



CATHOLIC LEGAL
IMMIGRATION
NETWORK, INC.

world relief®

May 19, 2020

Office of Management and Budget
Office of Information and Regulatory Affairs
Attention Department of Justice Desk Officer
Washington, D.C. 20503

Lauren Alder Reid
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5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

**RE: Request to Rescind New Versions of Forms EOIR-31 and EOIR-31A
for DOJ Recognition and Accreditation (62555, 62556) due to
noncompliance with PRA and APA requirements**

The Catholic Legal Immigration Network, Inc. (CLINIC) and World Relief respectfully write to request the Executive Office for Immigration Review (EOIR) rescind the new versions of Forms EOIR-31 and EOIR-31A for the Department of Justice (DOJ) Recognition and Accreditation Program, which are dated 2/2020 and were posted on the Recognition and Accreditation page of the EOIR website¹ on May 4, 2020. We urge EOIR to refrain from implementing the use of these new forms until the public has the appropriate opportunity to review and comment as set forth in the Paperwork Reduction Act (PRA) and the Administrative Procedures Act (APA).

For decades, CLINIC and World Relief have provided training and technical assistance to our respective network agencies on how to build capacity to respond to the demand for immigration legal services for low-income and indigent clients. Our organizations have collaborated in developing the leading resource on R&A, "DOJ Recognition and Accreditation: A Step-by-Step Guide for Non-Profit Community-based Agencies"² among other trainings and resources. It is based on this depth of experience and expertise in

¹ See www.justice.gov/eoir/recognition-and-accreditation-program

² <https://cliniclegal.org/toolkits/recognition-accreditation/preparing-apply>

R&A that we write to object to the implementation of the 2/2020 versions of Forms EOIR-31 and EOIR-31A.

The new versions of the Forms EOIR-31 and EOIR-31A that were recently published differ significantly from the draft forms that were provided by EOIR for review during the public comment period last year. The public was not given the opportunity to comment on the new version of these forms, as required by the PRA. In addition, some of the new information and documentation requests in the forms contradict or exceed the regulatory requirements³ for Recognition and Accreditation. These requirements would need to be promulgated through the rulemaking process under the APA, rather than included in a new version of a form under the PRA. For these reasons, and those described in more detail below, we request that the new versions of Forms EOIR-31 and EOIR-31A be rescinded.

Requirements of the PRA and the APA

Under the PRA, in order to collect information from more than 10 members of the public, an agency must publish a notice in the Federal Register and accept public comments for a period of 60 days. The agency then submits that information to OIRA along with a statement of the information to be collected, and publishes a second notice for the public to submit comments to OMB for a period of 30 days.⁴ The PRA requires the agency to provide “reasonable notice to the potential persons to whom the collection of information is addressed” of the proposed information collection to evaluate various aspects of the information collection and the burden it might impose.⁵ If the version of the form provided to the public during the public comment period does not reflect the content of the form as it is finalized and implemented, the public has not had “reasonable notice” of the nature of the information collection in order to meaningfully comment on the contents.

Under the APA, when an agency wishes to propose a new rule, it must publish a notice in the Federal Register and give interested persons the opportunity to participate in the rulemaking.⁶ According to the legislative history of the Administrative Procedure Act, “[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.”⁷ Generally, if a rule is not an interpretative rule; general statement of policy; or a rule of agency organization, procedure, or practice, and the agency does not have good reason to conclude that public commenting is impracticable,

³ 8 C.F.R. § 1292.11-16.

⁴ Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501-21).

⁵ 5 C.F.R. § 1320.8(c)-(d).

⁶ 5 U.S.C. § 553.

⁷ *Id.*

unnecessary, or contrary to the public interest, then it should go through notice and comment rulemaking.⁸

Procedural Deficiencies under the PRA

On September 5, 2019, the Department of Justice published two Agency Information Collection Requests (ICRs) in the Federal Register, opening 60-day comment periods in connection with the revisions for Forms EOIR-31 and EOIR-31A.⁹ Those ICR notices were insufficient to serve as effective notice to the public. They were published in the DOJ category rather than the EOIR category where concerned immigration practitioners would look for such notices, and they did not provide substantive information about the actual changes proposed or a link to access the draft forms. The comment periods for those ICRs closed on November 5, 2019.

Just ten days after the 60-day comment period closed, Federal Register Notices were published, opening the comment periods for the related 30-day OIRA review periods.¹⁰ The November 15, 2019 notices, which were now issued under EOIR as the agency, also did not provide direct access to the draft forms with the proposed changes. Thus, two layers of communication were necessary in order to access the draft forms, which CLINIC obtained via email from EOIR Public Affairs and shared with other stakeholders. The email correspondence and the draft forms that were provided by EOIR on November 27, 2019 are attached to this letter. This two-step process, rather than providing direct access in a docket folder on regulations.gov, severely limited the public's ability to engage in the comment process.

To date, the public does not have information about the number of comments that were submitted to these ICRs or access to the comments actually submitted. In all, the notice process has not met a reasonable standard of access and falls short of the "system of transparency, public participation, and collaboration" that was contemplated by the President's Jan. 2009 memorandum.¹¹

⁸ *Id.*

⁹ 84 FR 46760 www.federalregister.gov/documents/2019/09/05/2019-19143/agency-information-collection-activities-proposed-collection-comments-requested-request-by

84 FR 46760 www.federalregister.gov/documents/2019/09/05/2019-19143/agency-information-collection-activities-proposed-collection-comments-requested-request-by

¹⁰ 84 FR 62555 www.federalregister.gov/documents/2019/11/15/2019-24795/agency-information-collection-activities-proposed-collection-comments-requested-request-for-new

84 FR 62556 www.federalregister.gov/documents/2019/11/15/2019-24796/agency-information-collection-activities-proposed-collection-comments-requested-request-by

¹¹ <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government>

Status information on the ICRs indicated OIRA reviewed the forms and approved them without change on January 22, 2020.¹² This is notable because the draft forms that were provided to CLINIC for review and comment and the final forms reflect significant change both in structure and in content.

On May 4, 2020, new versions of the forms, dated 2/2020 were posted to the Recognition and Accreditation website. Stakeholders received no advance notice of the update and, to date, there has been no communication with the public or stakeholders as to when the new forms will be required for filings and the old version of the forms will be phased out.

Comparative Analysis of Forms

Examples of significant differences between the draft forms provided to CLINIC on Nov. 27, 2019 and the 2/2020 versions of the forms.

Form	Draft Form Language	2/2020 Version Language	Notes
EOIR-31	Form Instructions for Part 1 - Provide the organization's complete name, including any other names under which it is doing business or that it previously used to request recognition and accreditation.	Form Instructions for Part 1 - Provide the organization's complete name. The organization name must be a legal name that is on file with the Secretary of State or similar agency of the state under which the organization is formed.	The 2/2020 version creates a new requirement that the organization name must be on file with the Secretary of State or other state agency.
EOIR-31	Form Instructions for Part 5 (page 4) - Check the box(es) to indicate the proof submitted with the request to show that the applicant organization is established as a non-profit religious, charitable social service or similar organization in the United States. PLEASE NOTE: A mission statement or statement of purpose of the organization must be	Form Instructions for Part 3 (page 2) -Your organization must have currently valid non-profit status granted by the appropriate state agency... to qualify for recognition. Submit a printout from this agency's website or a contemporaneous letter from the agency, confirming that status. Form Part 3 (page 1) -	The 2/2020 version creates a new requirement for "currently valid" state non-profit status with documentation, while the draft form explicitly stated that evidence of state non-profit status was optional.

¹² <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1125-0012>
https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201911-1125-002

Form	Draft Form Language	2/2020 Version Language	Notes
	included. Additional proof may include the organization’s constitution, charter, by-laws, articles of incorporation, state non-profit status, or other documentation	Does your organization have current non-profit status? Attach proof from appropriate state agency.	
EOIR-31	<p>Form Instructions for Part 3 (page 3) - Check the “yes” box if you are seeking to extend the organization’s recognition from its headquarters or designated office to another office or location where the organization regularly provides immigration legal services. Provide the number of locations to which you are seeking to extend recognition and continue to Part 4.</p> <p>Form Instructions for Part 4 (page 4) -Check the appropriate box to indicate whether the extension request is for a new extension of recognition or a renewal of an extension of recognition. Also, indicate whether there is additional relevant information about 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. Provide this information</p>	<p>Form Instructions for Part 7 (page 5) -Attach detailed documentation that addresses the relationship between the designated office and the proposed extension office(s) in each of the following areas:</p> <ul style="list-style-type: none"> • 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 	The 2/2020 version creates new, extensive documentation requirements for an extension request, which contradicts DOJ’s purpose in creating the provision for extension of recognition to reduce the administrative burden on organizations. The draft form relied primarily on the attestation of the authorized officer that the organization meets the requirements for extension.

Form	Draft Form Language	2/2020 Version Language	Notes
	<p>on additional sheets of paper. NOTE: The corresponding information in the form p. 1, part 4 has been deleted.</p> <p>Form Part 11 (page 4) - The declaration of the authorized officer states: I also attest that the organization (and the offices or locations to which recognition is to be extended) will provide immigration legal services primarily to low-income and indigent clients, that the organization will supervise its accredited representatives, and that the organization will conduct regular inspections of extended offices or locations.</p>	<p>finances at each office?</p> <p>Form Part 7 (page 3) - Attach documentation and/or a narrative that demonstrates each of the following: Frequency with which Organization in Part 1 conducts inspections of proposed Extension Office Joint operations Joint management structure Joint funding sources and financial oversight</p>	
EOIR-31A	<p>Form Instructions for Section C, Part 4 (page 2) - Eligibility for accreditation requires the character and fitness to represent clients in immigration matters before DHS, or the Immigration Courts and the BIA, or all three immigration agencies. Provide documentation to show that the individual possesses the required character and fitness, such as character references from professionals in the community, employment</p>	<p>Form at Section C, Part 2 (page 2) -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? -Has the representative ever been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as</p>	<p>The 2/2020 version adds a series of broad questions about character and fitness that do not appear on the draft version. In the draft version (and in current practice), OLAP relies on character references and the attestations of the proposed representative and authorization officer (“to the best of my knowledge and belief”) to determine character and fitness.</p>

Form	Draft Form Language	2/2020 Version Language	Notes
	<p>references, and criminal background checks.</p> <p>Form Part 6 (page 3) - Declaration of Authorized Officer: I also attest that the proposed representative is an employee or volunteer of this organization, and to the best of my knowledge and belief, meets the qualifications for accreditation listed in Part 4 .</p> <p>-Declaration of Proposed Representative: I also attest that: I have the character and fitness and other qualifications for accreditation required to represent others before federal immigration agencies</p>	<p>defined in 8 C.F.R. § 1003.102(h), in any court anywhere in the world?</p> <p>-Has the representative ever committed prior acts involving dishonesty, fraud, deceit, or misrepresentation?</p> <p>-Does the representative have a history of neglecting professional, financial, or legal obligations?</p> <p>-Does the representative have a current immigration status that presents an actual or perceived conflict of interest?</p> <p>-Has the representative ever resigned while a disciplinary investigation or proceeding was pending?</p> <p>-Is the representative subject to any order disbaring, suspending, enjoining, restraining, or otherwise restricting the individual in the practice of law or representation before a court or any administrative agency?</p>	<p>This is in keeping with the final rule (12/19/16) in which DOJ stated, “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.”¹³</p>

¹³ Recognition of Organizations and Accreditation of Non-Attorney Representatives, 81 Fed. Reg. 92,346, 92,351 (Dec. 19, 2016).

Some Changes to the Forms Should Go Through APA Notice and Comment Instead

Some of the changes to the forms request information or documentation that contradicts or exceeds the scope of the Recognition and Accreditation regulations. Accordingly, those changes should go through notice and comment rulemaking under the Administrative Procedure Act as opposed to information collection under the PRA.¹⁴ The changes that contradict or exceed the scope of the current regulations are: (1) a requirement that the organization name must be on file with the Secretary of State or other state agency; (2) the new requirements regarding “current and valid” non-profit status and related documentation of non-profit status on Form EOIR-31; (3) new and extensive documentation requirements for an extension request on Form EOIR-31; and (4) the new character and fitness questions on page 2 of Form EOIR-31A.

The new version of the form requires that the name of the organization applying for recognition be on file with the Secretary of State or other state agency. This requirement does not appear in the recognition regulation.¹⁵ The names under which organizations operate are not a basis to disapprove an application for recognition. If EOIR wishes to make this a basis for disapproval, it would need to propose this change with notice and comment under the APA.

The 2/2020 version of the form sets a new and more burdensome standard for non-profit status and requires documentation of non-profit status that is not required evidence under the regulations. The regulation requires:

The organization ***must*** submit: 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. (emphasis added).

Organizing documents from the foundation of the organization are required evidence and serve as proof of non-profit status. However, requiring new and additional documentation of “currently valid” non-profit status exceeds the scope of the regulations, and would require EOIR to use the notice and comment procedures under the APA to change these requirements.

¹⁴ Todd Garvey, A Brief Overview of Rulemaking and Judicial Review, Congressional Research Service (March 27, 2017), <https://fas.org/sgp/crs/misc/R41546.pdf>.

¹⁵ See 8 C.F.R. § 1292.11.

The 2/2020 version of EOIR Form 31 also places new and burdensome requirements on agencies seeking extension of recognition and accreditation to multiple offices or locations pursuant to 8 C.F.R. 1292.15. As indicated above, the draft form that was provided for public comment more closely tracked the requirements under the regulations which states:

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... (emphasis added).

The new requirements in the 2/2020 form version vastly differ from the draft form and exceed the enumerated requirements of the regulation and shift the standard from attestation or declaration to making burdensome documentation and evidence mandatory.

Additionally, the questions related to character and fitness on page 2 of Form EOIR-31A well exceed the scope of the regulations. The Final Rule for the recognition and accreditation regulations states that it would not create administrative burdens for organizations, because 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. 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.

Expanding the character and fitness criterion to require in an initial filing that organizations to conduct a legal analysis of the individual's past to determine if he or she "ever practiced law, as defined in 8 C.F.R. §1001.1(i), without authorization" or "committed a crime of any kind, even if he or she was not arrested, cited, charged with, or tried for that crime," is certainly creating an administrative burden for the organization before any issue has been raised in the individual's record as established by attestations and background checks.

If EOIR wishes to expand the scope of the character and fitness requirement, it would need to use the notice and comment procedures under the APA to make that change.

As we have indicated above, the proposed changes are so burdensome, they may drastically reduce capacity for providing expanded, charitable immigration legal services to the most vulnerable non-citizens in our country. Courts have made clear that interpretive or procedural rules, "should not be deemed to include any action which goes

beyond formality and substantially affects the rights of those over whom the agency exercise authority.”¹⁶

Rationale for Request to Rescind the 2/2020 Versions of Forms EOIR-31 and EOIR-31A

EOIR should rescind the new versions of the forms in light of the procedural issues that hindered meaningful public comment. If EOIR plans to reissue the forms, it would need to separate the provisions that amount to regulatory changes and issue a Notice of Proposed Rulemaking under the APA along with the new forms. Or if EOIR prefers, it can rescind the provisions that exceed the scope of the regulations, and reissue new ICRs for public comment under the PRA. Because the draft versions of the forms that were provided by EOIR in November that the public relied on for our comments are vastly different from the final forms that EOIR posted on May 4, 2020, EOIR has not complied with the PRA requirement to collect public comments on its revised information collection.

Most alarmingly, the 2/2020 versions of the forms impose new application standards and place new and significant burdens on applicants that were not revealed during the ICR process, leaving us to question the propriety of the process. We ask OIRA and EOIR to compare the draft forms that were provided by EOIR in Nov. 2019 (attached) and the current version of the forms. While we acknowledge minor or typographical changes are permissible in the process, there is no doubt that the forms are substantially different. Thus, the public has not been given accurate representations of the forms and the information they seek to collect or an appropriate opportunity to review and evaluate them.

Recommendations for Implementation of Final Forms

CLINIC and World Relief recommend that the agency resume its past practice of more broadly engaging stakeholders, including rostered organizations and representatives, prior to introducing changes in Recognition and Accreditation in the future. Listening to the expertise and perspectives of CLINIC, World Relief, and other stakeholders would make the regulatory and form-change processes more efficient. Further, we recommend that any new form versions be released in coordination with a robust public engagement and outreach plan and include clear instructions on implementation, including timelines and updated Frequently Asked Questions.

¹⁶ *Id.*

Conclusion

For the reasons listed above, we call on EOIR to rescind the 2/2020 versions of Forms EOIR-31 and EOIR-31A immediately as they differ significantly from the draft forms provided during the 2019 ICRs, contradicting or exceeding the scope of the Recognition and Accreditation regulation, and were not issued under the proper legal framework under the PRA and APA. If you have any questions regarding this request, please contact Jill Marie Bussey, CLINIC's Advocacy Director, at jbussey@cliniclegal.org or Sarah Bankard, World Relief's Capacity Building Manager, Immigration Programs at SBankard@wr.org.

Respectfully submitted,



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Attachments (3)