VILLANOVA
UNIVERSITY

STRATEGIC INITIATIVE ON MIGRATION AND REFUGEE PROTECTION
OFFICE *of the* PROVOST

October 12, 2022

Submitted by UPS Overnight Mailing to:

Lauren Alder Reid
Assistant Director,
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

Cc: David Neal, Director
Executive Office for Immigration Review

RE: Comments on OMB 1125-0012, Agency Information Collection Activities; Request for New Recognition, Renewal of Recognition, Extension of Recognition of a Non-profit Religious, Charitable, Social Service, or Similar Organization (Form EOIR 31) 87 Fed. Reg. 50123 (August 15, 2022)[1]

AND

OMB 1125-0031 Agency Information Collection Activities; Proposed e-Collection; Comments Requested; Request by Organization for Accreditation or Renewal of Accreditation of Non-Attorney Representative (Form EOIR 31A) 87 Fed Reg. 50123 (August 15, 2022)[2]

To the Office of Policy:

On behalf of the Strategic Initiative Group on Migration and Refugee Protection at Villanova University, we submit the following comments in response to the Notices of Information Collection on Forms EOIR 31 and 31A specified above.

In clear violation of the Administrative Procedures Act (APA), the two notices at issue here aim to amend the regulatory requirements for recognition and accreditation found in 8 CFR Part 1292 by amending questions on the forms used to apply for recognition (EOIR Form 31) and accreditation (EOIR Form 31A) and by issuing a notice to the public about its intent to submit "an information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995." We submit that no changes to the requirements for recognition or accreditation or the application forms for those benefits should be implemented unless and until the Department undertakes a data-driven and transparent process and can justify proposals within the proper notice and public comment processes.

The Department of Justice's Recognition and Accreditation program is an important catalyst for non-profit organizations representing low-income immigrants to provide high-quality representation in immigration matters through specially trained professionals. These recognition and accreditation application forms are the linchpin for advancing the mission of the R&A program. Form EOIR 31 is used by an immigrant serving organization to apply for DOJ recognition, and Form EOIR 31A is used by a trained person within that organization to apply for accreditation. The versions of the Forms EOIR 31 and 31A that have been used since 2017 collect information relevant to the R&A Office's assessment of eligibility for recognition and accreditation under current regulatory standards. We urge EOIR to withdraw the proposed 2022 version of the EOIR 31 and 31A forms and continue to use the 2017 EOIR forms unless and until the new form requirements are subjected to notice and comment in accordance with the APA.

Background on the Villanova University's Strategic Initiative Group on Migration and Refugee Protection

The Strategic Initiative Group on Migration and Refugee Protection at Villanova University (the SIG) was launched in summer 2021 to build the field of accredited representatives and immigration advocates. Our centerpiece training program is VIISTA, Villanova Interdisciplinary Immigration Studies Training for Advocates, which was designed by Professor Michele Pistone of the Charles Widger School of Law at Villanova University. As the first training program of its kind offering university certificates, VIISTA prepares immigration advocates with the knowledge, skills and values needed to work in the immigration services field by combining formal immigration-related training with hands-on practical application as well as regular

assessment and feedback from practicing lawyers. The goal of the SIG is to increase the numbers of advocates who are qualified to work in recognized organizations and become accredited.

In the past year, VIISTA has awarded more than 400 certificates to students in 42 states. There are currently 175 students enrolled, spanning ages 21-76, and with educational levels ranging from associate degrees, undergraduate degrees, Masters, and PhDs. We expect more than 50 VIISTA students will apply for accreditation this year.

Given the programmatic goals of VIISTA and the SIG, we are well positioned to provide comments on the proposed forms EOIR-31 and EOIR 31-A.

Recent Historical Background on Forms EOIR 31 and 31A

We note that the 2022 version of the proposed forms incorporate changes from forms first introduced by EOIR in 2020 that were objectionable to service providers and advocates managing immigration legal service clinics at that time. In response to objections to the 2020 version of the forms, EOIR has had to continue allowing the public to use the forms from January 2017.[3] Although EOIR publishes on its website both the 2017 and 2020 versions, the agencies that support the application process – and therefore expedite the adjudication process for EOIR – advise applicants to use the 2017 form. As a practical matter, we do so because the R&A process is already daunting and time-consuming, requiring a great deal of documentation and details.

We submit that several of the proposed changes on the 2020 and 2022 versions of the forms are *ultra vires,* increasing the evidence required to qualify for recognition and accreditation far beyond what is supported by the current regulations in 8 CFR Part 1292. The proposed changes in the 2020 and 2022 forms only make the process more onerous without adding value, and therefore dissuade -- rather than persuade -- more quality legal representatives from applying.

Form Revision Process Does Not Comply with the PRA or the APA

As stated above, EOIR's process to propose changes to the forms EOIR-31 and EOIR-31A in both 2020 and 2022 does not reflect a good faith, transparent, and accessible effort to solicit public comment, as required by the PRA[4] and APA[5], and as indicated as best practices with stakeholders regulated by DOJ. If the pending version of the forms is finalized, we will have

gone through two revisions without meaningful stakeholder impact, with negative impact on thousands of people who rely on R&A in the country. This is unacceptable and unsustainable.

Irregular Procedure to File Electronically and To Create Public Record

EOIR should be expected to publish its proposed changes to regulations.gov along with a redlined version in a docket folder to make visible the proposed changes in both the 2020 and 2020 forms.

Instead, in this case, EOIR published a notice in the Federal Register soliciting public comment without including the revised form that is the subject of the solicitation. That is, the revised form itself is not posted by EOIR and the proposed changes are not summarized in the notice. Though titled as an "e-collection of information," there is no portal to electronically submit comments described in the note through regulations.gov. In fact, the only comment submission direction given in the EOIR notice is to submit comments to a postal address for the EOIR Office of Policy. This is concerning because the postal submission scheme does not allow for a public record of comments. Without public access, stakeholders and public comment engagement are ignored and the final products will be insufficient. Moreover, like much of the Department, EOIR staff members have been working mostly remotely since the inception of the pandemic, so mail collection in the office is irregular at best. Paper records could be mishandled or lost without any record of their receipt.

EOIR chose an indirect irregular procedure, different from the one commonly implemented by agencies. If EOIR wishes to implement changes, it should withdraw the 2022 version of the forms and begin a new comment period. This recommendation would bring EOIR in line with the procedures normally followed by other agencies revising forms.

EOIR Areas of Inquiry

We recommend that EOIR withdraw the changes to Forms EOIR 31 and 31A. The changes to the forms request information or documentation that contradicts or exceeds the scope of the Recognition and Accreditation regulations, and as such should go through notice and comment rulemaking under the APA as opposed to information collection under the PRA.

We object to the changes on substantive grounds as well as they exceed the regulatory eligibility requirements and do so without justification by data or experience.

Responding to the four areas of inquiry, we submit that:

- The proposed collection of information is unnecessary for the proper performance of the functions of the Executive Office for Immigration Review. As explained in detail below, the requested information is in some places redundant, in other places vague and over-inclusive. Overall, the requested information will not have any practical utility and will only create additional paperwork.
- The Department's estimate of the burden of the proposed collection of information at three hours for EOIR Form 31A and two hours for EOIR Form 31 vastly underestimates the time investment required for the collection of information. The notice does not include any information about the methodology used to calculate this time estimate or the assumptions undertaken. In our experience, first time applicants spend a minimum of eight hours to respond and up to 13 hours for a new organization.
- The specific information the Department proposes to collect is unclear and appears to be excessive, leaving questions about its relevance and utility.
- The proposed collection of information does not minimize the burden of the collection of information on those who are 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. In fact, as explained below, the comments are not even being collected electronically.

For these reasons, we urge the Department to engage in a proper and transparent process of stakeholder consultation and then a regulatory notice and comment period as required by the Administrative Procedures Act (APA)[6] and the Paperwork Reduction Act (PRA).[7]

Objections to Proposed Changes to Forms EOIR-31 and 31A

In addition to an improper process, the proposed changes should be withdrawn and not enacted because substantively they are flawed and impractical, presenting a burden without utility. Our analysis is discussed below:

1. *The new requirement that the organization name must be on file with the Secretary of State or other state agency.*

This requirement does not appear in the recognition regulation[8] and names under which organizations operate are not a basis to disapprove an application for recognition. Further, many organizations are sub-offices of a larger organization and operate under different names. For example, many Catholic Charities offices that provide legal representation operate under the auspices of a local Archdiocese, which would be the tax-exempt entity on file with the relevant state authority.

This proposal is not logical, practical, or necessary. However, if EOIR wished to make it a basis for disapproval, the APA requires it would need to propose this change with notice and comment.

1. *A new and more burdensome standard for non-profit status and documentation of non-profit status.*

This proposal is redundant of current requirements in the regulations and merely adds to the burden of paperwork. The underlying regulation, 8 CFR §1292.11(b) requires:

> The organization **must** submit: (emphasis added)
>
> - A copy of its organizing documents, including a statement of its mission or purpose.
> - a declaration from its authorized officer attesting that it serves primarily low-income and indigent clients.
> - a summary of the legal services to be provided.
> - if it charges fees for legal services, fee schedules and organizational policies or guidance regarding fee waivers or reduced fees based on financial need; and
> - its annual budget.

Organizing documents from the founding of the organization already require evidence and serve as proof of non-profit status. By requiring new and additional documentation of "currently valid" non-profit status from a state agency, including a notice or contemporaneous letter confirming that status, EOIR is adding paperwork for both the applicant and the adjudicator without adding value.

EOIR provides no justification for requiring redundant evidence or any explanation of why the redundant evidence would be useful. If EOIR wishes to consider this additional information, the APA requires it would need to propose this change with notice and comment under established processes.

2. *New and burdensome requirements on organizations seeking extension of recognition and accreditation to multiple offices or locations pursuant to 8 C.F.R. § 1292.15.*

Regulations at 8 C.F.R. § 1292.15 expressly establish the process for extending recognition and accreditation to multiple offices. Note the requirement in the regulations:

> 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...

The 2022 version of form EOIR 31 exceeds the enumerated requirements of 8 C.F.R. § 1292.15 and shifts the standard from attestation or declaration to requiring organizations to submit documentation and evidence. This new requirement increases paperwork burdens and is not supported by the regulations.

The 2017 version of form EOIR 31 now requires programs applying for extension to multiple offices to attach detailed documentation of periodic inspections, joint operations, joint management structure, joint finances, and legal resources available.

The goal of the 8 C.F.R. § 1292.15 regulation was to ease the process of extension offices by allowing them to become recognized through a central office.[9] Yet, the proposed 2022 version of the form adds a burden of proof that would yield the opposite result, making it more challenging and burdensome to apply for extensions of recognition to multiple offices.

4. *Additional and unnecessary questions related to the character and fitness of applicants on page two of Form EOIR-31A.*

The revised Form EOIR 31A imposes additional character and fitness requirements. We are all invested in supporting ethical, well-trained representatives who exhibit the good moral character and fitness required for the position. We support the final 2017 rule on character and fitness. Indeed, in 2017, the Department changed the requirement from "good moral character" to "character and fitness" and in an effort not to increase administrative burdens concluded that the character and fitness requirement could be satisfied through "attestations of the authorized officer of the organization and the proposed representative and letters of recommendation **or** favorable background checks."[10] (Emphasis added)

In the final rule, the Department expressly concludes that: "Additional documentation beyond this would **only** be necessary if the proposed representative has an issue in the proposed representative's record regarding the proposed representative's honesty, trustworthiness, diligence, professionalism, or reliability."[11] (Emphasis added)

Here, the Department seeks to expand the requirement beyond its 2017 final rule. We oppose the proposed expansion as frivolous, intrusive, and vague. It is unreasonable and unjustified to expect an organization to conduct a legal analysis of an individual's past for inclusion in an initial filing on the following determinations:

- If he or she "ever committed prior acts involving dishonesty, fraud, deceit or misrepresentation;"
- If he or she "ever resigned while a disciplinary investigation or proceeding was pending;" and

- Whether applicant is "subject to any order disbarring, enjoining, restraining, or otherwise restricting the individual in the practice or law or representation before a court or any administrative agency" or "ever been found guilty of, or pleaded guilty or nolo contendere to, a serious crime...in any court anywhere in the world."

This investigation creates an administrative burden for the organization before any issue has been raised in the individual's character or fitness. These questions are beyond the scope of the regulations and are suggested without justification. They will certainly discourage qualified and interested people from proceeding with applications for accreditation.

The questions themselves are unclear and unnecessarily broad. As a simple example, the question about whether the applicant "ever committed prior acts involving dishonesty, fraud, deceit or misrepresentation" itself raises several questions. For example, what is the scope of the prior acts? What is the relevant timeframe? Who is the adjudicator of whether the acts were indeed dishonest, fraudulent, deceitful or misrepresentative? Is there an expectation that the actions were found by a court of law to be dishonest or fraudulent, or is the recognized organization asked to collect and report information by any person who alleges that the applicant was dishonest or misrepresented a fact? If there was an allegation of deceit or misrepresentation, can it be about anything or must it be about something that is material? What is the expectation if there is an allegation of dishonesty or fraud by a college friend or an estranged spouse or partner?

The question that an organization must indicate whether an applicant has "ever been found guilty of, or pleaded guilty or nolo contendere to, a serious crime...in any court anywhere in the world" is unwarranted and time consuming. This question alone will take more than 3 hours to research – almost double what the Department estimates it takes an organizational to complete the entire application. Moreover, the form does not take into account the availability of criminal records from foreign legal systems, nor does it provide any guidance on how to conduct this research.

The proposed Form EOIR 31A also specifically states that the date of birth data now required of applicants "will be used to conduct criminal background checks." The regulations contain no such requirement, and this check adds to paperwork and presupposes problems before there is even a suggestion of one. The final rule clearly states that the "character and fitness requirement may be satisfied through attestations of the authorized officer of the organization and the proposed representative and letters of recommendation." Additional or redundant documentation may be required if and only when an application triggers a problem.

The extensive questions in the proposed Form EOIR 31, coupled with the requirement of universal background checks, transforms the documentation of character and fitness into an unreasonable burden that was not intended in the final rule. These questions are beyond the scope of the regulations and are suggested without justification. They will certainly discourage qualified and interested people from proceeding with applications for accreditation.

Conclusion: Undue Burdens Hinder R&A's Objective

The goal of the Recognition and Accreditation Program is to "increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice."[12] The proposed collection of information in these forms goes beyond what is required by the existing regulations and creates barriers for organizations applying, thwarting the stated goal of the R&A program. The proposed Form EOIR 31 requires organizations to provide redundant proof of nonprofit status and registration with the state Secretary of State and requires burdensome documentation for extension offices, where previously, an authorized officer's attestation was sufficient. Proposed Form EOIR 31A presents several redundant questions about the employee or volunteer's character and fitness, where previously, an attestation by the authorized officer was all that was required.

By including these new requirements—which, again, fall outside of what is required by current regulations—EOIR has placed an undue burden on legal services organizations that are already struggling for resources. While many organizations would undoubtedly welcome additional help representing clients, a lengthy application process, coupled with the currently long processing times for applications, would likely deter organizations from applying.

Some VIISTA students are pursuing an immigration legal education to start new organizations to provide immigration legal services or expand services offered by immigrant servicing organizations. These organizations are often small—just one or two people—and operate in "lawyer deserts" and other under-served areas of the country. EOIR has not made a case or submitted any justifications why service providers should be required to use limited resources to gather onerous and redundant information and documentation just to file applications for recognition and accreditation. Larger organizations in our networks could also be deterred from growing by the requirements set out specifically for extension offices and remote supervision.

VILLANOVA
UNIVERSITY

STRATEGIC INITIATIVE ON MIGRATION AND REFUGEE PROTECTION
OFFICE *of the* PROVOST

EOIR's proposed changes to Forms 31 and 31A are clearly an expansion of the regulations governing the R&A program, and as such they must be submitted for public comment according to the standard rulemaking procedures followed by other agencies. Until then, the 2017 Forms EOIR 31 and 31A should continue in use.

Sincerely,
Professor Michele Pistone
Robyn Lieberman
Elizabeth Taufa

On behalf of
The Strategic Initiative Group on Migration and Refugee Protection, Villanova University

800 E Lancaster Ave, St. Mary's Hall Room 109 | 800 Lancaster Avenue | Villanova, Pennsylvania 19085 | immigrantadvocate@villanova.edu