreditation of representatives may also be terminated if OLAP notifies the organization or representative of a deficiency affecting eligibility for recognition and accreditation—such as a failure to maintain the qualifications for recognition or accreditation or a failure to comply with the reporting, recordkeeping, and posting requirements—and the organization or representative does not dispute or provide an adequate explanation for the deficiency after being provided an opportunity to do so.

Upon notice to an organization that its recognition has been terminated, the accreditation of that organization's representatives will automatically be terminated as well, unless those individuals are also accredited through another recognized organization. The termination of a representative's

accreditation may result in termination of the recognition of the representative's organization if the organization does not have any other accredited representatives. If that is the case, OLAP, independently or at the request of the organization, in the exercise of discretion, may place the organization on inactive status in lieu of terminating the organization's recognition. Inactive status precludes the organization from providing immigration legal services if it does not have an attorney on staff, but gives the organization a reasonable opportunity to apply for and have approved the accreditation of a new representative without having to request recognition anew.

### D. Sanctioning Recognized Organizations and Accredited Representatives

The proposed rule would provide an additional tool for EOIR to regulate the roster of recognized organizations through EOIR's well-established disciplinary procedures at part 1003, subpart G, 8 CFR 1003.101 *et seq.* The disciplinary process is separate and apart from administrative termination, and is directed at removing and potentially barring from the roster organizations and representatives that commit misconduct and act against the public interest.

Currently, only attorneys, representatives, and other practitioners<sup>83</sup> are subject to sanctions for committing misconduct or acting against the public interest. Recognized organizations are subject to withdrawal of recognition, which, as discussed above, is limited to removing organizations for failing to maintain the qualifications for recognition (*e.g.*, non-profit status and nominal fees for its services). The current regulations do not address circumstances where organizations may submit false information to obtain recognition, abuse their recognized status by affiliating with unscrupulous individuals like notarios, or fail to monitor the provision of services provided by their representatives. The proposed rule extends sanctions to recognized organizations that commit misconduct or act against the public interest.

Building on EOIR's well-established disciplinary procedures in part 1003,

<sup>76</sup> See *Zauderer v. Office of Disciplinary Counsel*, Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (stating that required factual disclosures by commercial entities that are reasonably related to a valid government interest do not violate the First Amendment).

<sup>77</sup> Commenters have suggested that the recognition and accreditation determination letter include a certificate for office display. The certificate could have the names of the organization and representatives, expiration dates, and information regarding where complaints can be filed against organizations, representatives, or notarios. Additionally, commenters have recommended that photo identification cards or secure badges be required for accredited representatives. The proposed rule does not require issuance of a certificate, secure identity card, or badge. Fully accredited representatives already are required to register through EOIR's eRegistry. See 8 CFR 1292.1. There would be costs to implement any additional requirements and EOIR does not intend to charge a fee to apply for recognition or accreditation or to issue secure identity documents for all representatives. Rather, OLAP may explore less costly options in the future to provide certificates and accreditation cards. See *R&A Public Meeting Minutes* at 2; *R&A Program Comments* at 1, 8, 15, 26, 58, 61, 63; *ALLA Comments* at 3.

<sup>78</sup> See *R&A Public Meeting Minutes* at 3; *R&A Program Comments* at 59, 79; *ALLA Comments* at 4.

<sup>79</sup> See 8 CFR 1292.2(c).

<sup>80</sup> The current withdrawal-of-recognition regulation, which has not been updated since the creation of DHS, refers to a hearing before a "special inquiry officer." See 8 CFR 1292.2(c). That term is outdated and refers to the former title of individuals now known as "immigration judges."

<sup>81</sup> See *Matter of Baptist Educational Center*, 20 I&N Dec. 723, 736 (BIA 1993) (withdrawing an organization's recognition upon finding that the organization was not a non-profit because it was not an entity separate and apart from its accredited representative, who used the organization's recognition to obtain accreditation and receive income for himself).

<sup>82</sup> The proposed rule permits OLAP to grant additional time for an organization to renew its recognition or to accept late-filed renewal requests from organizations.

<sup>83</sup> "Other practitioners" includes qualifying law students and law graduates not yet admitted to the bar, reputable individuals, and accredited officials who, like attorneys and accredited representatives, are authorized to represent clients before EOIR and are subject to EOIR's disciplinary procedures and sanctions. Such practitioners are typically authorized to appear in a single case and do not have multiple clients or caseloads like attorneys or accredited representatives.

subpart G, the proposed rule would create a uniform disciplinary process for attorneys, accredited representatives, other practitioners and, now, organizations. The EOIR disciplinary counsel and the DHS disciplinary counsel will receive complaints against recognized organizations, just as they currently receive complaints against attorneys, accredited representatives, and other practitioners. The EOIR disciplinary counsel or DHS disciplinary counsel, or both, will conduct a preliminary inquiry into the complaints to determine if they have merit. If a complaint lacks merit, it will be dismissed. If a complaint has merit, the EOIR or DHS disciplinary counsel may disclose the information to OLAP so that OLAP may informally resolve the matter with the recognized organization or consider the information in the renewal process. The EOIR or DHS disciplinary counsel may also initiate formal disciplinary proceedings against the recognized organization under the procedures specified at 8 CFR 1003.101 *et seq.* Under the proposed rule, recognized organizations would be subject to the same regulatory procedures for formal disciplinary proceedings as attorneys and accredited representatives, with some exceptions specified below.<sup>84</sup>

The proposed rule would thus generally amend EOIR's disciplinary procedures so that they apply equally to recognized organizations, accredited representatives, and attorneys. The proposed rule would also add provisions to the disciplinary regulations that apply only to (1) recognized organizations, (2) accredited representatives, or (3) attorneys, accredited representatives, and other practitioners.

#### 1. Grounds and Sanctions Applicable to Recognized Organizations

The proposed rule provides, at 8 CFR 1003.110, a non-exhaustive list of grounds for which it would be in the public interest to impose sanctions against a recognized organization, including: (1) Providing a false statement or misleading information in applying for recognition or accreditation of the organization's representatives; (2)

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; (3) failing to adequately supervise accredited representatives; or (4) employing, receiving services from, or affiliating with an individual who performs an activity that constitutes the unauthorized practice of law or immigration fraud. These grounds for disciplinary sanctions ensure that only qualified organizations are recognized and that those organizations are providing competent representation.

While recognized organizations should be able to discern the scope of the rule's expectations with respect to the first, second, and fourth grounds of discipline listed above, a fuller explanation of what is expected of organizations with respect to the failure-to-supervise ground is provided herein. That ground requires that organizations oversee the legal services provided through their accredited representatives and any attorneys on staff. A recognized organization is not required to monitor the day-to-day services provided by its accredited representatives, but the organization should supervise accredited representatives who have been the subject of warning letters, informal admonitions, and agreements in lieu of discipline from the EOIR or DHS disciplinary counsel. The proposed rule would amend the confidentiality provisions at 8 CFR 1003.108 governing the information that the EOIR disciplinary counsel obtains and possesses so that the disciplinary counsel may share information about resolutions that pertain to accredited representatives<sup>85</sup> with OLAP and an accredited representative's organization.<sup>86</sup> These amendments ensure that both OLAP and recognized organizations are fully aware of complaints and other issues related to accredited representatives.<sup>87</sup> If the conduct that subjected the accredited

representative to discipline continues after notice to the organization, the EOIR or DHS disciplinary counsel would be able to consider whether to seek sanctions against the organization for failing to provide adequate supervision.

The sanctions that may be imposed against a recognized organization are (1) revocation; (2) termination; or (3) any other sanction, other than a suspension,<sup>88</sup> that an adjudicating official or the Board deems appropriate. Revocation removes an organization and its accredited representatives from the recognition and accreditation roster and permanently bars the organization from being recognized anew.<sup>89</sup> Termination, like administrative termination, also removes an organization and its accredited representatives from the recognition and accreditation roster, but does not permanently bar it from subsequently applying for recognition. Unlike administrative termination, however, the adjudicating official or the Board may impose a time restriction on the organization that would preclude the organization from submitting a new request for recognition before a specified date.

#### 2. Grounds and Sanctions Applicable to Accredited Representatives

The proposed rule would make two changes to the current grounds for discipline that are applicable only to accredited representatives, and provide a new process for the interim suspension of certain accredited representatives in disciplinary proceedings.

Both changes to the grounds for discipline are aimed at precluding accredited representatives from acting or attempting to act outside the scope of their full or partial accreditation. In other words, a partially accredited representative, who is permitted to appear only before DHS, must not act or

<sup>84</sup> In drafting the proposed rule, EOIR determined that suspension would not be a permissible sanction against a recognized organization due to the administrative complexities of suspending and reinstating an organization. These complexities stem from the interconnected relationship between organizations and their representatives and their respective renewal periods, and the possibility that an organization's qualifications to be recognized may be at issue after discipline.

<sup>85</sup> In addition to revoking an organization's recognition, an adjudicating official may identify individuals affiliated with the organization who were directly involved in the conduct that constituted the grounds for revocation. If such identified individuals affiliate with a new organization, OLAP may consider their past conduct when assessing the new organization's applications for recognition or accreditation. The burden would be on the new organization to show that the individual would not engage in similar conduct in the future.

<sup>84</sup> The proposed rule would codify the existing delegation of authority from the EOIR Director to the Chief Administrative Hearing Officer to appoint, upon request of the Chief Immigration Judge, an administrative law judge as adjudicating official in disciplinary proceedings. If neither the Chief Immigration Judge nor the Chief Administrative Hearing Officer appoints an adjudicating official, or in the interest of efficiency, the EOIR Director may appoint an immigration judge or administrative law judge as an adjudicating official for the disciplinary proceedings.

<sup>85</sup> The confidentiality provisions have not been changed as they pertain to practitioners other than accredited representatives, such as attorneys. Information concerning such practitioners remains confidential to the same extent as under the current regulations.

<sup>86</sup> The proposed rule does not require the EOIR disciplinary counsel to disclose this information. Rather, the EOIR disciplinary counsel, in the exercise of discretion, may share information with OLAP and organizations to the extent that the disclosure of information will not interfere with the EOIR disciplinary counsel's regulatory obligations or an ongoing investigation.

<sup>87</sup> Note that DHS has separate confidentiality provisions in its regulations that would govern DHS disciplinary counsel's ability to share similar information with OLAP and recognized organizations.

attempt to act as a fully accredited representative, who is permitted to appear before DHS, the immigration courts, and the Board. The proposed rule would amend 8 CFR 1003.102(f) to define the circumstances in which an accredited representative would be considered to have made a false or misleading communication about his or her qualifications or services that cannot be substantiated. The proposed rule would also add, at 8 CFR 1003.102(v), a new ground for discipline if an accredited representative acts outside the scope of his or her accreditation.

The proposed rule would also add 8 CFR 1003.111 to provide for the imposition of an interim suspension against certain accredited representatives in disciplinary proceedings. If the EOIR disciplinary counsel or DHS disciplinary counsel demonstrates by a preponderance of the evidence that an accredited representative poses a substantial threat of irreparable harm to clients or prospective clients, an adjudicating official may issue an interim suspension to the accredited representative. The interim suspension would preclude a representative who has committed or is likely to commit serious misconduct from continuing to practice during the pendency of his or her disciplinary proceedings so as to protect the public from further potential harm.

### 3. Procedures Applicable to Recognized Organizations and Accredited Representatives

The proposed rule would add two provisions to the disciplinary procedures that are applicable only to recognized organizations and accredited representatives. First, the proposed rule states that administrative termination of an organization's recognition or a representative's accreditation while disciplinary proceedings are pending has no effect on the continuation of disciplinary proceedings or the imposition of sanctions. The primary objective of this amendment is to prevent an organization or representative from voluntarily terminating recognition or accreditation to avoid disciplinary sanctions.

Second, the proposed rule provides that disciplinary sanctions, if imposed against an organization or accredited representative, would take effect immediately upon the issuance of a final order—that is, the issuance of the Board's decision on appeal or after the time for filing an appeal from the adjudicating official's decision has expired. Unlike imposition of disciplinary sanctions against attorneys and other practitioners, which take

effect 15 days after the final order, disciplinary sanctions would be imposed immediately against organizations and accredited representatives. Recognized organizations and their accredited representatives are permitted to represent persons before the immigration courts, the Board, or DHS because EOIR itself grants them that permission and indicates to the public that the recognized organizations and accredited representatives are qualified to provide representation. Although attorneys also appear on behalf of multiple immigration clients, they do not need similar permission from EOIR to do so; they may practice before DHS, the immigration courts, and the Board because they are members in good standing of a state bar and not subject to any orders restricting their practice of law. The imposition of discipline against an organization or accredited representative thus allows EOIR to act immediately to protect the public from organizations and representatives that have engaged in misconduct by preventing them from continuing such conduct and significantly impairing the cases of individuals appearing before DHS, the immigration courts, and the Board.

### 4. Reinstatement

The proposed rule would amend the provisions regarding reinstatement after suspension or disbarment. Some of these amendments would apply to accredited representatives, attorneys, and other practitioners, while others would apply only to accredited representatives.

The proposed rule would allow the EOIR or DHS disciplinary counsel to object to reinstatement because a practitioner failed to comply with the terms of a suspension; such objections could be raised in the context of both reinstatement after a suspension has expired and requests for early reinstatement. The EOIR and DHS disciplinary counsel frequently receive evidence that suspended practitioners continue to practice immigration law while they are under an order of suspension. This new provision would enable the EOIR and DHS disciplinary counsels to raise relevant evidence to the Board during reinstatement proceedings.

In addition, the proposed rule would make two changes to the reinstatement provisions that are applicable only to accredited representatives. First, accredited representatives who are disbarred by EOIR are permanently barred from appearing before the Board, the immigration courts, or DHS as

accredited representatives and cannot seek reinstatement. Disbarment is permanent for accredited representatives because, as discussed above, EOIR is responsible for permitting accredited representatives to represent persons before EOIR and DHS, and it must protect the public from representatives who have been found to have engaged in misconduct worthy of disbarment. Second, the proposed rule would amend the reinstatement provisions to provide that accredited representatives may seek reinstatement only if, following the expiration of their suspension, there is time remaining on their period of accreditation. In other words, an accredited representative who has been suspended for a period of time greater than the remaining validity period of his or her accreditation at the time of the suspension is not eligible to be reinstated. In such circumstances, an organization may submit a new request for accreditation on behalf of such an individual after the period of suspension has elapsed.

### *E. Recognition and Accreditation for Practice Before DHS*

As noted, this proposed rule would amend the standards governing recognition of organizations and accreditation of representatives seeking to practice before either DHS or EOIR. Currently, those standards are set forth in two parallel sets of regulations: Regulations under the authority of DHS and contained in 8 CFR part 292; and regulations under the authority of the Department and contained in 8 CFR part 1292. Each set of regulations contains substantially similar standards for recognition and accreditation, and each directs organizations and individuals to apply to the Board in order to obtain recognition or accreditation. Compare 8 CFR 292.1(a)(4), 292.2, with 8 CFR 1292.1(a)(4), 1292.2.

Although this proposed rule would revise only 8 CFR part 1292, it would prescribe the standards and procedures that EOIR would apply in adjudicating all future applications for recognition and accreditation, including applications for partial accreditation to represent individuals before DHS. Accordingly, as of the effective date of a final rule, EOIR would not apply the standards and procedures for recognition and accreditation set forth in 8 CFR part 292. DHS has informed the Department that it plans to publish regulatory amendments to 8 CFR part 292 consistent with any pertinent changes to Department regulations. The Department welcomes public comment on this matter.

## V. Request for Public Comments

Based on the foregoing and the proposed rule, the Department welcomes comments from the public on all aspects of this rule.<sup>90</sup> In particular, the Department seeks the public's input on the following aspects of the proposed rule:

- The proposed requirement that an organization must demonstrate Federal tax-exempt status, including whether there are any non-profit organizations that are currently recognized that would be precluded from recognition by this requirement; and whether recognition should be restricted to non-profit organizations that have obtained section 501(c)(3) tax-exempt status from the IRS.

- The proposed requirement that a "substantial amount of the organization's immigration legal services budget is derived from sources other than funds provided by or on behalf of immigration clients themselves (such as legal fees, donations, or membership dues)."

- The proposed requirement that an organization must demonstrate that its immigration legal services are directed primarily to low-income and indigent clients within the United States and that, if an organization charges fees, the organization has a written policy for accommodating clients unable to pay for immigration legal services.

- The proposed requirement that, in order to be recognized, each organization must have an accredited representative, including whether an organization with a licensed attorney and no accredited representative on staff should be able to become a recognized organization.

- The proposed replacement of the "good moral character" requirement for accreditation with the requirement that an accredited representative possesses the "character and fitness" to represent clients, including what factors may be relevant to that assessment. Under this requirement, how should current immigration status be a factor in the fitness determination; to what extent should the agency consider whether the individual has employment authorization, has been issued a notice of intent to revoke or terminate an immigration status (or other relief), such as asylum or withholding of removal or deportation, or is in pending deportation, exclusion, or removal proceedings?

<sup>90</sup> Additionally, EOIR intends to engage with the public through public meetings and other means to receive comments on the entire rule. EOIR will provide notice of any public engagements in the **Federal Register** and on its Web site.

- The proposed provision permitting an organization to extend its recognition and the accreditation of its representatives to any office or location where it offers immigration legal services.

- The proposed provision that would grant conditional recognition to an organization if it has not been recognized previously or has been approved for recognition after its recognition was previously terminated, including whether conditionally recognized organizations, particularly new organizations, would be able to remove conditional status after one year, instead of two, by producing the required records (including documentation demonstrating tax-exempt status) and otherwise meeting the requirements for renewal.

- The absence, as under the current R&A regulations, of any opportunity for administrative review or appeal of adverse OLAP determinations regarding the recognition of organizations or the accreditation of representatives. Under the revised procedures, would it be appropriate to provide some opportunity for administrative review of adverse OLAP determinations, and if so, to what extent and in what contexts?

## VI. Regulatory Requirements

### A. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, this rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

Currently, there are more than 900 recognized organizations and more than 1,600 accredited representatives. This rule seeks to increase the number of recognized organizations and accredited representatives that are competent and qualified to provide immigration legal services primarily to low-income and indigent persons. The Department, however, cannot estimate with certainty the actual increase in the number of recognized organizations and accredited individuals that may result from the proposed rule. That figure is subject to multiple external factors, including changes in immigration law and policy and fluctuating needs for representation and immigration legal services.

While EOIR does not keep statistics on the size of recognized organizations, many of these organizations and their accredited representatives may be classified as, or employed by, "small entities" as defined under section 5 U.S.C. 601. In particular, recognized organizations, which are by definition non-profit entities, may also be classified as "small organizations" and

thus, as "small entities" under section 601.

Although the exact number of recognized organizations that may be classified as "small entities" is not known, the Department certifies that this rule will not have a significant economic impact on a substantial number of these entities. The proposed rule, like the current regulations, does not assess any fees on an organization to apply for initial recognition or accreditation, to renew recognition or accreditation, or to extend recognition.

The Department, however, acknowledges that organizations may incur costs to apply for recognition or accreditation, renew recognition or accreditation, or extend recognition. Based on Bureau of Labor Statistics reports and the average burden hours to apply for recognition or accreditation, renew recognition or accreditation, or extend recognition, discussed below in the Paperwork Reduction Act section, the Department estimates the costs as follows. *See also* Section G *infra* (discussing these burdens in detail in connection with the Paperwork Reduction Act). If an organization hires a lawyer to assist with the application process, the organization would incur costs of approximately \$109.90 to apply for initial recognition, \$164.85 to renew recognition, and \$109.90 to apply for or to renew accreditation. If an organization prepares its applications on its own, the organization would incur costs of approximately \$20.00 to apply for initial recognition, \$30.00 to renew recognition, and \$20.00 to apply for or to renew accreditation.

The Department also recognizes that the proposed rule imposes a new recordkeeping requirement on recognized organizations to compile and maintain fee schedules, if the organization charges any fees, and annual reports for a period of six years. However, the Department does not believe that the recordkeeping requirement will have a significant economic impact on recognized organizations. The annual reports would be compiled from information already in the possession of recognized organizations, and based on the estimates from the Paperwork Reduction Act section below, the Department estimates that it would cost an organization approximately \$54.95 to have a lawyer compile three annual reports, and \$10.00 for a non-lawyer to do so.<sup>91</sup> Maintaining the fee schedules and annual reports after their creation

<sup>91</sup> Note that the total average burden (and cost) for renewing recognition includes the burden (and cost) of compiling three annual reports.

for six years should not impose any significant economic impact on recognized organizations because such records may be retained in the normal course of business like other records, such as client files, that organizations are obligated to retain for state or Federal purposes.

Despite the costs mentioned above, the Department notes that the proposed rule will economically benefit recognized organizations. The proposed rule eliminates the requirement that recognized organizations assess only “nominal charges” for their immigration legal services. Shifting the primary focus of eligibility for recognition from the fees an organization charges its clients to the organization’s funding will provide organizations with flexibility in assessing fees, which should improve their financial sustainability and their ability to serve more persons.

#### *B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *C. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. As discussed in the certification under the Regulatory Flexibility Act, organizations and representatives will not be assessed a fee to either apply for or seek renewal of recognition and accreditation, and the burden of seeking renewal of recognition has been reasonably mitigated. The Department recognizes, however, that the proposed rule’s elimination of the “nominal charges” restriction may affect competition and employment in the market for legal services because a recognized organization could charge higher fees (but less than market rates) to clients. The proposed rule balances the elimination of the “nominal charges” restriction by also requiring that non-profit organizations primarily serve low-income and indigent persons and those in underserved areas. Legal fees charged by a non-profit organization are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area.

Accordingly, this rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### *D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)*

The proposed rule is considered by the Department to be a “significant regulatory action” under section 3(f)(4) of Executive Order 12866. Accordingly, the regulation has been submitted to the Office of Management and Budget (OMB) for review. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The proposed rule seeks to address the critical and ongoing shortage of qualified legal representation in underserved populations in immigration cases before Federal administrative agencies. Specifically, the proposed rule would revise the eligibility requirements and procedures for recognizing organizations and accrediting their representatives to provide immigration legal services to underserved populations. To expand the availability of such legal services, the proposed rule permits recognized organizations to extend their recognition and the accreditation of their representatives to multiple offices or locations and to have flexibility in charging fees for services. The proposed rule also imposes greater oversight over recognized organizations and their representatives in order to protect against potential abuse of vulnerable immigrant populations by unscrupulous organizations and individuals.

The proposed rule will greatly benefit organizations, DHS, EOIR, and most importantly, persons who need legal representation. The proposed rule is expected to increase the availability of

competent and qualified legal representation in underserved areas and particularly for indigent and low-income persons where an ongoing and critical shortage of such representation exists. For example, the elimination of the nominal fee restriction will allow organizations the flexibility to assess fees so that organizations will be able to sustain their operations and potentially expand them to serve more persons. In addition, the extension of recognition and accreditation to multiple offices or locations will permit organizations and their representatives, through mobile or technological means, to reach underserved persons who may currently have difficulty finding legal representation in remote or rural locations. These two provisions will greatly increase legal representation for persons before EOIR and DHS, and in turn, will substantially aid the administration of justice.

The proposed rule will provide EOIR with greater tools to manage and oversee the recognition and accreditation program. The proposed rule requires organizations to renew their recognition and their representatives’ accreditation every three years, and it imposes reporting, recordkeeping, and posting requirements on the organizations. The Department acknowledges that the new oversight provisions impose burdens on organizations. However, the burdens on the organizations are necessary to protect vulnerable immigrant populations from unscrupulous organizations and individuals and to legitimize reputable organizations and representatives.

Although the renewal requirement adds a new burden on recognized organizations, the Department has reasonably mitigated this burden. The proposed rule simplifies the renewal process so that all renewal requests, both for recognition and for accreditation of representatives of the organization are filed simultaneously. Also, the documentation to support renewal of recognition and accreditation would be supplemental to the documentation used to establish initial eligibility for recognition and accreditation. The information and documentation required to renew recognition should be in the possession of the organization in the normal course of its operations.

The reporting requirement expands the reporting obligation of organizations under the current rule, which only requires organizations to report changes in the organization’s name, address, or public telephone number, or in the employment status of an accredited representative. The proposed rule



expands the requirement to include any changes that would affect the organization's recognition (such as a merger), or a representative's accreditation (such as a change in the representative's name). The reporting requirement should not impose a significant cost to organizations because organizations may comply with the requirement by simply contacting EOIR to report such changes.

The recordkeeping requirement will primarily aid EOIR in evaluating an organization's request to renew recognition. The recordkeeping requirement requires an organization to compile fee schedules, if it charges any fees, and annual reports, and maintain them for a period of six years. The recordkeeping requirement is not unduly burdensome, as organizations should have such information in their possession, and the six-year record retention requirement is consistent with the organization's obligation to retain records, such as client files, for state or Federal purposes.

The posting requirement would require organizations to post public notices about the approval period of an organization's recognition and the accreditation of its representatives, the requirements for recognition and accreditation, and the process for filing a complaint against a recognized organization or accredited representative. EOIR would provide the notices to the organizations, and the organizations would not incur any tangible costs for the minimal burden of posting the notices. In fact, the public notices should greatly benefit organizations because the notices would legitimize organizations and notify the public that they are qualified to provide immigration legal services.

As detailed in Sections A (Regulatory Flexibility Act), *supra*, and G (Paperwork Reduction Act), *infra*, EOIR anticipates that if an organization hires a lawyer to assist with the application process, the organization would incur costs of approximately \$109.90 to apply for initial recognition, \$164.85 to renew recognition, and \$109.90 to apply for or to renew accreditation. If an organization prepares its applications on its own, the organization would incur costs of approximately \$20.00 to apply for initial recognition, \$30.00 to renew recognition, and \$20.00 to apply for or to renew accreditation.

#### E. Executive Order 13132: Federalism

This rule may have federalism implications but, as detailed below, will not have substantial direct effects on the States, on the relationship between the National Government and the States, or

on the distribution of power and responsibilities among the various levels of government.

The proposed rule, like the current regulations it would replace, permits non-lawyer accredited representatives to engage in the practice of law before EOIR and DHS. This practice of law by non-lawyers may constitute the unauthorized practice of law under some state laws and rules prohibiting the unauthorized practice of law. The proposed rule, like the current regulations, would preempt such state law prohibitions pursuant to *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), to the extent they prohibit accredited representatives from practicing law before EOIR and DHS.<sup>92</sup>

Despite the preemptive effects of this proposed rule, the federalism implications are minimal. The proposed rule merely updates the current, well-established regulations permitting non-lawyer accredited representatives to engage in the practice of law before EOIR and DHS. The proposed rule does not alter or extend the scope of the limited authorization to practice law before Federal administrative agencies provided under the current regulations. More significantly, following *Sperry*, many States have determined that the limited authorization for non-lawyers to practice law before EOIR and DHS does not constitute the unauthorized practice of law under their State laws and rules.<sup>93</sup>

Under these circumstances, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### F. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

<sup>92</sup> *Sperry* held that a statute and implementing regulation authorizing non-lawyers to practice before the Patent Office preempted a contrary state law prohibition on the unauthorized practice of law to the extent that the state law prohibition was incompatible with the Federal rules. See 373 U.S. at 385.

<sup>93</sup> See Ariz. Rev. Stat. Ann. § 12-2702(A)(4) (stating that an accredited representative is not engaging in the unauthorized practice of immigration law by providing immigration legal services); N.J. Stat. Ann. § 2C:21-31(d) (same); N.M. Stat. Ann. § 36-3-4(A)(4) (same); Va. Unauthorized Practice R. 9-103 (same); North Carolina State Bar, *Preventing Unlicensed Legal Practice*, <http://www.ncbar.gov/public/upl.asp> (last visited Sept. 15, 2015) (same).

#### G. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, no person is required to respond to a Federal collection of information unless the agency has in advance obtained a control number from OMB. In accordance with the PRA, the Department has submitted requests to OMB to revise the currently approved information collections contained in this rule (Forms EOIR-31, EOIR-31A and EOIR-44). These information collections were previously approved by OMB under the provisions of the PRA, and the information collections were assigned OMB Control Numbers 1125-0012 (EOIR-31), 1125-0013 (EOIR-31A), and 1125-0007 (EOIR-44). Through this notice of proposed rulemaking, the Department invites comments from the public and affected agencies regarding the revised information collections. Comments are encouraged and will be accepted for sixty days in conjunction with the proposed rule. Comments should be directed to the address listed in the **ADDRESSES** section at the beginning of this preamble. Comments should also be submitted to the Office of Management and Budget, Office of the Information and Regulatory Affairs, Attention: Desk Officer for EOIR, New Executive Building, 725 17th Street NW., Washington, DC 20053. This process is in accordance with 5 CFR 1320.10.

If you have any suggestions or comments, especially on the estimated public burden or associated response time, or need a copy of the proposed information collection instruments with instructions or additional information, please contact the Department as noted above. Written comments and suggestions from the public and affected agencies concerning the proposed collections of information are encouraged.

Comments on the proposed information collections should address one or more of the following four points: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) how the Department could enhance the quality, utility, and clarity of the information to be collected; and (4) how the Department could minimize the burden of the collections of information on those who elect to respond, including through the use of appropriate

automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Based on the proposed rule, three currently approved information collection instruments will need to be revised: (1) The form for non-profit religious, charitable, or social service organizations to apply for recognition (Form EOIR-31) (Current OMB approval number: 1125-0012); (2) the form for recognized organizations to apply for accreditation of non-attorney representatives (Form EOIR-31A) (Current OMB approval number: 1125-0013); and (3) the form for filing a complaint against an immigration practitioner (Form EOIR-44) (Current OMB approval number: 1125-0007).

1. Request for Recognition, Renewal of Recognition, or Extension of Recognition for a Non-Profit, Federal Tax-Exempt Religious, Charitable, Social Service, or Similar Organization (Form EOIR-31)

The revised Form EOIR-31 will be used to apply for initial recognition, renewal of recognition, and extension of recognition. Form EOIR-31 will generally be used every three years in connection with a request to renew recognition. It may also be used on occasion in the three-year period prior to renewal if an organization seeks to extend recognition to a new office or location, although extension of recognition to a new office may also be sought at the same time that initial recognition or renewal of recognition is sought.

Form EOIR-31 will be updated to reflect the eligibility requirements for an organization to be initially recognized and to renew recognition, as stated in the proposed rule. All of the information required under the current information collection will be required by the revised form, as most of the eligibility requirements under the current regulations are consistent with the proposed rule;<sup>94</sup> however, some of the information will be examined

<sup>94</sup> The revised form will require organizations to provide the same information and documents that are required under the current information collection. Organizations will continue to have to submit: A copy of their charter, constitution, by-laws, or articles of incorporation; documentation of their Federal tax-exempt status (e.g., the first page of the last IRS information return, if any); information regarding fees charged to clients, including fee schedules and fee waiver or reduced-fee policies; documents regarding funding sources and budget; and information regarding the immigration services the organizations intend to provide, members of their staff, their legal resources, and consultation agreements with other organizations or private attorneys.

differently to determine whether an organization satisfies the new eligibility requirements for recognition of the proposed rule.

The proposed rule would require revision of the currently approved information collection with regard to its use for renewal of recognition. In the renewal context, the revised form requires organizations to provide: (1) Fee schedules used since the last approval of recognition; and (2) annual reports for each year since the last approval of recognition. As described in footnote 75, the annual report should include information already gathered by the organization, such as the number of clients served, the types of services provided, the number of clients who were provided with services at no cost, the total amount of fees charged to and donations or dues requested from immigration clients for the services provided, and the locations where accredited representatives provided legal services. The fee schedules and annual reports will be used to: (1) Evaluate an organization's request to renew recognition to determine whether the organization is satisfying the requirements for recognition, namely the provision of immigration legal services to primarily low-income and indigent persons; and (2) evaluate the effectiveness of the recognition and accreditation program in providing immigration legal services to primarily low-income and indigent persons.

Under the current information collection, which is currently used only for initial recognition, the estimated average time to review the form, gather necessary materials, complete the form, and assemble the attachments is 2 hours. The Department estimates that the average total response time will remain 2 hours for initial recognition because initial recognition requires the same materials as the current information collection. For renewal of recognition, with the additional requirements described above, namely the assembly of the annual reports, the Department estimates that the average time to review the form, gather necessary materials, complete the form, and assemble the attachments for each application to renew recognition will be 3 hours in total. Both estimates include the time saved from streamlining the recognition process by allowing an organization to file a single application for multiple locations.<sup>95</sup> The estimate

<sup>95</sup> Note that organizations must currently seek recognition separately for each office that provides immigration legal services. Under the proposed rule and revised form, organizations may extend recognition from one office to other offices that provide immigration legal services by providing

for the renewal context includes the additional burdens associated with document retention and preparation of the annual reports. The Department estimates that the number of respondents seeking recognition in the first year will be approximately 432 organizations (128 new organizations and 304 recognized organizations seeking renewal).<sup>96</sup> The total public burden of this revised collection is estimated to be 1,168 burden hours annually ((128 respondents × 1 response per respondent × 2 hours per response = 256 burden hours) + (304 respondents × 1 response per respondent × 3 hours per response = 912 burden hours) = 1,168 burden hours).

2. Request by Organization for Accreditation or Renewal of Accreditation of Non-Attorney (Form EOIR-31A)

Form EOIR-31A will be updated to reflect the eligibility requirements for an individual to become an accredited representative, as stated in the proposed rule. The revisions are non-substantive and are simply intended to clarify what information is required when applying for initial accreditation and renewal of accreditation, as well as the eligibility requirements for becoming an accredited representative.<sup>97</sup> The revised form will not require the applicant to provide any new or additional information not already provided under the current information collection. EOIR Form-31A will continue to be used to apply for initial accreditation and to seek renewal of accreditation. EOIR Form-31A will be generally used every three years in connection with a request to renew accreditation, and may be used on occasion in the intervening time if an organization seeks accreditation for a new representative. As there is no new or additional information collected under the revised form, the Department estimates the average response time of 2 hours to complete Form EOIR-31A for

information regarding the additional offices on the same form as the initial office.

<sup>96</sup> Under the proposed rule, the 913 currently recognized organizations are expected to seek renewal of recognition over the next three years. Accordingly, the Department estimates that at least one third (304) of the 913 approved organizations will seek renewal of recognition each year for the next three years.

<sup>97</sup> For example, Part 5 (Qualifications for Accreditation) of Form EOIR-31A has been revised to include a list eligibility requirements, including that the applicant is an employee or volunteer of the organization; the applicant is not a licensed attorney; the applicant is not subject to any order restricting the individual in the practice of law or from otherwise providing representation before a court or administrative agency; and the applicant has not been convicted of a serious crime anywhere in the world.

each application for initial accreditation or to renew accreditation will remain the same as the currently approved collection, with a total number of respondents at approximately 615 applications for accreditation annually. The total public burden of this revised collection is 1,230 burden hours annually (615 respondents × 1 response per respondent × 2 hours per response = 1,230 burden hours).

3. Immigration Practitioner Complaint Form (Form EOIR-44)

Form EOIR-44 will be updated to reflect that the public may use the form to file a complaint against a recognized organization, in addition to an immigration practitioner. The revised form will not require the preparer to provide any new or additional information not already provided under the current collection. The information on this form will be used to determine whether the EOIR or DHS disciplinary counsel should conduct a preliminary inquiry, request additional information from the complainant, refer the matter to a law enforcement agency, or take no further action. The Department estimates an average response time of 2 hours to complete Form EOIR-44, with a total number of respondents at approximately 200 complainants annually. The total public burden of this revised collection is 400 burden hours annually.

There are no capital or start-up costs associated with these information collections. The estimated public cost is zero. For informational purposes only, there may be additional costs to respondents. Respondents may incur a cost if they hire a private practitioner to assist them with completing these forms. The Bureau of Labor Statistics reports that the median hourly wage for lawyers is \$54.95. For those respondents who proceed without a practitioner, there is an estimated cost of \$10 per hour for completing the form (the individuals' time and supplies) in lieu of the practitioner cost. There are also no fees associated with filing these forms.

List of Subjects

8 CFR Part 1001

Administrative practice and procedure, Aliens, Immigration, Organizations and functions (Government agencies).

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organizations and functions (Government agencies).

8 CFR Part 1103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 1212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1292

Administrative practice and procedure, Immigration, Lawyers, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1001, 1003, 1103, 1212, 1240, and 1292 are proposed to be amended as follows:

PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107-296, 116 Stat. 2135; Title VII of Pub. L. 110-229.

■ 2. In § 1001.1, add paragraphs (x) and (y) to read as follows:

§ 1001.1 Definitions.

\* \* \* \* \*

(x) The term *OLAP* means the Office of Legal Access Programs.

(y) The term *OLAP Director* means the Program Director of the Office of Legal Access Programs.

\* \* \* \* \*

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

■ 4. In § 1003.0, revise paragraphs (a) and (e)(1), redesignate paragraph (f) as paragraph (g), and add new paragraph (f), to read as follows:

§ 1003.0 Executive Office for Immigration Review.

(a) *Organization*. Within the Department of Justice, there shall be an

Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General. The Director shall be assisted by a Deputy Director and by a General Counsel. EOIR shall include the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, the Office of Legal Access Programs, and such other staff as the Attorney General or the Director may provide.

\* \* \* \* \*

(e) \* \* \*

(1) *Professional standards*. The General Counsel shall administer programs to protect the integrity of immigration proceedings before EOIR, including administering the disciplinary program for practitioners and recognized organizations under subpart G of this part.

\* \* \* \* \*

(f) *Office of Legal Access Programs and authorities of the Program Director*. Within EOIR, there shall be an Office of Legal Access Programs (OLAP), consisting of a Program Director and such other staff as the Director deems necessary. Subject to the supervision of the Director, the Program Director of OLAP (the OLAP Director), or his designee, shall have the authority to:

(1) Develop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law;

(2) Develop and administer a program to recognize organizations and accredit representatives to provide representation before the Immigration Courts, the Board, and DHS, or DHS alone. The OLAP Director shall determine whether an organization and its representatives meet the eligibility requirements for recognition and accreditation in accordance with this chapter. The OLAP Director shall also have the authority to administratively terminate the recognition of an organization and the accreditation of a representative and to maintain the roster of recognized organizations and their accredited representatives;

(3) Issue guidance and policies regarding the implementation of OLAP's statutory and regulatory authorities; and

(4) Exercise such other authorities as the Director may provide.

\* \* \* \* \*

■ 5. In § 1003.1, revise paragraph (b)(13), the first sentence of paragraph (d)(2)(iii), and paragraph (d)(5) to read as follows:

**§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.**

\* \* \* \* \*

(b) \* \* \*

(13) Decisions of adjudicating officials in disciplinary proceedings involving practitioners or recognized organizations as provided in subpart G of this part.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(iii) *Disciplinary consequences.* The filing by a practitioner, as defined in § 1003.101(b), of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section, may constitute frivolous behavior under § 1003.102(j).

\* \* \* \* \*

(5) *Discipline of practitioners and recognized organizations.* The Board shall have the authority pursuant to § 1003.101 *et seq.* to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or DHS, and upon recognized organizations. The Board shall also have the authority pursuant to § 1003.107 to reinstate disciplined practitioners to appear in a representative capacity before the Board and the Immigration Courts, or DHS, or all three authorities.

\* \* \* \* \*

■ 6. In § 1003.101, add paragraph (c) to read as follows:

**§ 1003.101 General provisions.**

\* \* \* \* \*

(c) The administrative termination of a representative's accreditation under 8 CFR 1292.17 after the issuance of a Notice of Intent to Discipline pursuant to § 1003.105(a)(1) shall not preclude the continuation of disciplinary proceedings and the imposition of sanctions, unless counsel for the government moves to withdraw the Notice of Intent to Discipline and the adjudicating official or the Board grants the motion.

■ 7. In § 1003.102, revise paragraph (f)(2), remove the word "or" from the end of paragraph (t)(2), remove the period and add "; and" in its place at the end of paragraph (u), and add paragraph (v).

The revisions and addition read as follows:

**§ 1003.102 Grounds.**

\* \* \* \* \*

(f) \* \* \*

(2) Contains an assertion about the practitioner or his or her qualifications or services that cannot be substantiated. A practitioner shall not state or imply

that he or she has been recognized or certified as a specialist in immigration or nationality law unless such certification is granted by the appropriate state regulatory authority or by an organization that has been approved by the appropriate state regulatory authority to grant such certification. An accredited representative shall not state or imply that he or she

(i) Is approved to practice before the Immigration Courts or the Board, if he or she is only approved as an accredited representative before DHS;

(ii) Is an accredited representative for an organization other than a recognized organization through which he or she acquired accreditation; or

(iii) Is an attorney.

\* \* \* \* \*

(v) Acts outside the scope of his or her approved authority as an accredited representative.

■ 8. In § 1003.103, revise paragraph (c) to read as follows:

**§ 1003.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner or recognized organization to notify EOIR of conviction or discipline.**

\* \* \* \* \*

(c) *Duty of practitioner and recognized organizations to notify EOIR of conviction or discipline.* A practitioner and if applicable, the authorized officer of each recognized organization with which a practitioner is affiliated must notify the EOIR disciplinary counsel within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending, when the practitioner has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in § 1003.102(h), or has been disbarred or suspended by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory or Commonwealth of the United States, or the District of Columbia, or any Federal court. A practitioner's failure to do so may result in an immediate suspension as set forth in paragraph (a) of this section and other final discipline. An organization's failure to do so may result in the administrative termination of its recognition for violating the reporting requirement under 8 CFR 1292.14. This duty to notify applies only to convictions for serious crimes and to orders imposing discipline for professional misconduct entered on or after August 28, 2000.

■ 9. In § 1003.104, revise paragraph (b) to read as follows:

**§ 1003.104 Filing of Complaints; preliminary inquiries; resolutions; referrals of complaints.**

\* \* \* \* \*

(b) *Preliminary inquiry.* Upon receipt of a disciplinary complaint or on its own initiative, the EOIR disciplinary counsel will initiate a preliminary inquiry. If a complaint is filed by a client or former client, the complainant thereby waives the attorney-client privilege and any other privilege relating to the representation to the extent necessary to conduct a preliminary inquiry and any subsequent proceedings based thereon. If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may, in his or her discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. The complainant and the practitioner shall be notified of any such determination in writing.

\* \* \* \* \*

■ 10. In § 1003.105, revise paragraph (a)(1), the first sentence of paragraph (c)(1), the last sentence of paragraph (c)(2), and paragraphs (c)(3), (d)(2) introductory text, and (d)(2)(ii) to read as follows:

**§ 1003.105 Notice of Intent to Discipline.**

(a) *Issuance of Notice.* (1) If, upon completion of the preliminary inquiry, the EOIR disciplinary counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 1003.102 or a recognized organization with misconduct as set forth in § 1003.110, he or she will file with the Board and issue to the practitioner or organization that was the subject of the preliminary inquiry a Notice of Intent to Discipline. In cases involving practitioners, service of the notice will be made upon the practitioner either by certified mail to his or her last known address, as defined in paragraph (a)(2) of this section, or by personal delivery. In cases involving recognized organizations, service of the notice will be made upon the authorized officer of the organization either by certified mail at the address of the organization or by personal delivery. The notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board. In summary disciplinary proceedings brought pursuant to

§ 1003.103(b), a preliminary inquiry report is not required to be filed with the Notice of Intent to Discipline. If a Notice of Intent to Discipline is filed against an accredited representative, the EOIR disciplinary counsel shall send a copy of the notice to the authorized officer of the recognized organization through which the representative is accredited at the address of the organization.

\* \* \* \* \*

(c) *Answer.* (1) *Filing.* The practitioner or, in cases involving a recognized organization, the organization shall file a written answer to the Notice of Intent to Discipline with the Board within 30 days of the date of service of the Notice of Intent to Discipline unless, on motion to the Board, an extension of time to answer is granted for good cause. \* \* \*

(2) \* \* \* The practitioner or, in cases involving a recognized organization, the organization may also state affirmatively special matters of defense and may submit supporting documents, including affidavits or statements, along with the answer.

(3) *Request for hearing.* The practitioner or, in cases involving a recognized organization, the organization shall also state in the answer whether a hearing on the matter is requested. If no such request is made, the opportunity for a hearing will be deemed waived.

(d) \* \* \*

(2) Upon such a default by the practitioner or, in cases involving a recognized organization, the organization, the counsel for the government shall submit to the Board proof of service of the Notice of Intent to Discipline. The practitioner or the organization shall be precluded thereafter from requesting a hearing on the matter. The Board shall issue a final order adopting the proposed disciplinary sanctions in the Notice of Intent to Discipline unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted or not in the interests of justice. With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103 or that otherwise involve an accredited representative or recognized organization, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of

any sanction. Any final order imposing discipline against an accredited representative or recognized organization shall become effective immediately. A practitioner or a recognized organization may file a motion to set aside a final order of discipline issued pursuant to this paragraph, with service of such motion on counsel for the government, provided:

\* \* \* \* \*

(ii) The practitioner's or the recognized organization's failure to file an answer was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner or the recognized organization.

■ 11. In § 1003.106, revise paragraph (a)(2) introductory text, paragraphs (a)(2)(i) through (iii), paragraph (a)(3) introductory text, and paragraphs (a)(3)(ii), (b), and (c) to read as follows:

**§ 1003.106 Right to be heard and disposition.**

(a) \* \* \*

(2) The procedures of paragraphs (b) through (d) of this section apply to cases in which the practitioner or recognized organization files a timely answer to the Notice of Intent to Discipline, with the exception of cases in which the Board issues a final order pursuant to § 1003.105(d)(2) or § 1003.106(a)(1).

(i) The Chief Immigration Judge shall, upon the filing of an answer, appoint an Immigration Judge as an adjudicating official. At the request of the Chief Immigration Judge, the Chief Administrative Hearing Officer may appoint an Administrative Law Judge as an adjudicating official. If the Chief Immigration Judge or the Chief Administrative Hearing Officer does not appoint an adjudicating official or if in the interest of efficiency, the Director may appoint either an Immigration Judge or Administrative Law Judge as an adjudicating official. An Immigration Judge or Administrative Law Judge shall not serve as the adjudicating official in any case in which he or she is the complainant, in any case involving a practitioner who regularly appears before him or her, or in any case involving a recognized organization whose representatives regularly appear before him or her.

(ii) Upon the practitioner's or, in cases involving a recognized organization, the organization's request for a hearing, the adjudicating official may designate the time and place of the hearing with due regard to the location of the

practitioner's practice or residence or of the recognized organization, the convenience of witnesses, and any other relevant factors. When designating the time and place of a hearing, the adjudicating official shall provide for the service of a notice of hearing, as the term "service" is defined in § 1003.13, on the practitioner or the authorized officer of the recognized organization and the counsel for the government. The practitioner or the recognized organization shall be afforded adequate time to prepare his, her, or its case in advance of the hearing. Pre-hearing conferences may be scheduled at the discretion of the adjudicating official in order to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline are subject to final approval by the adjudicating official or, if the practitioner or organization has not filed an answer, subject to final approval by the Board.

(iii) The practitioner or, in cases involving a recognized organization, the organization may be represented by counsel at no expense to the government. Counsel for the practitioner or the organization shall file the appropriate Notice of Entry of Appearance (Form EOIR-27 or EOIR-28) in accordance with the procedures set forth in this part. Each party shall have a reasonable opportunity to examine and object to evidence presented by the other party, to present evidence, and to cross-examine witnesses presented by the other party. If the practitioner or the recognized organization files an answer but does not request a hearing, then the adjudicating official shall provide the parties an opportunity to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

\* \* \* \* \*

(3) *Failure to appear in proceedings.* If the practitioner or, in cases involving a recognized organization, the organization requests a hearing as provided in § 1003.105(c)(3) but fails to appear, the adjudicating official shall then proceed and decide the case in the absence of the practitioner or the recognized organization in accordance with paragraph (b) of this section, based on the available record, including any additional evidence or arguments presented by the counsel for the government at the hearing. In such a proceeding the counsel for the government shall submit to the adjudicating official proof of service of

the Notice of Intent to Discipline as well as the Notice of the Hearing. The practitioner or the recognized organization shall be precluded thereafter from participating further in the proceedings. A final order imposing discipline issued pursuant to this paragraph shall not be subject to further review, except that the practitioner or the recognized organization may file a motion to set aside the order, with service of such motion on counsel for the government, provided:

\* \* \* \* \*

(ii) The practitioner's or the recognized organization's failure to appear was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner or the recognized organization.

(b) *Decision.* The adjudicating official shall consider the entire record and, as soon as practicable, render a decision. If the adjudicating official finds that one or more grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear and convincing evidence, the official shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified. If the adjudicating official determines that the organization's recognition should be revoked, the official may also identify the persons affiliated with the organization who were directly involved in the conduct that constituted the grounds for revocation. If the adjudicating official determines that the organization's recognition should be terminated, the official shall specify the time restriction, if any, before the organization may submit a new request for recognition. Any grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline that have not been established by clear and convincing evidence shall be dismissed. The adjudicating official shall provide for service of a written decision or memorandum summarizing an oral decision, as the term "service" is defined in § 1003.13, on the practitioner or, in cases involving a recognized organization, on the authorized officer of the organization and on the counsel for the government. Except as provided in paragraph (a)(2) of this section, the adjudicating official's decision becomes

final only upon waiver of appeal or expiration of the time for appeal to the Board, whichever comes first, nor does it take effect during the pendency of an appeal to the Board as provided in § 1003.6. A final order imposing discipline against an accredited representative or recognized organization shall take effect immediately.

(c) *Appeal.* Upon issuance of a decision by the adjudicating official, either party or both parties may appeal to the Board to conduct a review pursuant to § 1003.1(d)(3). Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in Part 1003, and must use Form EOIR-45. The decision of the Board is the final administrative order as provided in § 1003.1(d)(7), and shall be served upon the practitioner or, in cases involving a recognized organization, the organization as provided in § 1003.1(f). With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103 or cases involving accredited representatives or recognized organizations, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A final order imposing discipline against an accredited representative or recognized organization shall take effect immediately. A copy of the final administrative order of the Board shall be served upon the counsel for the government. If disciplinary sanctions are imposed against a practitioner or a recognized organization (other than a private censure), the Board may require that notice of such sanctions be posted at the Board, the Immigration Courts, or DHS for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.

\* \* \* \* \*

■ 12. In § 1003.107, revise paragraphs (a) and (b), redesignate paragraph (c) as paragraph (d), and add new paragraph (c) to read as follows:

**§ 1003.107 Reinstatement after disbarment or suspension.**

(a) *Reinstatement upon expiration of suspension.* (1) Except as provided in paragraph (c)(1) of this section, after the period of suspension has expired, a

practitioner who has been suspended and wishes to be reinstated must file a motion to the Board requesting reinstatement to practice before the Board and the Immigration Courts, or DHS, or before all three authorities. The practitioner must demonstrate by clear and convincing evidence that he or she meets the definition of attorney or representative as set forth in § 1001.1(f) and (j), respectively, of this chapter. The practitioner must serve a copy of such motion on the EOIR disciplinary counsel. In matters in which the practitioner was ordered suspended from practice before DHS, the practitioner must serve a copy of such motion on the DHS disciplinary counsel.

(2) The EOIR disciplinary counsel and, in matters in which the practitioner was ordered suspended from practice before DHS, the DHS disciplinary counsel may reply within 13 days of service of the motion in the form of a written response objecting to the reinstatement on the ground that the practitioner failed to comply with the terms of the suspension. The response must include supporting documentation or evidence of the petitioner's failure to comply with the terms of the suspension. The Board, in its discretion, may afford the parties additional time to file briefs or hold a hearing to determine if the practitioner meets all the requirements for reinstatement.

(3) If a practitioner does not meet the definition of attorney or representative, the Board shall deny the motion for reinstatement without further consideration. If the practitioner failed to comply with the terms of the suspension, the Board shall deny the motion and indicate the circumstances under which the practitioner may apply for reinstatement. If the practitioner meets the definition of attorney or representative and the practitioner otherwise has complied with the terms of the suspension, the Board shall grant the motion and reinstate the practitioner.

(b) *Early reinstatement.* (1) Except as provided in paragraph (c) of this section, a practitioner who has been disbarred or who has been suspended for one year or more may file a petition for reinstatement directly with the Board after one-half of the suspension period has expired or one year has passed, whichever is greater, provided that he or she meets the definition of attorney or representative as set forth in § 1001.1(f) and (j), respectively, of this chapter. A copy of such a petition shall be served on the EOIR disciplinary counsel. In matters in which the practitioner was ordered disbarred or

suspended from practice before DHS, a copy of such petition shall be served on the DHS disciplinary counsel.

(2) A practitioner seeking early reinstatement must demonstrate by clear and convincing evidence that he or she possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, or DHS, and that his or her reinstatement will not be detrimental to the administration of justice. The EOIR disciplinary counsel and, in matters in which the practitioner was ordered disbarred or suspended from practice before DHS, the DHS disciplinary counsel may reply within 30 days of service of the petition in the form of a written response to the Board, which may include, but is not limited to, documentation or evidence of the practitioner's failure to comply with the terms of the disbarment or suspension or of any complaints filed against the disbarred or suspended practitioner subsequent to his or her disbarment or suspension.

(c) *Accredited representatives.* (1) An accredited representative who has been suspended for a period of time greater than the remaining period of validity of his or her accreditation at the time of the suspension is not eligible to be reinstated under § 1003.107(a) or (b). In such circumstances, after the period of suspension has expired, an organization may submit a new request for accreditation pursuant to 8 CFR 1292.13 on behalf of such an individual.

(2) *Disbarment.* An accredited representative who has been disbarred is permanently barred from appearing before the Board, the Immigration Courts, or DHS as an accredited representative and cannot seek reinstatement.

\* \* \* \* \*

■ 13. In § 1003.108, revise paragraph (a) introductory text, paragraphs (a)(1)(i) through (iv), and paragraph (a)(2)(iv), add paragraph (a)(3), and revise paragraph (b) to read as follows:

**§ 1003.108 Confidentiality.**

(a) *Complaints and preliminary inquiries.* Except as otherwise provided by law or regulation, information concerning complaints or preliminary inquiries is confidential. A practitioner or recognized organization whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the EOIR disciplinary counsel may decline to permit a waiver of confidentiality if it is determined that an ongoing preliminary inquiry may be substantially prejudiced by public

disclosure before the filing of a Notice of Intent to Discipline.

(1) \* \* \*

(i) A practitioner or recognized organization has caused, or is likely to cause, harm to client(s), the public, or the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. If disclosure of information is made pursuant to this paragraph, the EOIR disciplinary counsel may define the scope of information disseminated and may limit the disclosure of information to specified individuals and entities;

(ii) A practitioner or recognized organization has committed criminal acts or is under investigation by law enforcement authorities;

(iii) A practitioner or recognized organization is under investigation by a disciplinary or regulatory authority, or has committed acts or made omissions that may reasonably result in investigation by such authorities;

(iv) A practitioner or recognized organization is the subject of multiple disciplinary complaints and the EOIR disciplinary counsel has determined not to pursue all of the complaints. The EOIR disciplinary counsel may inform complainants whose allegations have not been pursued of the status of any other preliminary inquiries or the manner in which any other complaint(s) against the practitioner or recognized organization have been resolved.

(2) \* \* \*

(iv) To the practitioner or recognized organization who is the subject of the complaint or preliminary inquiry or the practitioner's or recognized organization's counsel of record.

\* \* \* \* \*

(3) *Disclosure of information for the purpose of recognition of organizations and accreditation of representatives.* The EOIR disciplinary counsel, in the exercise of discretion, may disclose information concerning complaints or preliminary inquiries regarding applicants for recognition and accreditation, recognized organizations or their authorized officers, or accredited representatives to the OLAP Director for any purpose related to the recognition of organizations and accreditation of representatives.

(b) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* Resolutions reached prior to the issuance of a Notice of Intent to Discipline, such as warning letters, admonitions, and agreements in lieu of discipline are confidential, except that resolutions that pertain to an accredited representative may be disclosed to the

accredited representative's organization and the OLAP Director. However, all such resolutions may become part of the public record if the practitioner becomes subject to a subsequent Notice of Intent to Discipline.

\* \* \* \* \*

■ 14. Add §§ 1003.110 and 1003.111 to read as follows:

**§ 1003.110 Sanction of recognized organizations.**

(a) *Authority to sanction.* (1) An adjudicating official or the Board may impose disciplinary sanctions against a recognized organization if it is in the public interest to do so. It will be in the public interest to impose disciplinary sanctions if a recognized organization has engaged in the conduct described in paragraph (b). In accordance with the disciplinary proceedings set forth in this subpart, an adjudicating official or the Board may impose the following sanctions:

(i) Revocation, which removes the organization and its accredited representatives from the recognition and accreditation roster and permanently bars the organization from future recognition;

(ii) Termination, which removes the organization and its accredited representatives from the recognition and accreditation roster but does not bar the organization from future recognition. In terminating recognition under this section, the adjudicating official or the Board may preclude the organization from submitting a new request for recognition under 8 CFR 1292.13 before a specified date; or

(iii) Such other disciplinary sanctions, except a suspension, as the adjudicating official or the Board deems appropriate.

(2) The administrative termination of an organization's recognition under 8 CFR 1292.17 after the issuance of Notice of Intent to Discipline pursuant to § 1003.105(a)(1) shall not preclude the continuation of disciplinary proceedings and the imposition of sanctions, unless counsel for the government moves to dismiss the Notice of Intent to Discipline and the adjudicating official or the Board grants the motion.

(3) The imposition of disciplinary sanctions against a recognized organization does not result in disciplinary sanctions against that organization's accredited representatives; disciplinary sanctions, if any, against an organization's accredited representatives must be imposed separately from disciplinary sanctions against the organization. Termination or revocation of an organization's recognition has the effect

of terminating the accreditation of representatives of that organization, but such individuals may retain or seek accreditation through another recognized organization.

(b) *Grounds.* It shall be deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any recognized organization that violates one or more of the grounds specified in this paragraph, except that these grounds do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. A recognized organization may be subject to disciplinary sanctions if it:

(1) Knowingly or with reckless disregard provides a false statement or misleading information in applying for recognition or accreditation of its representatives;

(2) Knowingly or with reckless disregard provides false or misleading information to clients or prospective clients regarding the scope of authority of, or the services provided by, the organization or its accredited representatives;

(3) Fails to adequately supervise accredited representatives; or

(4) Employs, receives services from, or affiliates with an individual who performs an activity that constitutes the unauthorized practice of law or immigration fraud.

(c) *Joint disciplinary proceedings.* The EOIR disciplinary counsel or DHS disciplinary counsel may file a Notice of Intent to Discipline against a recognized organization and one or more of its accredited representatives pursuant to § 1003.101 *et seq.* Disciplinary proceedings conducted on such notices, if they are filed jointly with the Board, shall be joined and referred to the same adjudicating official pursuant to § 1003.106. An adjudicating official may join related disciplinary proceedings after the filing of a Notice of Intent to Discipline.

#### § 1003.111 Interim suspension.

(a) *Petition for interim suspension—*

(1) *EOIR Petition.* In conjunction with the filing of a Notice of Intent to Discipline or at any time thereafter during disciplinary proceedings before an adjudicating official, the EOIR disciplinary counsel may file a petition for an interim suspension of an accredited representative. Such suspension, if issued, precludes the representative from practicing before the Board and the Immigration Courts during the pendency of disciplinary proceedings and continues until the issuance of a final order in the disciplinary proceedings.

(2) *DHS Petition.* In conjunction with the filing of a Notice of Intent to Discipline or at any time thereafter during disciplinary proceedings before an adjudicating official, the DHS disciplinary counsel may file a petition for an interim suspension of an accredited representative. Such suspension, if issued, precludes the representative from practicing before DHS during the pendency of disciplinary proceedings and continues until the issuance of a final order in the disciplinary proceedings.

(3) *Contents of the petition.* In the petition, counsel for the government must demonstrate by a preponderance of the evidence that the accredited representative poses a substantial threat of irreparable harm to clients or prospective clients. An accredited representative poses a substantial threat of irreparable harm to clients or prospective clients if the representative committed three or more acts in violation of the grounds of discipline described at § 1003.102, when actual harm or threatened harm is demonstrated, or any other conduct that, if continued, will likely cause irreparable harm to clients or prospective clients. Counsel for the government must serve the petition on the accredited representative, as provided in § 1003.105, and send a copy of the petition to the authorized officer of the recognized organization at the address of the organization through which the representative is accredited.

(4) *Requests to broaden scope.* The EOIR disciplinary counsel or DHS disciplinary counsel may submit a request to broaden the scope of any interim suspension order such that an accredited representative would be precluded from practice before the Board, the Immigration Courts, and DHS.

(b) *Response.* The accredited representative may file a written response to the petition for interim suspension within 30 days of service of the petition.

(c) *Adjudication.* Upon the expiration of the time to respond to the petition for an interim suspension, the adjudicating official will consider the petition for an interim suspension, the accredited representative's response, if any, and any other evidence presented by the parties before determining whether to issue an interim suspension. If the adjudicating official imposes an interim suspension on the representative, the adjudicating official may require that notice of the interim suspension be posted at the Board and the Immigration Courts, or DHS, or all three authorities. Upon good cause shown, the

adjudicating official may set aside an order of interim suspension when it appears in the interest of justice to do so. If a final order in the disciplinary proceedings includes the imposition of a period of suspension against an accredited representative, time spent by the representative under an interim suspension pursuant to this section may be credited toward the period of suspension imposed under the final order.

#### PART 1103—APPEALS, RECORDS, AND FEES

■ 15. The authority citation for part 1103 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510

■ 16. In § 1103.3, revise paragraph (a), remove and reserve paragraph (b), and revise paragraph (c).

The revisions read as follows:

#### § 1103.3 Denials, appeals, and precedent decisions.

(a) The regulations pertaining to denials, appeals, and precedent decisions of the Department of Homeland Security are contained in 8 CFR 103.3.

\* \* \* \* \*

(c) *DHS precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General.

\* \* \* \* \*

#### PART 1212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 17. The authority citation for part 1212 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458); Title VII of Pub. L. 110-229.

■ 18. Revise § 1212.6 to read as follows:



**§ 1212.6 Border crossing identification cards.**

The regulations of the Department of Homeland Security pertaining to border crossing identification cards can be found at 8 CFR 212.6.

**PART 1292—REPRESENTATION AND APPEARANCES**

■ 19. Revise the authority citation for part 1292 to read as follows:

**Authority:** 8 U.S.C. 1103, 1362.

■ 20. In part 1292, before § 1292.1, add an undesignated center heading to read “In General”.

■ 21. In § 1292.1, revise paragraph (a)(4) to read as follows:

**§ 1292.1 Representation of others.**

(a) \* \* \*

(4) *Accredited representative.* An individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired. A partially accredited representative is authorized to practice solely before DHS. A fully accredited representative is authorized to practice before DHS, and upon registration, to practice before the Immigration Courts and the Board.

\* \* \* \* \*

**§ 1292.2 [Removed and Reserved]**

■ 22. Remove and reserve § 1292.2.

■ 23. Revise § 1292.3 to read as follows:

**§ 1292.3 Conduct for practitioners and recognized organizations—Rules and Procedures.**

Practitioners, as defined in § 1003.101(b) of this chapter, and recognized organizations are subject to the imposition of sanctions as provided in 8 CFR part 1003, subpart G, § 1003.101 *et seq.*, and 8 CFR 292.3 (pertaining to practice before DHS).

■ 24. Revise § 1292.6 to read as follows:

**§ 1292.6 Interpretation.**

Interpretations of §§ 1292.1 through 1292.6 will be made by the Board, subject to the provisions of part 1003 of this chapter. Interpretations of §§ 1292.11 through 1292.19 will be made by the OLAP Director.

■ 25. Add §§ 1292.11 through 1292.19, with an undesignated center heading preceding § 1292.11, to read as follows:  
Sec.

\* \* \* \* \*

**Recognition of Organizations and Accreditation of Non-Attorney Representatives**

1292.11 Recognition of an organization.

1292.12 Accreditation of representatives.

1292.13 Applying for recognition of organizations or accreditation of representatives.

1292.14 Reporting, recordkeeping, and posting requirements for recognized organizations.

1292.15 Extension of recognition and accreditation to multiple offices or locations of an organization.

1292.16 Renewal of recognition and accreditation.

1292.17 Administrative termination of recognition and accreditation.

1292.18 Complaints against recognized organizations and accredited representatives.

1292.19 Roster of recognized organizations and accredited representatives.

\* \* \* \* \*

**Recognition of Organizations and Accreditation of Non-Attorney Representatives**

**§ 1292.11 Recognition of an organization.**

(a) *In general.* The OLAP Director, in the exercise of discretion, may recognize an eligible organization to provide representation through accredited representatives who appear on behalf of clients before the Immigration Courts, the Board, and DHS, or DHS alone. The OLAP Director will determine whether an organization is eligible for recognition. To be eligible for recognition, the organization must establish that:

(1) The organization is a non-profit, Federal tax-exempt religious, charitable, social service, or similar organization established in the United States;

(2) The organization is simultaneously applying to have at least one employee or volunteer of the organization approved as an accredited representative by the OLAP Director and at least one application for accreditation is concurrently approved;

(3) A substantial amount of the organization’s immigration legal services budget is derived from sources other than funds provided by or on behalf of the immigration clients themselves (such as legal fees, donations, or membership dues);

(4) The organization provides immigration legal services primarily to low-income and indigent clients within the United States and if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services;

(5) The organization has access to adequate knowledge, information, and experience in all aspects of immigration law and procedure; and

(6) The organization has designated an authorized officer to act on behalf of the organization.

(b) *Proof of status as non-profit religious, charitable, social service, or*

*similar organization established in the United States.* The organization must submit a copy of its organizing documents, including a statement of its mission or purpose.

(c) *Proof of tax-exempt status.* The organization must submit a copy of its currently valid IRS tax-exemption determination letter and a copy of the first page of its last annual IRS information return (such as the IRS Form 990, 990–N, or 990–T) or otherwise demonstrate that the organization is not required to file a return. If an IRS tax-exemption determination letter has not been issued, the organization must submit proof that it has applied for tax-exempt status.

(d) *Proof of funding and service to low-income and indigent clients.* The organization must submit an annual budget for providing immigration legal services, a declaration from its authorized officer, and any additional documentation to demonstrate that the organization provides immigration legal services primarily to low-income and indigent clients within the United States, that the organization derives a substantial amount of its immigration legal services budget from sources other than funds provided by or on behalf of the immigration clients themselves, and, if the organization charges fees, that it has a written policy for accommodating clients unable to pay fees for immigration legal services.

(1) *Annual budget.* The organization must submit its annual budget for providing immigration legal services for the current year and, if available, its annual budget for providing immigration legal service for the prior year. If the annual budgets for both the current and prior year are unavailable, the organization must submit its projected annual budget for the upcoming year. The annual budget should describe how the organization is funded and include information about the organization’s operating expenses and sources of revenue for providing immigration legal services. Sources of revenue may include, but are not limited to, grants, fees, donations, or dues.

(2) *Declaration.* The authorized officer must attest that the organization provides immigration legal services primarily to low-income and indigent clients within the United States.

(3) *Waiver.* The organization may request a waiver of the requirement that a substantial amount of the organization’s annual immigration legal services budget is derived from sources other than funds provided by or on behalf of the immigration clients

themselves. To support its request for a waiver, the organization must submit documentation to show that a waiver would be in the public interest.

(4) *Additional documentation.*

Additional documentation may include, but is not limited to, a fee schedule and organizational policies and guidance regarding fee waivers or reduced fees based on financial need.

(e) *Proof of knowledge, information, and experience.* The organization must submit: A description of the immigration legal services that the organization seeks to offer; a description of the legal resources to which the organization has access; an organizational chart showing names, titles, and supervisors of immigration legal staff members; a description of the qualifications, experience, and breadth of immigration knowledge of these staff members, including, but not limited to resumes, letters of recommendation, certifications, and a list of all relevant, formal immigration-related trainings attended by staff members; and any agreement or proof of a formal arrangement entered into with non-staff immigration practitioners and recognized organizations for consultations or technical legal assistance.

(f) *Validity period of recognition.*

Recognition is valid for a period of three years from the date of the OLAP Director's approval of recognition, unless the organization has been granted conditional recognition. Conditional recognition is granted to an organization that has not been recognized previously or that has been approved for recognition after recognition was previously terminated pursuant to § 1292.17 or 8 CFR 1003.101 *et seq.* Conditional recognition is valid for two years from the date of the OLAP Director's approval of conditional recognition. Any organization's recognition is subject to being terminated pursuant to § 1292.17 or upon the issuance of disciplinary sanctions (termination or revocation) under 8 CFR 1003.101 *et seq.*

**§ 1292.12 Accreditation of representatives.**

(a) *In general.* Only recognized organizations, or organizations simultaneously applying for recognition, may request accreditation of individuals. The OLAP Director, in the exercise of discretion, may approve accreditation of an eligible individual as a representative of a recognized organization for either full or partial accreditation. An individual who receives full accreditation may represent clients before the Immigration Courts, the Board and DHS. An individual who

receives partial accreditation may represent clients only before DHS. In the request for accreditation, the organization must specify whether it seeks full or partial accreditation and establish eligibility for accreditation for the individual. To establish eligibility for accreditation, an organization must demonstrate that the individual for whom the organization seeks accreditation:

(1) Has 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;

(2) Is employed by or is a volunteer of the organization;

(3) Is not an attorney as defined in 8 CFR 1001.1(f);

(4) Has not resigned while a disciplinary investigation or proceeding is pending and is not subject to any order disbarring, suspending, enjoining, restraining, or otherwise restricting him or her in the practice of law or representation before a court or any administrative agency;

(5) Has not been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in 8 CFR 1003.102(h), in any court of the United States, or of any state, possession, territory, commonwealth, or the District of Columbia, or of a jurisdiction outside of the United States; and

(6) Possesses broad knowledge and adequate experience in immigration law and procedure. If an organization seeks full accreditation for an individual, it must establish that the individual also possesses skills essential for effective litigation.

(b) *Request for accreditation.* To establish that an individual satisfies the requirements of paragraph (a), the organization must submit a request for accreditation (Form EOIR-31A and supporting documents). The request for accreditation must be signed by the authorized officer and the individual to be accredited, both attesting that the individual satisfies these requirements.

(c) *Proof of knowledge and experience.* To establish that the individual satisfies the requirement in paragraph (a)(6) of this section, the organization must submit with its request for accreditation, at minimum: A description of the individual's qualifications, including education and immigration law experience; letters of

recommendation from at least two persons familiar with the individual's qualifications; and documentation of all relevant, formal immigration-related training, including a course on the fundamentals of immigration law, procedure, and practice. An organization must also submit documentation that an individual for whom the organization seeks full accreditation has formal training, education, or experience related to trial and appellate advocacy.

(d) *Validity period of accreditation.*

Accreditation is valid for the same period as the recognition of the organization that applied for accreditation, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(e) *Change in accreditation.* An organization may request to change the accreditation of a representative from partial to full accreditation at any time during the validity period of accreditation or at renewal. Such a request will be treated as a new, initial request for full accreditation and must comply with this section.

**§ 1292.13 Applying for recognition of organizations or accreditation of representatives.**

(a) *In general.* An organization applying for recognition or accreditation of a representative must submit a request for recognition (Form EOIR-31) or a request for accreditation (Form EOIR-31A) to the OLAP Director with proof of service of a copy of the request on each USCIS district director in the jurisdictions where the organization offers or intends to offer immigration legal services. An organization must submit a separate request for accreditation (Form EOIR-31A) for each individual for whom it seeks accreditation. To determine whether an organization has established eligibility for recognition or accreditation of a representative, the OLAP Director shall review all information contained in the request for recognition or accreditation and may review any publicly available information or any other information that OLAP may possess about the organization, its authorized officer, or the proposed representative or may have received pursuant to paragraphs (b), (c), and (d) of this section. Unfavorable information obtained by the OLAP Director that may be relied upon to disapprove a recognition or accreditation request, if not previously

served on the organization, shall be disclosed to the organization, and the organization shall be given a reasonable opportunity to respond. Prior to determining whether to approve or disapprove a request for recognition or accreditation, the OLAP Director may request additional information from the organization pertaining to the eligibility requirements for recognition or accreditation. The OLAP Director, in writing, shall inform the organization and each USCIS district director in the jurisdictions where the organization offers or intends to offer immigration legal services of the determination approving or disapproving the organization's request for recognition or accreditation of a representative. The OLAP Director may, in the exercise of discretion, extend the deadlines provided in this section.

(b) *USCIS recommendation and investigation.* Within 30 days from the date of service of the request for recognition or accreditation, each USCIS district director served with the request may submit to the OLAP Director a recommendation for approval or disapproval of the request for recognition or accreditation including an explanation for the recommendation, or may request from the OLAP Director a specified period of additional time, generally no more than 30 days, in which to conduct an investigation or otherwise obtain relevant information regarding the organization, its authorized officer, or any individual for whom the organization seeks accreditation. The OLAP Director shall inform the organization if he or she grants a request from a USCIS district director for additional time to conduct an investigation, or if, in the exercise of discretion, the OLAP Director has requested that a USCIS district director conduct an investigation of the organization, its authorized officer, or any individual for whom the organization seeks accreditation. A USCIS district director must submit any recommendation with proof of service of a copy of the recommendation on the organization. Within 30 days of service of an unfavorable recommendation, the organization may file with the OLAP Director a response to the unfavorable recommendation, along with proof of service of a copy of such response on the USCIS district director that provided the recommendation.

(c) *ICE recommendation.* Upon receipt of a request for recognition or accreditation, the OLAP Director may request a recommendation or information from each ICE chief counsel in the jurisdictions where the organization offers or intends to offer

immigration legal services regarding the organization, its authorized officer, or any individual for whom the organization seeks accreditation. Within 30 days from the date of receipt of the OLAP Director's request, each ICE chief counsel may make a recommendation or disclose information regarding the organization, its authorized officer, or individuals for whom the organization seeks accreditation. An ICE chief counsel must submit any recommendation with proof of service of a copy of the recommendation on the organization. Within 30 days of service of an unfavorable recommendation, the organization may file with the OLAP Director a response to the unfavorable recommendation, along with proof of service of a copy of such response on the ICE chief counsel that provided the recommendation. The OLAP Director, in writing, shall inform each ICE chief counsel that provided a recommendation of the determination approving or disapproving the organization's request for recognition or accreditation of a representative.

(d) *EOIR investigation.* Upon receipt of a request for recognition or accreditation, the OLAP Director may request that the EOIR disciplinary counsel or anti-fraud officer conduct an investigation into the organization, its authorized officer, or any individual for whom the organization seeks accreditation. Within 30 days from the date of receipt of the OLAP Director's request, the EOIR disciplinary counsel or anti-fraud officer may disclose to the OLAP Director information, including complaints, preliminary inquiries, warning letters, and admonitions, relating to the organization, its authorized officer, or any individual for whom the organization seeks accreditation.

(e) *Finality of decision.* The OLAP Director's determination to approve or disapprove a request for recognition or accreditation is final. An organization whose request for recognition or accreditation was previously disapproved may submit a new request for recognition or accreditation at any time unless otherwise prohibited.

**§ 1292.14 Reporting, recordkeeping, and posting requirements for recognized organizations.**

(a) *Duty to report changes.* A recognized organization has a duty to promptly notify the OLAP Director in writing of changes in the organization's contact information, changes to any material information the organization provided in Form EOIR-31, Form EOIR-31A, or the documents submitted in support thereof, or changes that

otherwise materially relate to the organization's eligibility for recognition or the eligibility for accreditation of any of the organization's accredited representatives. These changes may include alterations to: The organization's name, address, telephone number, Web site address, email address, or the designation of the authorized officer of the organization; an accredited representative's name or employment or volunteer status with the organization; and the organization's structure, including a merger of organizations that have already been individually accorded recognition or a change in non-profit or Federal tax-exempt status.

(b) *Recordkeeping.* A recognized organization must compile each of the following records in a timely manner, and retain them for a period of six years from the date the record is created, as long as the organization remains recognized:

(1) The organization's immigration legal services fee schedule, if the organization charges any fees for immigration legal services, for each office or location where such services are provided; and

(2) An annual report compiled by the organization regarding, for each accredited representative, the types and numbers of immigration cases and applications for which it provided immigration legal services, the nature of the services provided, the number of clients to which it provided services at no cost, the amount of fees, donations, and membership dues, if any, charged or requested of immigration clients, and the offices or locations where the immigration legal services were provided. OLAP may require the organization to submit such records to it or USCIS upon request.

(c) *Posting.* The OLAP Director shall have the authority to issue public notices regarding recognition and accreditation and to require recognized organizations and accredited representatives to post such public notices. Information contained in the public notices shall be limited to: The names and validity periods of a recognized organization and its accredited representatives, the requirements for recognition and accreditation, and the means to complain about a recognized organization or accredited representative.

**§ 1292.15 Extension of recognition and accreditation to multiple offices or locations of an organization.**

Upon approving an initial request for recognition or a request for renewal of

recognition, or at any other time, the OLAP Director, in his or her discretion, may extend the recognition of an organization to any office or location where the organization offers services. To request extension of recognition, an organization that is seeking or has received recognition must submit a Form EOIR-31 that identifies the name and address of the organization's headquarters or designated office and the name and address of each other office or location for which the organization seeks extension of recognition. The organization must also provide a declaration from its authorized officer attesting that it periodically conducts inspections of each such office or location, exercises supervision and control over its accredited representatives at those offices and locations, and provides access to adequate legal resources at each such office or location. OLAP may require an organization to seek separate recognition for an office or location of the organization, for example, when a subordinate office or location has distinct operations, management structure, or funding sources from the organization's headquarters. The OLAP Director's determination to extend recognition to the offices or locations identified in Form EOIR-31 permits the organization's accredited representatives to provide immigration legal services out of those offices or locations. OLAP will post the address of each office or location to which recognition has been extended on the roster of recognized organizations and accredited representatives.

**§ 1292.16 Renewal of recognition and accreditation.**

(a) *In general.* To retain its recognition and the accreditation of its representatives after the conclusion of the validity period specified in § 1292.11(f), an organization must submit a request for renewal of its recognition, in conjunction with a request for renewal of accreditation of each representative for whom it seeks renewal of accreditation, or a request for accreditation of each proposed representative for whom it seeks initial accreditation (Form EOIR-31, Form EOIR 31A, and supporting documents). The request for renewal of recognition may only be approved if at least one request for accreditation is concurrently approved or renewed.

(b) *Timing of renewal.* An organization requesting renewal of recognition and renewal of accreditation must submit the requests on or before the third anniversary date of the organization's last approval or renewal

of recognition or, for a conditionally recognized organization, on or before the second anniversary of the approval date of the conditional recognition with proof of service of a copy of the requests on each USCIS district director in the jurisdictions where the organization offers or intends to offer immigration legal services. The OLAP Director, in his or her discretion, may grant additional time to submit a request for renewal or accept a request for renewal filed out of time. The recognition of the organization and the accreditation of any representatives for whom the organization timely requests renewal shall remain valid pending the OLAP Director's consideration of the renewal requests, except in the case of an interim suspension pursuant to 8 CFR 1003.111.

(c) *Renewal requirements—(1) Recognition.* The request for renewal of recognition must establish that the organization remains eligible for recognition under § 1292.11(a), include the records specified in § 1292.14(b) that the organization compiled since the last approval of recognition, and describe any unreported changes that impact eligibility for recognition for the date of the last approval of recognition.

(2) *Accreditation.* Each request for renewal of accreditation must establish that the individual remains eligible for accreditation under § 1292.12(a) and has continued to receive formal training in immigration law and procedure commensurate with the services the organization provides and the duration of the representative's accreditation. Each request for initial accreditation of a proposed representative submitted with a request for renewal of recognition must comply with § 1292.12.

(d) *Recommendations and investigations.* Each USCIS district director served with a request for renewal of recognition or a request for renewal of accreditation may submit to the OLAP Director a recommendation for approval or disapproval of that request pursuant to § 1292.13(b). The OLAP Director may request a recommendation from the ICE chief counsels, or an investigation from the EOIR disciplinary counsel or anti-fraud officer, pursuant to § 1292.13(c) and (d).

(e) *Renewal process.* The OLAP Director shall review all information contained in the requests and may review any publicly available information or any other information that OLAP may possess about the organization, its authorized officer, or any individual for whom the organization seeks accreditation or renewal of accreditation or that OLAP may have received pursuant to

§ 1292.13(b) through (d). Unfavorable information obtained by the OLAP Director that may be relied upon to disapprove a recognition or accreditation request, if not previously served on the organization, shall be disclosed to the organization, and the organization shall be given a reasonable opportunity to respond. Prior to determining whether to approve or disapprove a request for renewal of recognition or accreditation, the OLAP Director may request additional information from the organization pertaining to the eligibility requirements for recognition or accreditation. The OLAP Director, in writing, shall inform the organization and each USCIS district director in the jurisdictions where the organization offers or intends to offer immigration legal services of the determination to approve or disapprove a request for renewal of recognition. If the OLAP Director renews recognition, the OLAP Director shall issue a written determination approving or disapproving each request for accreditation or renewal of accreditation.

(f) *Finality of decision.* The OLAP Director's determination to approve or disapprove a request to renew recognition or accreditation is final. An organization whose request for renewal of recognition or accreditation of its representatives has been disapproved, and whose recognition or accreditation of its representatives is terminated, may submit a new request for recognition and accreditation at any time unless otherwise prohibited.

(g) *Validity period of recognition and accreditation after renewal.* After renewal of recognition and accreditation, the recognition of the organization and the accreditation of its representatives are valid for a period of three years from the date of the OLAP Director's determination to renew recognition and accreditation, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (*i.e.*, termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(h) *Organizations and representatives recognized and accredited prior to the regulation's effective date—(1) Applicability.* An organization or representative that received recognition or accreditation prior to the effective date of this regulation through the Board under former § 1292.2 is subject to the provisions of this part. Such an organization or representative shall continue to be recognized or accredited

until the organization is required to request renewal of its recognition and accreditation of its representatives as required by paragraph (h)(2) of this section and pending the OLAP Director's determination on the organization's request for renewal if such a request is timely made, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(2) *Renewal of recognition and accreditation.* To retain its recognition and the accreditation of its representatives, an organization that received recognition prior to the effective date of this regulation must request renewal of its recognition and the accreditation of its representative(s) pursuant to this section on or before the following dates:

(i) Within 1 year of the effective date of this regulation, if the organization does not have an accredited representative on the effective date of this regulation;

(ii) Upon the submission of a request for accreditation of an individual who has not been previously accredited through that organization or a request to extend recognition and accreditation pursuant to § 1292.15;

(iii) Within 2 years of the effective date of this regulation, if the organization is not required to submit a request for renewal at an earlier date under paragraphs (i) or (ii) of this section, and the organization has been recognized for more than 10 years as of the effective date of this regulation; or

(iv) Within 3 years of the effective date of this regulation, if the organization is not required to submit a request for renewal at an earlier date under paragraphs (i), (ii), or (iii) of this section.

**§ 1292.17 Administrative termination of recognition and accreditation.**

(a) *In general.* The OLAP Director may administratively terminate an organization's recognition or a representative's accreditation and remove the organization or representative from the recognition and accreditation roster. Prior to issuing a determination to administratively terminate recognition or accreditation, the OLAP Director may request information from the organization, representative, USCIS, or EOIR, regarding the bases for termination. The OLAP Director, in writing, shall inform the organization and the representative,

as applicable, of the determination to terminate the organization's recognition or the representative's accreditation, and the reasons for the determination.

(b) *Bases for administrative termination of recognition.* The bases for termination of recognition under this section are:

(1) An organization did not submit a request to renew its recognition, or to renew accreditation of a representative or to obtain initial accreditation for a proposed representative, at the time required for renewal;

(2) An organization's request for renewal of recognition is disapproved;

(3) All of the organization's accredited representatives have been terminated pursuant to this section or suspended or disbarred pursuant to 8 CFR 1003.101 *et seq.*;

(4) An organization submits a written request to the OLAP Director for termination of its recognition;

(5) An organization fails to comply with its reporting, recordkeeping, and posting requirements under § 1292.14, after being notified of the deficiencies and having an opportunity to respond; or

(6) An organization fails to maintain eligibility for recognition under § 1292.11, after being notified of the deficiencies and having an opportunity to respond.

(c) *Bases for administrative termination of accreditation.* The bases for termination of accreditation under this section are:

(1) An individual's organization has its recognition terminated pursuant to this section or terminated or revoked pursuant to 8 CFR 1003.101 *et seq.*;

(2) An organization does not submit a request for renewal of the individual's accreditation at the time required for renewal;

(3) An accredited representative submits a written request to the OLAP Director for termination of his or her accreditation;

(4) An organization submits a written request to the OLAP Director for termination of the accreditation of one or more of its representatives; or

(5) An individual fails to maintain eligibility for accreditation under § 1292.12, after the individual's organization has been notified of the deficiencies and had an opportunity to respond.

(d) *Effect of administrative termination of recognition.* The OLAP Director's determination to terminate recognition is final as of the date of service of the administrative termination notice. Upon service of an administrative termination notice to the organization's accredited

representatives by OLAP, the organization's representatives shall no longer be authorized to represent clients before the Immigration Courts, the Board, or DHS on behalf of that organization, but the notice shall not affect an individual's accreditation through another recognized organization unless otherwise specified. An organization whose recognition is terminated may submit a new request for recognition at any time after its termination unless otherwise prohibited.

(e) *Effect of administrative termination of accreditation.* The OLAP Director's determination to terminate accreditation is final as of the date of service of the administrative termination notice. Upon service of an administrative termination notice to an accredited representative by OLAP, the individual shall no longer be authorized to represent clients before the Immigration Courts, the Board, or DHS on behalf of that organization, but the notice does not affect the individual's accreditation through another organization unless specified in the determination. If there are no other accredited representatives for the individual's recognized organization, the OLAP Director's termination of the individual's accreditation may result in the termination of recognition of that individual's organization. In the exercise of discretion, the OLAP Director, independently or upon the request of such an organization, may place the organization on inactive status, which precludes the organization from providing immigration legal services unless it has an attorney of staff, in order for the organization to apply for and have approved, within a reasonable time, the accreditation of one or more representatives. An organization may submit a request for accreditation on behalf of any individual whose accreditation has been terminated unless otherwise prohibited.

**§ 1292.18 Complaints against recognized organizations and accredited representatives.**

(a) *Filing complaints.* Any individual may submit a complaint to EOIR or USCIS that a recognized organization or accredited representative has engaged in behavior that is a ground of termination or otherwise contrary to the public interest. Complaints must be submitted in writing or on Form EOIR-44 to the EOIR disciplinary counsel or DHS disciplinary counsel and must state in detail the information that supports the basis for the complaint, including, but not limited to: The name and address of each complainant; the name and

address of each recognized organization and accredited representative that is a subject of the complaint; the nature of the conduct or behavior; the individuals involved; and any other relevant information. EOIR disciplinary counsel and DHS disciplinary counsel shall notify each other of any complaint that pertains, in whole or in part, to a matter involving the other agency.

(b) *Preliminary inquiry.* Upon receipt of the complaint, the EOIR disciplinary counsel will initiate a preliminary inquiry. If a complaint is filed by a client or former client of a recognized organization or any of its accredited representatives, the complainant waives the attorney-client privilege and any other privilege relating to the representation to the extent necessary to conduct a preliminary inquiry and any subsequent proceedings based thereon.

If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may also, in his or her discretion, dismiss a complaint if the complainant fails to comply with reasonable requests for information or documentation. If the EOIR disciplinary counsel determines that a complaint has merit, the EOIR disciplinary counsel may disclose information concerning the complaint or the preliminary inquiry to the OLAP Director pursuant to 8 CFR 1003.108(a)(3) or initiate disciplinary proceedings through the filing of a Notice of Intent to Discipline pursuant to 8 CFR 1003.105. If a complaint involves allegations that a recognized organization or accredited representative engaged in criminal conduct, the EOIR disciplinary counsel

shall refer the matter to DHS or the appropriate United States Attorney, and if appropriate, to the Inspector General, the Federal Bureau of Investigation, or other law enforcement agency.

**§ 1292.19 Roster of recognized organizations and accredited representatives.**

The OLAP Director shall maintain a roster of recognized organizations and their accredited representatives. An electronic copy of the roster shall be made available to the public and updated periodically.

Dated: September 15, 2015.

**Sally Quillian Yates,**

*Deputy Attorney General.*

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