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Submitted by Overnight Express mail to:
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RE: Comments in Opposition to Agency Information Collection Activities, EOIR Forms-31 and 31A

Doc. Citation: 85 Fed. Reg. 42008, Docket OMB: 1125-0012, Docket number 2020-14953, Agency Information Collection Activities Extension of Recognition of a Non-Profit Religious, Charitable, Social Service or Similar Organization (EOIR-31) and

Doc. Citation: 85 Fed. Reg. 42009, Docket OMB: 1125-0013, Docket number 2020-14954, Agency Information Collection Activities Request by Organization for Accreditation or Renewal of Accreditation of Non-Attorney Representative (EOIR-31A).

Dear EOIR,

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) to oppose the form changes to EOIR-31 (recognition) and EOIR-31A (accreditation), cited above, published in the Federal Register on July 13, 2020. These two forms are the backbone of the Recognition and Accreditation (R&A) Program, which extends legal services for low-income immigrants by authorizing services by qualified non-profit legal services groups and their staff or volunteers.

ILRC is a national non-profit organization that provides legal trainings, educational materials, and legal support to legal practitioners and non-profit legal services providers. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC provides technical support for attorneys and non-profit programs that represent immigrants during the process of applying for a wide variety of immigration benefits, as well as producing webinars, trainings, manuals, and practice advisories. Through our extensive networks with service providers and immigration practitioners we have developed a profound understanding of the barriers low-income individuals face when seeking to obtain an immigration benefit.

The immigrants and their representatives whom we serve are heavily burdened by the form changes on EOIR-31 and EOIR-31A because the changes create new standards for the recognition and accreditation program that are unsupported, and indeed exceed, what is authorized by regulation. In some instances, the changes violate legal requirements imposed on employers by law. The changes harm the immigrant population and those who represent them by encouraging the denial of recognition to qualified programs, and accreditation to qualified individuals. These services are vitally important to the underrepresented low-income immigrant population, and these form changes will serve to restrict recognition and accreditation to an ever-decreasing number of groups and individuals.

The purpose of the R&A program is to increase the capacity of the immigration bar to meet the needs of low-income and indigent immigrants.[1] Immigration law and policy is complex and rapidly changing. Without counsel to guide them through the application of immigration law to their case, many immigrants who cannot afford counsel do not have access to justice or due process. The R&A program was created to help ensure that immigrants and their families understand the immigration process, make informed decisions, and are able to present high-quality applications for immigration benefits. These proposed changes run counter to the fundamental purposes of the R& A program.

The current information collection is only the most recent in a tortured history of changes to these forms. Following a prior 2019 Information Collection, EOIR released a significantly different version of Forms EOIR-31 and EOIR-31A from what was provided to the public for comment. The new forms, which were dated 2/2020, were simply posted on the Recognition and Accreditation Program page on the EOIR website on May 4, 2020.[2] On May 19, 2020, advocacy groups formally requested that EOIR rescind the 2/2020 versions of the forms and asked EOIR provide stakeholders with an opportunity to review and comment. The 2/2020 version of the forms remain posted on EOIR's Recognition and Accreditation webpage. We urge EOIR to rescind these forms, as they were not properly released for public notice and comment as required by the PRA.

The Proposed Forms and the February 2020 Version of EOIR-31 and EOIR-31A Should Be Rescinded Because They Violate the Administrative Procedures Act and the Paperwork Reduction Act

The Information Collection process is not supposed to be a replacement of the notice and comment process for regulations under the Administrative Procedures Act (APA). Several of the proposed changes increase the evidence required in order to qualify for recognition or accreditation in ways that are not supported by the current regulations. These changes are *ultra vires* to the regulations at 8 CFR § 1292. If DOJ wishes to increase the evidence required to qualify for the program, it would need to introduce these changes as a notice of proposed rulemaking under the APA.

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[1] The program is described by the Executive Office for Immigration Review on its website, "the Recognition and Accreditation (R&A) Program, which aims to increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice." https://www.justice.gov/eoir/recognition-and-accreditation-program.

[2] EOIR-31, posted at https://www.justice.gov/eoir/page/file/1276426/download and EOIR-31A, https://www.justice.gov/eoir/page/file/1276431/download.

Further, this Information Collection creates a significant increase in information and documentation in violation of the Paperwork Reduction Act (PRA), which seeks to reduce the paperwork burden on individuals and organizations. This DOJ Information Collection adds questions that suggest an examination of fraud and would turn a highly successful capacity-building program into a fraud investigation program. EOIR already has a fraud investigation program, and this is not within the mission of the R&A program.[3]

The proposed changes would alter the substantive standards used to evaluate applications. This is contrary to the APA and the PRA.

EOIR Improperly Made Substantive Changes to the EOIR-31 Recognition Form in the Information Collection

Part 3 of the proposed form asks about the legal services the organization offers, and the instructions state, "An organization that does not currently offer immigration legal services must include a detailed description of the types of services it intends to provide if recognized. An organization that does currently offer immigration legal services must provide a detailed description of the scope, nature, and history of these services, and by whom they have been provided" (Part 3, p. 3). This level of detail is not consistent with the regulations. The regulations and current form merely require a "description of the immigration legal services." To meet this requirement, individuals currently submit a brief, general statement along with a list of the specific immigration forms they will assist with, usually in the form of a fee schedule. In contrast, the proposed form would require a lengthy essay that would greatly increase the burden on applicants without justification.

When the final version of the R&A regulations was published, the final rule described changes to the wording of the relevant section: "the information required to be submitted is more concise and has shifted to a focus on the legal services provided by the organization as a whole, rather than by its accredited representatives individually." Despite the stated intentions of the final rule that is currently in effect, this revised form requires more, rather than less information and documentation. These changes are not consistent with the regulations, are not necessary for the proper performance of the agency's duties, and do not minimize the burden of the information collection on the respondents.

Technical Legal Support

In Part 4 of the proposed form on p. 2 the last question is about technical legal support and requires a "Description of other party's qualifications, experience, and breadth of immigration knowledge." The corresponding instructions on p. 4 mention this description as well as another requirement: "If the other party is a private attorney, also attach his or her resume." This additional information is *ultra vires* to the regulations. The regulations state, "The organization must submit... any agreement or proof of a formal arrangement... for consultations or technical legal assistance." The current form in Part 7d states, "Attach all agreements with name(s) of private counsel and bar admission(s)" (p. 2). The detailed description of qualifications and resume are an added documentation burden that is unnecessary and without justification from DOJ.

[3] The EOIR's Fraud and Abuse Prevention program can be found at https://www.justice.gov/eoir/fraud-and-abuse-prevention.

If the agency wishes to impose a requirement for applicants to document the qualifications, experience, and breadth of immigration knowledge not only for themselves, but for their advisors as well, then the agency would need to go through notice and comment rulemaking under the APA. Such a change cannot be made by revising a form under the PRA.

Extension of Recognition

Despite being subject to the Paperwork Reduction Act, the proposed changes to Form EOIR-31 include five additional documents that would be required with a typical recognition application that includes a request for extension: 1) documentation of state non-profit status; 2) detailed description of legal services; 3) fee waiver or reduction application used by organization; 4) resume of attorney providing technical legal support; and 5) documentation of periodic inspections, joint operations, joint management structure, and joint finances for extension.

Part 7 of the proposed form requires extensive documentation in order to obtain recognition for an extension office. The instructions on p. 5 state:

> Attach detailed documentation that addresses the relationship between the designated office and the proposed extension office(s) in each of the following areas:
>
> - Periodic Inspections: How often does the designated office inspect the extension office(s) and how do these inspections take place?
> - Joint Operations: What types of immigration legal services does each office perform?
> - Joint Management Structure: What is the management structure for the organization as a whole and for each office individually?
> - Joint Finances: How is the immigration legal services program at each office funded and who oversees the finances at each office?
> - Access to Legal Resources: What legal resources does the designated office have access to, and which of those resources can the proposed extension office(s) also access?

This level of detailed documentation is *ultra vires* to the regulations. The regulations state,

> To request extension of recognition, an organization... must submit a Form EOIR-31 that identifies the name and address of the organization's headquarters or designated office 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. 8 CFR 1292.15.

The current form requires limited additional information *only* if there are differences between the main office and extension sites: "Check this box if you have additional relevant information regarding this office or location, such as other contact information, or a fee schedule or supervisory structure different than the organization's headquarters

or designated office (attach additional sheets of paper to describe)" (Part 4, p. 1). The regulations state at 8 CFR 1292.15 that declarations on the form and in the authorized officer's declaration are sufficient to demonstrate eligibility for recognition. Requiring documentation from all organizations in addition to the declarations is unnecessary and burdensome to both the applicant and to the agency that would have to process this paperwork.

As stated in the proposed instructions, "The purpose of extension of recognition is to *simplify* the communication and application processes between EOIR and a qualifying organization with more than one location" (Part 7, p. 5). Requiring extensive, additional documentation for an extension request defeats the purpose for which extension was created. Eligibility for extension is already demonstrated in the standard documents that are submitted for recognition. For example, an extension would be listed in the organizational chart that is submitted for recognition of the primary organization. We oppose efforts to make the application for extension more burdensome, as it is inconsistent with the purpose of the regulation: to increase the capacity of non-profit organizations to serve immigrant communities. The significant increase in information and documentation required by the proposed form is unnecessary and burdensome, as the application process is already thorough and consistent with the regulations.

EOIR Improperly Made Substantive Changes to Form EOIR-31A Accreditation in the Information Collection

Representative's Work Location

Part 1 of the proposed form on p. 1 requires the organization address(es) where the non-attorney representative works or intends to work. It is unnecessary to add a separate question for this information, since OLAP does not track or indicate work location on the roster of recognized locations, and all accredited staff are listed under the main office address and are authorized to practice at any other recognized extension office of the organization. We also note that this information is subject to change, as staff may be moved around to work in different extension offices as needed.

Status with the Organization

Part 2A of the proposed form has a new question requesting the representative's status with the organization (employee, volunteer, or other) and the corresponding instructions state, "the resume... should reflect how frequently the representative has worked with your organization's immigration legal services program" (p. 3). This additional information is irrelevant to the accreditation adjudication and therefore unnecessarily burdensome. The status of the representative does not matter, as both employees and volunteers are eligible for accreditation. Also, some applicants have not worked with the organization's legal services program at all if the program is not yet recognized. In these cases, the applicant has received his/her hands-on training with an outside, authorized provider such as another recognized organization. The question on frequency is not relevant. There is no provision in the regulations that would require the agency to deny accreditation if the frequency of work is below a particular threshold. Requiring submission of information or documentation that would not affect the applicant's eligibility for accreditation is wasteful and burdensome to both the applicant and the agency.

Previous Applications

Part 2A of the proposed form also asks about previous applications submitted on the representative's behalf. The corresponding instructions on p. 3 state, "describe any previous applications that have been submitted to the R&A Program on this representative's behalf. Include all applications ever submitted, whether by your organization or any other. For each application, list the date submitted, the name of the applicant organization, and the outcome of the application." This request is burdensome and includes information that OLAP should already have in its records.

Many programs do not have this information easily available to them and would struggle to obtain it, especially for staff with many years of experience. Some people have been accredited for decades. This new requirement would lead to significant delays in completing the application process, thereby disincentivizing the best of the accredited representatives from renewing their accreditation.

Submission of information about previous accreditation applications is not required by the regulations. In order to renew accreditation according to the regulations, an applicant need only demonstrate that they meet the same requirements as initial accreditation and that they continued to receive training in immigration law and procedure. Requiring that the applicant also to submit their accreditation history is not supported by the regulations. Any applicant who is unable to submit their accreditation history may inaccurately believe that they do not qualify to renew their accreditation. This revision would impact the outcome of accreditation applications; such changes should go through notice and comment as a proposed rule under the APA, rather than as a form change under the PRA.

Previous Employment

Part 2A of the proposed form asks about the representative's previous employment. The corresponding instructions on p. 3 state, "If the representative is no longer affiliated with any of the organizations listed, indicate his or her reason for leaving." The information about the reason for leaving a previous employer is not required by the regulations. Such changes should go through notice and comment as a proposed rule under the APA, rather than as a form change under the PRA.

Practice for Renewal

Part 2B of the proposed form has a new question for those who are renewing accreditation. The question is about how frequently the representative has provided direct legal representation before USCIS or EOIR. The corresponding instructions on p. 5 state, "For renewal of accreditation applications only, indicate approximately how often during the past three years the Accredited Representative has entered an appearance before USCIS and EOIR on Forms G-28, E-28, or E-27." The regulations do not require demonstrating prior appearance in cases for renewal of accreditation. They only require that "Each request for renewal of accreditation must establish that the individual remains eligible for accreditation under 8 CFR § 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." To establish eligibility, the regulations require "A description of the individual's qualifications, including education and immigration law experience." Furthermore, we note that an individual may practice immigration law without entering an appearance before USCIS or EOIR, such as when screening clients for eligibility for an immigration benefit or answering questions about their cases.

Date of Birth

In Part 2C of the proposed form, there is a new question requiring the applicant's date of birth. The corresponding instructions on p. 5 state, "The representative's date of birth may be used to conduct a criminal background check." In the instructions for Form EOIR-31A, there is a Privacy Act Notice that states in relevant part, "EOIR may share the information provided with this form with others in accordance with approved routine uses." An applicant's date of birth is personally identifiable information (PII). Because DOJ intends to collect additional PII on this form, more clarification is needed in the privacy notice to indicate what "routine uses" would justify sharing this information.

Representative's Background – New Question on Character and Fitness Violates State Laws

In Part 2C, the proposed form has a series of eight new questions pertaining to the applicant's character and fitness. The regulations outline the requirements for character and fitness in 8 CFR § 1292.12 (a) (1-5). They only require an attestation from the authorized officer and the proposed representative: "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." The regulations also state, "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 or favorable background checks" (Part III, B, 2 (a)).

Six of the eight new questions match the language in the regulations, but we are especially troubled by the first two questions that are not found in the R&A regulations:

- Has the representative ever practiced law, as defined in 8 CFR 1001.1(i), without authorization?
- Has the representative ever committed a crime of any kind, even if he or she was not arrested, cited, charged with, or tried for that crime?

With these questions, the revised form requires organizations to ask about and report on applicants' past actions such as unauthorized practice of law and possible criminal activity even if they were not arrested or charged with any crime. The regulation only requires that both applicants and authorized officers attest to the character and fitness of the applicant for accreditation. These questions are far too broad, requiring individuals and organizations to make legal judgments about matters that have not been before any court.

Asking the questions on this form of their employees may, in fact, cause some employers to violate state law or expose themselves to liability under state fair employment statutes. Requiring employers to ask these questions could result in fines and penalties or liability to employee lawsuits for employment discrimination.

One example is New York State Human Rights Law §296(16), which provides protections to people with prior arrest records that were favorably resolved or resulted in sealed convictions or youthful offender adjudications. Under New York State Human Rights Law §296(16), it is unlawful for an employer to ask an applicant or employee whether he or she has ever been arrested or had a criminal accusation filed against him or her. It is also unlawful to require any individual to divulge information pertaining to any such arrest or criminal accusation.

New York's law is not unique. There are currently at least thirteen states and eighteen municipalities that have similar "ban the box" laws which prohibit private employers from asking applicants about criminal history.[4]

The regulations require the organization's authorized officer to review and sign the request for accreditation, which in the new form would include information pertaining to an applicant's prior arrests, even when those arrests did not result in conviction. Responding to this question on the new form EOIR-31A would require the organization seeking accreditation for one of their employees to engage in action in violation of many state and local employment laws.

EOIR should strike this question as unnecessary and contradictory to legal authority.

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[4] Beth Avery, *Ban the Box U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (July 1, 2019) https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/

Conclusion

The EOIR-31 and EOIR- 31A proposed form changes should be rescinded because they lack legal authority, and in some instances, are in violation of state and local employment laws.

The cumulative effect of these changes is to require a significant amount of new information, none of which is necessary for the approval of recognition or accreditation. By imposing new eligibility requirements that do not exist in the regulations, the changes will result in an ever-decreasing number of recognized legal services and accredited representatives who can serve low-income immigrants.

Sincerely,

Peggy Gleason

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