

**Amicus Invitation No. 20-02-21R**

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**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE DIRECTOR  
FALLS CHURCH, VIRGINIA**

In the Matter of  <b>Amicus Invitation No. 20-02-21R</b>	
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## STATEMENT OF INTEREST

The Catholic Legal Immigration Network, Inc. (CLINIC) embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated national network of Catholic and community legal immigration programs. CLINIC supports the largest nationwide network of nonprofit immigration programs, with approximately 375 community-based Catholic (numbering 165) and non-Catholic (numbering 210) immigration legal programs. CLINIC's affiliated immigration programs serve over 400,000 immigrants each year. CLINIC's network of affiliated programs is diverse in program size, types of immigration cases represented, and types of nonprofit organizations. Through its affiliates, as well as our Advocacy Program, CLINIC advocates for the just and humane treatment of immigrants through direct representation, pro bono referrals, and engagement with policy makers.

Understanding the need for legal services, CLINIC has worked for over three decades to ensure access to justice and fundamental fairness for immigrants in removal proceedings. We do this by assisting affiliates around the country to build their capacity by obtaining Department of Justice (DOJ) Recognition and Accreditation, providing training for aspiring partially and fully accredited representatives, and offering ongoing training and support to affiliates. A majority of CLINIC affiliates rely solely on accredited representatives to provide legal services.<sup>1</sup> This is especially true in geographic regions where obtaining and retaining an immigration attorney is more difficult. Other affiliates utilize both attorneys and accredited representatives, giving attorneys the additional legal support needed to expand and diversify their caseloads to better

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<sup>1</sup> 203 affiliates rely solely on accredited representatives, comprising 54 percent of CLINIC's network.

meet the needs of low-income and indigent immigrant communities.<sup>2</sup> CLINIC's capacity building programs and services help nonprofits open, expand, and maintain charitable legal immigration services for low-income immigrants and refugees. CLINIC also works closely with affiliates to expand and enhance their program management and direct legal services, and seeks to strengthen specific initiatives that serve the most vulnerable immigrant populations.

CLINIC has therefore accomplished much of its work in partnership with the DOJ's Executive Office for Immigration Review (EOIR). In particular, CLINIC and our network affiliates have worked closely with the Office of Legal Access Programs (OLAP) on the Legal Orientation Program (LOP), the Legal Orientation Program for Custodians of Unaccompanied Alien Minors (LOPC), and the Recognition and Accreditation (R&A) program. CLINIC's experience working with accredited representatives and expertise on the R&A program accordingly renders CLINIC as an interested party and qualified *amicus curiae*.

While CLINIC submits this brief in response to the February 21, 2020 Amicus Invitation No. 20-02-21R, CLINIC respectfully requests that EOIR re-issue this amicus invitation with a response period longer than 21 days and background information as to the reasons for this amicus invitation. Reissuance of this amicus invitation coupled with background information will provide stakeholders, including CLINIC, a meaningful opportunity to respond to Amicus Invitation No. 20-02-21R, especially in light of the current COVID-19 pandemic.<sup>3</sup>

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<sup>2</sup> Affiliate staff members practice in a variety of areas of immigration law, including by providing representation before the Board of Immigration Appeals (BIA), Immigration Courts, U.S. Citizenship and Immigration Services, and the Department of State.

<sup>3</sup> CLINIC attempted to seek an extension of the filing deadline to no avail. The Amicus Invitation contains no phone number or email to the EOIR Office of the Director. CLINIC therefore called other EOIR offices in an attempt to reach the EOIR Office of the Director. Either no one answered our calls or we reached someone who was unable to assist and then transferred us to voicemail. Messages left on these voicemail boxes went unreturned including a message to the Communications and Legislative Affairs Division voicemail box recorded on March 6, 2020. Therefore, CLINIC is submitting this brief without having seen the underlying record. EOIR sought out amicus briefing so that the issues in the case would be fully presented, but it has not been possible to fully present the issues here where CLINIC has not had the benefits of reviewing the record.

## ISSUES PRESENTED

- (1) Is the 30-day deadline for a request for reconsideration in 8 C.F.R. § 1292.13(e) (and in § 1292.16(f) and § 1292.17(d)) subject to equitable tolling? If so, what circumstances may warrant such tolling?
- (2) What is the appropriate legal standard for evaluating a request for reconsideration pursuant to 8 C.F.R. § 1292.13(e) (or § 1292.16(f) or § 1292.17(d))?
- (3) What is the appropriate standard of review for an administrative review conducted under 8 C.F.R. § 1292.18?
- (4) Are prior precedent decisions of the Board of Immigration Appeals in recognition and accreditation cases binding on consideration of requests for reconsideration pursuant to 8 C.F.R. §§ 1292.13(e), 1292.16(f), or 1292.17(d) and on administrative reviews conducted under 8 C.F.R. § 1292.18?

## ARGUMENT

### **I. Equitable tolling applies to the 30-day deadline for a request for reconsideration under 8 C.F.R. §§ 1292.13(e), § 1292.16(f) and § 1292.17(d).**

The regulations at 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d) all employ the same language: “[...] may make one request for reconsideration of the disapproval *within 30 days of the determination.*” (emphasis added). EOIR should apply equitable tolling to this 30-day deadline.

#### **A. Federal courts’ general tolling analysis proves that the 30-day reconsideration deadline is subject to equitable tolling.**

The equitable tolling doctrine effectively extends deadlines to treat an otherwise untimely action as timely in extraordinary circumstances for parties who have been prevented from complying with them through no fault or lack of diligence of their own. *See, e.g., Holland v. Florida*, 560 U.S. 631, 653 (2010). Courts have long recognized equitable tolling’s importance in promoting access to a fair and just legal system, and have applied equitable tolling to a variety of situations. *See, e.g., United States v. Johnson*, 541 F.3d 1064, 1067 (11th Cir. 2008); *see also Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990) (applying equitable tolling to Title VII

claims); *Bowen v. City of New York*, 476 U.S. 467 (1986) (applying equitable tolling to Social Security Administration denial of benefits); *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 708 (11th Cir. 2008) (applying equitable tolling to Truth in Lending Act claims). Equitable tolling applies on a case-by-case basis, avoiding mechanical rules and favoring flexibility. *Ortega Candelaria v. Orthobiologics, LLC*, 661 F.3d 675, 680 (1st Cir. 2011).

Whether equitable tolling applies to a statute hinges on whether a rule is jurisdictional or claim-processing. Jurisdictional rules are mandatory and not subject to equitable exceptions, whereas claim-processing rules generally are subject to equitable exceptions based on concerns for fairness and justice. *See Holland v. Florida*, 560 U.S. 631, 645-46 (2010). A jurisdictional rule is one that governs adjudicatory capacity, *i.e.*, a court’s subject matter or personal jurisdiction. *E.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). Claim-processing rules are those that “seek to promote the orderly progress of litigation by requiring parties to take certain procedural steps at specified times.” *Henderson v. Shinseki*, 562 U. S. 428, 435 (2011). Statutory filing deadlines are quintessential claim-processing rules. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-512 (2006); *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13 (2017) (stating that “a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time” and that “[a] time limit not prescribed by Congress ranks as a mandatory claim-processing rule”). It is hornbook law that limitations periods are “customarily subject to ‘equitable tolling,’” *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *Young v. United States*, 535 U.S. 43, 49–50 (2002)).

Equitable tolling should similarly apply to regulations. As rules set by agencies that fill in the ambiguous areas of laws enacted by Congress, the same equitable tolling considerations that apply to statutes also apply to regulations. In addition, the Supreme Court has held that an

agency may not contract its own jurisdiction through regulation or through adjudicative decisions. *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 590 (2009). In this vein, the U.S. Court of Appeals for the Seventh Circuit recently considered whether 8 C.F.R. § 1003.14(a) is a jurisdictional rule and reasoned that an agency regulation could not be jurisdictional. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019) (“While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases.”). Furthermore, in the regulatory context, equitable tolling offers the same fairness and justice benefits as in the statutory context by protecting individuals from the harsh consequences of strict application of procedural requirements. Therefore, equitable tolling should apply to 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d).

**B. Tolling of the 30-day deadline is necessary to avoid results that would thwart the purpose and effectiveness of the recognition and accreditation program.**

Unless EOIR recognizes equitable tolling of the 30-day reconsideration deadline, the agency risks thwarting the purpose of the R&A program. The R&A program “addresses the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before Federal administrative agencies”<sup>4</sup> by increasing “the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice.”<sup>5</sup> The R&A program ensures that these non-attorney accredited representatives and the non-profit organizations where they work can provide competent, reliable immigration legal services to indigent and low-income immigrants. These representatives provide immigration legal representation for low-income and

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<sup>4</sup> Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59514, 59514 (Oct. 1, 2015) (to be codified at 8 C.F.R. §§ 1001, 1003, 1212, 1292).

<sup>5</sup> Recognition and Accreditation (R&A) Program, [www.justice.gov/eoir/recognition-and-accreditation-program](http://www.justice.gov/eoir/recognition-and-accreditation-program) (last updated Aug. 20, 2019).

indigent persons, thereby promoting the effective and efficient administration of justice.<sup>6</sup> If an organization believes that EOIR has made a factual and/or legal error in disapproving an application for recognition or accreditation or in terminating recognition or accreditation, the legal representative should be able to seek reconsideration beyond the 30-day deadline pursuant to equitable tolling. Equitable tolling would allow the accredited representative the opportunity to access the reconsideration process, which provides for a faster decision-making process and avoids the need for organizations to go through the potentially lengthy request process anew to correct simple errors or issues. Furthermore, because the filing of a request for reconsideration automatically stays the disapproval determination until issuance of a decision on the reconsideration request, the recognized organization and its accredited representatives may continue to provide immigration legal services during the reconsideration process without interruption. Without equitable tolling, however, human errors made by EOIR employees and circumstances beyond the control of the reconsideration requestor will prejudice the accredited representative and, in turn, low-income, indigent immigrants who stand to benefit from their representation.

**C. EOIR should follow traditional equitable tolling principles, which rely on a fact-based, circumstances approach, instead of setting a bright line, rigid rule, to determine what circumstances may warrant such tolling.**

Equitable tolling would allow EOIR flexibility in considering the circumstances that the requestor could not have reasonably foreseen and whether the requestor was sufficiently diligent in discovering the circumstances. Under U.S. Supreme Court precedent, generally to obtain equitable tolling of a deadline, an individual must demonstrate that ““(1) . . . he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way” to

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<sup>6</sup> *Id.*

prevent timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). To warrant tolling, a claimant must exercise reasonable diligence, not “maximum feasible diligence.” *See, e.g., Holland v. Florida*, 560 U.S. 631, 653 (2010).

One such harsh consequence of strictly applying the 30-day deadline under 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d) is inadequate notice of EOIR’s disapproval. Inadequate notice has been cited by courts, including the Supreme Court, as a ground for invoking equitable tolling. *See Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, (1984); *Mercado v. Ritz–Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 47–48 (1st Cir. 2005) (listing examples of the “[m]any other courts” that view lack of notice as adequate justification for equitable tolling); *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 752 (1st Cir. 1988) (finding that there may be a valid claim for equitable tolling when an employer breaches its legal obligation to provide notice crucial to an employee’s timely filing of a suit).

Myriad, non-exhaustive reasons exist as to why notice of the disapproval decision may not be adequate and why equitable tolling is necessary.<sup>7</sup> First, per the language of the regulations, the 30-day clock starts from the date that EOIR issues a disapproval decision, not the date of receipt by the requestor. EOIR has traditionally provided notice of the disapproval via first-class mail, yet the regulations at 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d) do not account for mail transit time or circumstances arising between the time that EOIR issues the disapproval decision to the time of actual receipt, both of which could give rise to inadequate

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<sup>7</sup> These examples of inadequate notice have been documented in the in absentia removal orders context. *See, e.g., Catholic Legal Immigration Network, Inc. (CLINIC) and Asylum Seeker Advocacy Project (ASAP), Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum* (2019), <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders> (showcasing 46 asylum seekers with in absentia removal orders at 15 different immigration courts who were unable to attend immigration hearings due to lack of notice, incorrect government information, serious medical problems, language barriers, and severe trauma or disabilities) (last visited Marc. 13, 2019).

notice.<sup>8</sup> Second, EOIR may address the correspondence to the wrong location or could mistakenly place the disapproval correspondence in the wrong mail bin. Third, the U.S. Postal Service may deliver the correspondence to the wrong recipient. Fourth, the requestor's organization may deliver the disapproval correspondence to the wrong internal mailbox or fail to transfer the disapproval notice to the accredited representative. The inadequate notice presented by these circumstances would mean that accredited representatives will not have a full 30 days to file a reconsideration request with EOIR. An accredited representative may not have the benefit of legal counsel in their reconsideration request, so it is imperative that the accredited representative have the full 30 days to submit the reconsideration request.

In addition, equitable tolling should also account for other circumstances outside of the requestor's control as courts have recognized in other contexts. U.S. courts of appeals have found that equitable tolling is warranted in circumstances including fraud, *see Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); government interference, *see Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016); due process violations, *see Valdovinos-Lopez v. Att'y Gen.*, 628 F. App'x 817 (3d Cir. 2015) (unpublished); and mental health issues or lack of mental competence, *see Rajwayi v. Sessions*, 692 F. App'x 815 (9th Cir. 2017) (unpublished). Furthermore, unexpected and severe illness, a death in the family, or bodily injury should merit equitable tolling. Pandemics, such as COVID-19, which has forced employees to telecommute with no ability to check mail or access files, are also an example of circumstances beyond the control of the reconsideration requestor. Each of these examples reflects a circumstance beyond the control of

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<sup>8</sup> Unlike 8 C.F.R. § 103.3(a)(2)(i), for example, 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d) lack a companion regulatory provision that takes into account the time it takes the requestor to receive the disapproval decision via first class mail. Section 103.3(a)(2)(i) of 8 C.F.R. provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision but 8 C.F.R. § 103.5a(b) states that if the decision was mailed, the appeal must be filed within 33 days. Absent a built-in time cushion for the first-class mail transit time, equitable tolling should apply to the 30-day deadline for a request for reconsideration under 8 C.F.R. § 1292.13(e), § 1292.16(f) and § 1292.17(d).

the reconsideration requestor that EOIR should consider on a case-by-case basis and assess if the requestor acted diligently to discover the circumstances, as courts have historically done with equitable tolling claims and as equitable principles require.

**II. Requests for reconsideration pursuant to 8 C.F.R. § 1292.13(e) (or § 1292.16(f) or § 1292.17(d)) should be evaluated based only on the governing regulations and prior Board of Immigration Appeals (BIA) precedent decisions.**

Just as with other EOIR reconsideration standards,<sup>9</sup> a request to reconsider should require the requestor to state the reasons for the reconsideration request by specifying the errors of fact or law in EOIR’s disapproval decision. For errors of law, the request for reconsideration should include the pertinent legal authority that highlights the legal error, such as that the previous decision was based upon improper legal or regulatory standards, disregarded or misread prior BIA precedents, or overlooked a recent change in the law. Pertinent legal authority refers to citations to regulations and prior BIA precedent decisions to establish that EOIR based its disapproval decision on an incorrect application of law. EOIR review of any authority beyond the regulations and prior BIA precedent decisions would constitute improper reliance on *ultra vires* authority that will render the recognition and accreditation process unnecessarily onerous thus countering the purpose of the R&A program.

**III. *De novo* review is the appropriate standard of review for an administrative review conducted under 8 C.F.R. § 1292.18.**

The EOIR Director should apply *de novo* review to an administrative review request under 8 C.F.R. § 1292.18. “*De novo*” means reviewing the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered. *See* 2 Am.Jur.2d § 698;

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<sup>9</sup> *See e.g.*, 8 C.F.R. § 1003.23(b)(2) (“A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the Immigration Judge’s prior decision and shall be supported by pertinent authority.”); 8 C.F.R. § 1003.2(b)(1) (“A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority.”).

*see also Farmingdale Supermarket, Inc. v. United States*, 336 F. Supp. 534, 536 (D.C.N.J.1971). *De novo* review therefore means that the Director would view the record from the same position as the EOIR Office of Policy. *See Confederated Tribes of Grand Ronde ex rel. Children & Family Servs. v. M.Q.*, 2013 WL 10977626 (Grand Ronde C.A. July 22, 2013). Since *de novo* review is non-deferential, the Director will have the authority to render “independent review” of the record. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) (noting also that “[w]hen *de novo* review is compelled, no form of appellate deference is acceptable”); *see Doe v. Chao*, 540 U.S. 614, 620-19 (2004) (noting *de novo* review is “distinct from any form of deferential review”). *De novo* review by the EOIR Director will thus ensure that the Office of Policy will not be the sole decision-maker regarding recognition. Given the lack of transparency with the creation of the Office of Policy and the manner in which EOIR has concentrated power within the Office of Policy, it is especially important for the EOIR Director to maintain independence, exercise discretion, and ultimately safeguard EOIR’s primary adjudicatory mission. *De novo* review will provide recognized organizations and their accredited representatives the best opportunity to obtain fair and meaningful administrative review, which will allow them to continue to provide immigration legal services long-term.

**IV. Prior precedent decisions of the Board of Immigration Appeals in recognition and accreditation cases should be adhered to in agency adjudications of requests for reconsideration pursuant to 8 C.F.R. §§ 1292.13(e), 1292.16(f), or 1292.17(d) and in administrative reviews conducted under 8 C.F.R. § 1292.18 where the regulations do not clearly address the issue at bar.**

The regulations governing the R&A program are binding on the agency, and accordingly should supersede any decision issued by the BIA before the regulations went into effect.<sup>10</sup> *See*,

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<sup>10</sup> In 2016, EOIR promulgated new regulations transferring the administration of the R&A program from the Board of Immigration Appeals to the Office for Legal Access Programs. Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 243 (December 19, 2016). In 2019, EOIR promulgated additional

*e.g., National Latino Media Coalition v. Federal Communications Commission*, 816 F.2d 785, 788 (D.C. Cir. 1987) (“A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.”). Thus, where there is a conflict between the regulations and a decision issued by the BIA before the new regulations went into effect, the regulations supplant the prior precedent.

Where the regulations do not speak to a particular question, leaving a gap for the agency to fill through adjudicative decisions, the agency should generally adhere to prior precedent issued by the BIA in R&A cases. The agency should do so for three reasons: 1) adhering to these decisions is consistent with the purpose of the R&A program, which is to build capacity and increase rates of representation for low-income and indigent persons appearing before the Immigration Courts and the BIA; 2) the BIA has considerable institutional expertise; and 3) following existing precedent encourages consistency of adjudications as required under the Administrative Procedure Act. Where the agency declines to follow the existing BIA precedent, it must provide a reasoned explanation for its departure from this established precedent.

First, adhering to BIA precedent on recognition and accreditation cases advances the purposes of the R&A program. The R&A program expands access to high quality legal representation, and ensures that even low-income and indigent non-citizens can access representation.<sup>11</sup> Expanding access to legal representation in turn promotes efficiency and

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regulations pertaining to the R&A program. *See* Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (Aug. 26, 2019).

<sup>11</sup> Office of Legal Access Programs, Department of Justice, <https://www.justice.gov/eoir/office-of-legal-access-programs> (last visited March 13, 2020) (“The purpose of the R&A program is to authorize qualified non-attorneys to provide representation in immigration matters through approved organizations.”); *see also* Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59514, 59515 (Oct. 1, 2015) (to be codified at 8 C.F.R. §§ 1001, 1003, 1212, 1292) (stating that OLAP’s purpose is to “. . . to improve access to legal information and counseling and increase rates of representation for persons appearing before the Immigration Courts and the Board”).

fairness in immigration proceedings. The precedential decisions previously issued by the BIA advanced this goal by both increasing the number of recognized organizations and accredited representatives able to provide legal services to those most in need and ensuring that noncitizens received high quality representation from accredited representatives. These decisions therefore should continue to guide agency adjudications.

Adhering to BIA precedent where the regulations are silent also makes sense because the BIA has considerable institutional expertise concerning R&A cases. Indeed, the BIA oversaw the R&A program from 1958 until 2016. Institutional expertise is an important factor in reasoned decision-making. *E.g. United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (considering an agency's relative expertise as an important factor in determining whether to afford deference to an agency decision). The agency should accordingly adhere to BIA precedent where the regulations do not address the matter at issue.

Finally, following BIA precedent encourages consistency in adjudications. Consistency in adjudications is important because longstanding policies and precedents may have “engendered serious reliance interests that must be taken into account.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Many recognized organizations have been assisting their employees in becoming accredited representatives for many years, and have relied on BIA precedent in ensuring that they complete those applications efficiently and effectively, so that they can focus their resources on providing services to underserved communities. The agency should continue to rely on these precedential decisions to ensure consistency with prior practice.

In the rare cases where the agency declines to follow existing BIA precedent in recognition and accreditation cases, it must adequately explain its departure from this existing

precedent.<sup>12</sup> *E.g.*, *Encino Motorcars*, 136 S. Ct. at 2126 (stating that an agency must always supply a “good reason” for a policy revision, cannot leave “unexplained inconsistency,” and must address underlying “facts and circumstances” relevant to the earlier and new action); *Apex Oil Co. v. Fed. Energy Admin.*, 443 F. Supp. 647, 650 (D.D.C. 1977) (explaining that under the Administrative Procedures Act, an agency can change a standard of law through adjudication only if it has adequately explained its reasons for departure from precedent). To do otherwise is arbitrary and capricious. *Apex Oil Co.*, 443 F. Supp. at 650; 5 U.S.C.A. § 706(2)(A).

## CONCLUSION

The R&A program exists to combat “the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before federal administrative agencies”<sup>13</sup> by increasing “the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice.”<sup>14</sup> EOIR must keep this purpose in mind as it evaluates the applicability of equitable tolling to the deadline for filing a reconsideration request, the proper legal standards for requests for reconsideration, the correct standard of review for such requests, and the weight due to prior BIA precedent on the recognition and accreditation program.

To best serve this purpose, EOIR should enact standards that safeguard due process and do not unduly burden nonprofit organizations seeking recognition. First, EOIR should recognize that equitable tolling applies to the 30-day deadline for a request for reconsideration under 8 C.F.R. §§ 1292.13(e), § 1292.16(f) and § 1292.17(d). Second, EOIR should evaluate requests for

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<sup>12</sup> Importantly, although EOIR has reorganized such that the BIA is no longer charged with administering the R&A program, the program remains within the same agency—EOIR—and accordingly, a departure from prior agency precedent still would require explanation.

<sup>13</sup> Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59514, 59514 (Oct. 1, 2015) (to be codified at 8 C.F.R. §§ 1001, 1003, 1212, 1292).

<sup>14</sup> Recognition and Accreditation (R&A) Program, [www.justice.gov/eoir/recognition-and-accreditation-program](http://www.justice.gov/eoir/recognition-and-accreditation-program) (last updated Aug. 20, 2019).

reconsideration pursuant to 8 C.F.R. § 1292.13(e) (or § 1292.16(f) or § 1292.17(d)) based only on the governing regulations and prior BIA precedent decisions. Third, EOIR should apply *de novo* review for administrative review conducted under 8 C.F.R. § 1292.18. Finally, EOIR should adhere to prior precedent decisions of the Board of Immigration Appeals in recognition and accreditation cases where the regulations do not clearly address the matter at issue. These standards will ensure fairness and increase access to representation for underserved populations.

Dated: March 13, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michelle Mendez", written in a cursive style.

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