



*Submitted via [www.regulations.gov](http://www.regulations.gov)*

October 17, 2019

Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
Department of Justice  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA 22041

**RE: Executive Office for Immigration Review, Department of Justice, EOIR Docket No. 18-0502; A.G. Order No.4515-2019; RIN 1125-AA85**

Dear Ms. Alder Reid:

The Catholic Legal Immigration Network, Inc. (CLINIC) submits these comments in response to the Department of Justice's Interim Rule and Request for Comment entitled "Organization of the Executive Office for Immigration Review" published on August 26, 2019. CLINIC opposes the Interim Rule for the reasons set forth below and requests that it be withdrawn.

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 through projects such as our BIA Pro Bono Project, CLINIC advocates for the just and humane treatment of immigrants through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC appreciates the opportunity to provide comments on this Interim Rule. CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants. Immigration policies should ensure justice, offer protection, and honor immigrants' human dignity. As a faith-based organization, we have consistently stood by the principle that all immigrants deserve an immigration system that is fair and ensures due process for all. In this vein, CLINIC submits the following comments in opposition to the changes outlined in this Interim Rule.

## I. Introduction and General Comments

There has long been an overwhelming need for immigration legal services in the United States<sup>1</sup>, particularly for low-income immigrants and vulnerable populations. The private bar, alone, cannot meet the need for qualified representation, which has grown as immigration laws and policies are rapidly changing and becoming increasingly complex.

Understanding this need for legal services, CLINIC has worked for over three decades to ensure access to justice for all immigrants. We do this by assisting affiliates around the country to build their capacity by obtaining DOJ Recognition and Accreditation, providing training for aspiring partially and fully accredited representatives, and offering ongoing training and support to affiliates. 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.

Much of CLINIC's work has been done in partnership with the Department of Justice'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 accordingly provides these comments as a stakeholder with special expertise on many of the programs most affected by this Interim Rule.

In particular, CLINIC strongly opposes codifying the creation of the Office of Policy through regulation, moving OLAP to the Office of Policy and allowing the Director of EOIR to adjudicate long-pending Board of Immigration Appeals (BIA) cases. CLINIC does not believe the reorganization of OLAP brings merit or value to OLAP's programs. Rather, CLINIC sees the Interim Rule as an erosion of OLAP's mission to enhance access to counsel. CLINIC also has serious concerns about the reorganization's implications for the future of the R&A Program. In addition, the section allowing the EOIR Director to adjudicate BIA cases raises serious due

---

<sup>1</sup> While the total number of people currently eligible for any available form of immigration benefit would be difficult if not impossible to determine, one of the larger subsets of that number is lawful permanent residents who are eligible to apply for U.S. citizenship, numbering nearly 9 million people. Similarly, the total number of legal representatives currently practicing immigration law would be impossible to ascertain. However, one of the larger subsets of that total number is the approximate 15,000 members of the American Immigration Lawyers Association in addition to the more than 2,000 DOJ Accredited Representatives who are eligible to provide legal services to this population. *See* Boundless Immigration, *The State of New American Citizenship*, Feb. 4, 2019, [www.boundless.com/american-citizenship-report/](http://www.boundless.com/american-citizenship-report/) (reporting nearly 9 million lawful permanent residents eligible to apply for U.S. citizenship); *see also* American Immigration Lawyers Association, *About*, [www.aila.org/about](http://www.aila.org/about) (last visited Oct. 17, 2019) (listing AILA membership at approximately 15,000); *see also* OFFICE OF LEGAL ACCESS PROGRAMS, ACCREDITED REPRESENTATIVES ROSTER, [www.justice.gov/eoir/page/file/942311/download](http://www.justice.gov/eoir/page/file/942311/download) (last accessed Oct. 17, 2019) (listing the number of accredited representatives).

process concerns. The changes described in the Interim Rule seem to be tied to impermissible political considerations, rather than administrative expediency.

Furthermore, CLINIC rejects the Justice Department's assertion that the Interim Rule does not adversely affect members of the public, as the public is directly served by OLAP's programs. CLINIC opposes the process through which the agency promulgated this Interim Rule because it disregards the importance of stakeholder input, lacks transparency, and is inconsistent with the requirements set forth in the Administrative Procedures Act.

## II. CLINIC opposes the Creation of the Office of Policy

CLINIC is troubled by the very existence of the Office of Policy, and is deeply concerned that EOIR is now attempting to formalize the role of the Office of Policy and make this office permanent through regulatory codification. Establishing and elevating the importance of a policy office politicizes an agency whose mission historically has been adjudicatory.<sup>2</sup>

The Office of Policy is a new office created in 2017 to “centralize coordination between the components on a number of policy projects and issues, including policy development, communications, strategic planning, training, and legal updates.”<sup>3</sup> The National Association of Immigration Judges (NAIJ) has described the creation of the Office of Policy as an effort to “substitute the policy directives of a single political appointee [the EOIR Director] over the legal analysis of non-political, independent adjudicators.”<sup>4</sup> EOIR itself stated that the Office of Policy “will be key in EOIR's efforts to meet the Presidential and Attorney General Priority goal to Enforce Immigration Law.”<sup>5</sup> Indeed, many troubling policies are widely believed to have originated from the Office of Policy, and the Office of Policy already has already inserted itself into case adjudication for high profile cases.<sup>6</sup>

The Office of Policy now plays an enormous role in the functioning of EOIR. Despite its outsize role, there is very little publicly available information about the office, its staff, its functions, or the office's interactions with the other components of EOIR, like the Office of General Counsel.

---

<sup>2</sup> Executive Office for Immigration Review, About the Office, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018) (“The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.”).

<sup>3</sup> Executive Office for Immigration Review, FY 2019 Congressional Budget Submission (Feb. 2018), at 12, [www.justice.gov/doj/page/file/1135086/download](http://www.justice.gov/doj/page/file/1135086/download).

<sup>4</sup> Ashley Tabaddor, President of the National Association of Immigration Judges, Statement to National Public Radio, [www.npr.org/2019/08/23/753912351/doj-increases-power-of-agency-running-immigration-court-system](http://www.npr.org/2019/08/23/753912351/doj-increases-power-of-agency-running-immigration-court-system).

<sup>5</sup> “EOIR Office of Policy- September 2017.” Document obtained through Freedom of Information Act (FOIA) request and on file with the author.

<sup>6</sup> Emails released in response to a FOIA request filed by CLINIC show that the Acting Assistant Director for the Office of Policy was directly involved in the adjudication of the *Castro-Tum* case on remand following the Attorney General's decision in that matter. He intervened to make sure that the case would proceed before a different Immigration Judge after the Immigration Judge originally assigned requested briefing on notice issues rather than issuing an in absentia order. Although the Acting Assistant Director for the Office of Policy also remained a Deputy Chief Immigration Judge at that time, it is deeply troubling to see leadership intervene in case adjudication in this manner. It is more troubling still when the decision to intervene was so obviously tied to political considerations and involved an individual who was also working for the Office of Policy.

The regulation does not provide much clarification on these points. Instead, it only purports to give legitimacy to the existence of the Office of Policy. CLINIC opposes legitimizing the Office of Policy, because the existence of such an office seriously undermines the agency's ability to impartially adjudicate cases.

### **III. Moving OLAP to the Office of Policy**

CLINIC opposes moving OLAP to the Office of Policy because such a move seriously undermines the critical role that OLAP plays in promoting fairness in immigration proceedings.

OLAP plays a crucial role in advancing due process and efficiency in immigration proceedings by expanding access to counsel and providing public information on the immigration court process. OLAP helps to connect immigrants with pro bono immigration attorneys and provides legal orientation programs that offer immigrants basic information about the immigration system in the United States.<sup>7</sup> Further, OLAP works to increase access to high quality legal representation through administering the recognition and accreditation program and the national qualified representative program, and through running the model hearing program. Because noncitizens in removal proceedings are not entitled to free legal representation,<sup>8</sup> OLAP's work is vital for ensuring due process and giving immigrants a fair chance in court when they must defend their cases against experienced prosecuting attorneys from Immigration and Customs Enforcement.<sup>9</sup>

The interim rule moves OLAP to the Office of Policy. As explained above, CLINIC is deeply concerned by the mere existence of the Office of Policy, and is even more troubled by the decision to move OLAP's functions into this office. Although the interim rule states that it "is not intended to change—and does not have the effect of changing—any of OLAP's current functions," CLINIC is very concerned that moving OLAP to the Office of Policy will detrimentally impact existing programs and the people served by them. This move threatens programs that provide important information to immigrants appearing pro se before the immigration courts and BIA, and will create additional obstacles to obtaining quality legal representation. Placing OLAP under the control of the Office of Policy gives it power to exercise executive authority in the immigration realm. Indeed, EOIR can effectuate massive changes simply by reducing OLAP's budget, staffing levels, training opportunities, and opportunities for public engagement.<sup>10</sup>

---

<sup>7</sup> 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").

<sup>8</sup> 8 U.S.C. § 1362 (providing that noncitizens in removal proceedings before the Immigration Judge or on appeal to the BIA have the "privilege" of being represented at no expense to the government).

<sup>9</sup> In recent years, as immigration law has become more complex, OLAP's activities have appropriately expanded to manage the demands on the Immigration Court system and comply with the requirements of congressional appropriations.

<sup>10</sup> The timing of this reorganization is peculiar. Earlier this year, the Department of Justice launched an audit of OLAP. CLINIC has met with the auditors to share our perspective on the value of the R&A Program and other OLAP functions. The audit is not yet complete, and it seems premature for EOIR to reorganize OLAP while the audit remains ongoing.

The interim rule also states the reorganization “allows for greater flexibility in the future regarding OLAP’s mission . . .”. CLINIC is alarmed by the administration’s desire for “greater flexibility” in this context.<sup>11</sup> Such flexibility is of great concern given the current climate,<sup>12</sup> and would be inconsistent with congressional directives to strengthen OLAP.<sup>13</sup>

CLINIC is particularly concerned about the impact of this move on the R&A program and LOP.

**a. The R&A Program is vital in providing access to legal representation for low-income and indigent immigrants**

CLINIC supports the R&A Program as a means of increasing access to justice for all immigrants, and opposes any changes to the program that might weaken its efficacy.<sup>14</sup> 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>15</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>16</sup> The program achieves this by allowing trained non-attorneys to represent noncitizens before the Department of Homeland Security (DHS) and EOIR.<sup>17</sup> The R&A process 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.<sup>18</sup>

---

<sup>11</sup> This Administration has sought “greater flexibility” in other contexts, including through relying on “acting” appointments as a means of evading congressional oversight and ignoring constitutional requirements. *See* Compl. for Decl. and Injunctive Relief, *L.M.-M. v. Cuccinelli*, 1:19-CV-02676, (D.D.C. Sept. 6, 2019).

<sup>12</sup> This Administration’s actions to undermine access to counsel, such as through directives to shorten the amount of time allowed before a Credible Fear Interview and to deny continuances to allow individuals to consult with an attorney, *see, e.g.*, Compl. For Decl. and Injunctive Relief, *L.M.-M. v. Cuccinelli*, 1:19-CV-02676, (D.D.C. Sept. 6, 2019), stand in stark contrast to the position the Government has taken in litigation, claiming that “EOIR is committed to promoting both the availability of representation and the quality of representation.” Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction at 40, *NWIRP v. Sessions*, 2:17-cv-00716-RAJ (W.D. Wash. 2017).

<sup>13</sup> *See, e.g.*, Press Release, Senator Robert Menendez, Menendez Urges DOJ to Restart Legal Orientation Program (April 18, 2018), [www.menendez.senate.gov/news-and-events/press/menendez-urges-doj-to-restart-legal-orientation-program](http://www.menendez.senate.gov/news-and-events/press/menendez-urges-doj-to-restart-legal-orientation-program).

<sup>14</sup> Individuals detained in remote locations face additional obstacles to obtaining legal representation. Results of a Freedom of Information Act request filed by CLINIC demonstrate that accredited representatives are increasingly filling this gap by helping noncitizens detained in remote locations to obtain bond. Between 2016 and 2018, immigration courts that serve only detained populations saw some of the largest percentage increases in the number of bond grants obtained by an accredited representative. For example, in Adelanto, there was a 300 percent increase in the number of bond grants obtained by an accredited representative. In Batavia, there was 1300 percent increase during this same period, and in Otero, there was an increase of 4600 percent.

<sup>15</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>16</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).

<sup>17</sup> 8 C.F.R. § 1292.1(a)(4).

<sup>18</sup> Accredited representatives were effective advocates in even the most difficult jurisdictions for immigration matters. For example, records released to CLINIC in response to a Freedom of Information Act request indicate that in Atlanta, accredited representatives won termination in 37 cases between 2010 and 2018. This represented 86% of the 43 total cases in which an accredited representative represented the respondent. During this same time period, accredited representatives won relief (not including voluntary departure) for their clients in 67 percent of cases in which an accredited representative represented the respondent before the Stewart Immigration Court.

CLINIC worries that moving OLAP (and with it the R&A Program) to the Office of Policy, an office that issues and implements politically motivated policy directives,<sup>19</sup> may represent an effort to undermine the R&A Program.<sup>20</sup> As such, CLINIC opposes the move described in the interim regulation.

**i. The R&A program forms a strong public/private partnership to combat fraud and the unauthorized practice of immigration law**

Nonprofits and law enforcement agencies share a common goal of combatting unauthorized practice of law and preventing consumers from unscrupulous people who seek to rob vulnerable and unsuspecting people of their money. Immigrant communities are particularly vulnerable to fraud due to unfamiliarity with U.S. laws and limited knowledge of English.<sup>21</sup> Many unsuspecting noncitizens are promised false outcomes, and end up paying for immigration application assistance that will not provide them with the benefit they seek or any benefit, and worse, possible removal from the United States. As such, the charitable work that recognized agencies do at the local level is in concert with federal and state law enforcement priorities to prevent fraud and alleviate its harms.

**ii. Representation as a result of the R&A Program Increases U.S. Government Efficiency and Protects Due Process**

Legal representation of immigrants in federal judicial and administrative proceedings saves the government money and adds efficiency to government procedures. Efficient and fair proceedings help uphold the government's responsibility to protect due process rights. Below we offer just a few examples of the benefits:

- Immigrants with legal representation have better prepared cases reducing time spent in requesting more evidence, delaying the case and increasing the backlog of cases.

---

<sup>19</sup> e.g., Memorandum from Director James R. McHenry, III to All of EOIR, PM 19-05 *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), [www.justice.gov/eoir/page/file/1112581/download](http://www.justice.gov/eoir/page/file/1112581/download); Memorandum from Director James R. McHenry, III to All of EOIR, PM 19-04, *Tracking and Expedition of "Family Unit" Cases* (Nov. 16, 2018), [www.justice.gov/eoir/page/file/1112036/download](http://www.justice.gov/eoir/page/file/1112036/download).

<sup>20</sup> Indeed, there have been substantial changes in adjudication patterns for recognition and accreditation applications since the beginning of this Administration. For example, records released to CLINIC in response to a Freedom of Information Act request show that in the last years of the Obama administration, the approval rate for new full accreditation applications was 70% in 2015 and 78% in 2016. A significant change occurred with the change in Administration. In 2017, the approval rate dropped to 47%. In 2018, it dropped even further to only 43%.

<sup>21</sup> Margaret Mikyung Lee, *Legal Ethics in Immigration Matters: Legal Representation and Unauthorized Practice of Law*, U.S. CONGRESSIONAL RESEARCH SERVICE, Sept. 18, 2009, <https://trac.syr.edu/immigration/library/P4026.pdf>; See also, *Stopping Immigration Services Scams: A Tool for Advocates and Lawmakers*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW AND CATHOLIC LEGAL IMMIGRATION NETWORK, INC., July 2017, <https://cliniclegal.org/resources/stopping-immigration-services-scams-tool-advocates-and-lawmakers>.

- Immigrants with legal representation are more likely to appear in Immigration Court for each hearing<sup>22</sup> and are better prepared, which reduces time in hearings.
- Immigrants with legal representation and orientation from a legal expert on defense from removal are more likely to decide if they have a meritorious claim before an Immigration Judge, and if not, voluntarily return home, thereby saving the government money in additional detention bed space cost and costs to the Immigration Court.
- Immigrants with legal representation are more likely to win their removal cases which, in turn, prevents people with meritorious cases but denied due to lack of representation from filing appeals which adds to the government's cost per each case.
- Representation by DOJ accredited representatives estimated at 10 percent of applications filed to USCIS brings the federal government revenue it would otherwise not receive.

Retired Immigration Judge Denise Slavin responded to CLINIC's request for her opinion of the R&A Program stating:

[I]n over two decades of service as an Immigration Judge, I found the Department's Recognition and Accreditation program to be invaluable. In some jurisdictions, it provided the main resource for low income immigrants to obtain assistance in negotiating the complex maze of immigration law to either obtain relief or accept voluntary departure or removal, saving time and money for our overburdened court system by reducing the need for numerous court appearances and reducing appeals. The program also helped Judges and the court ferret out unscrupulous individuals who were trying to take advantage of the uneducated migrant population, and gave an alternate bona fide resource to that population so meritless claims were reduced. When Judges have a healthy list of accredited representatives to give to poor, uneducated migrants at a first appearance, it assisted in guiding them away from nefarious individuals who would take what little money they had and mislead them about the immigration process.

The R&A Program benefits immigration judges, court administrators, immigration legal representatives, and immigrants themselves. The interim regulation reduces protections that prevent political machinations from encumbering this universally beneficial program. It is for these reasons that we request its withdrawal.

### **iii. CLINIC is a major stakeholder in the R&A Program**

CLINIC has a long and productive history of carrying out its mission of providing poor and low-income immigrants with legal representation through the R&A Program. CLINIC supports a nationwide network of over 375 community-based immigration legal programs. It is the largest network of its kind. CLINIC's affiliated immigration programs operate out of more than 450 offices in 49 states; employ over 2,400 staff including attorneys, accredited representatives and other office staff; and serve over 400,000 immigrants each year. A recent count of DOJ's roster

---

<sup>22</sup> See TRAC, Syracuse University, "Most Released Families Attend Immigration Court Hearings," June 18, 2019, available at <https://trac.syr.edu/immigration/reports/562/> (reporting on data that shows that appearance rates increased to 99.9% when families are represented).

shows that more than 30 percent of the recognized agencies are CLINIC affiliates and more than 40 percent of the accredited representatives are employed by a CLINIC affiliate.

A majority of CLINIC affiliates rely solely on accredited representatives.<sup>23</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 meet the needs of low-income and indigent immigrant communities.<sup>24</sup>

Many of CLINIC's affiliates would be unable to provide any legal services for low-income and indigent immigrants without the R&A Program. For others, curtailment of the R&A Program would mean a drastic decrease in their capacity to provide legal services to vulnerable populations.

The R&A Program constitutes an important facet of CLINIC's mission. As an illustration of how the R&A program helps CLINIC and the Catholic Church to enact its faith, consider the story of a young woman named Jaqueline:

*After graduating high school, Jaqueline felt that her life could not progress because she was undocumented. She volunteered as a translator for two Catholic Sisters who were accredited representatives. When the sisters learned of Jaqueline's situation, they helped her to secure a scholarship to nursing school and apply for DACA as soon as the program was established, which allowed her to land her "dream job" as a nurse. That job provided her with health insurance, which she unfortunately needed to use, as she was soon after diagnosed with a congenital heart defect that required surgery. Without the Catholic Sisters and their accreditation, Jaqueline would not have had DACA, a job, or health insurance, and likely would have died without affordable access to health care. Our faith calls us to honor the inherent dignity of all, including helping our neighbors to find dignity in work, and solidarity in justice. Jaqueline's story is just one among countless members of our communities whose lives have been improved through the R&A program and the enactment of our beliefs.*

CLINIC and its growing, diversifying network of faith-based and community-based nonprofits is the largest participant in DOJ's R&A Program. As such, CLINIC submits this comment as an important stakeholder with unique expertise on the impact of this interim rule on the R&A Program.

---

<sup>23</sup> 203 affiliates rely solely on accredited representatives, comprising 52% of CLINIC's network.

<sup>24</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.

## **b. Moving the LOP and LOPC Programs to the Office of Policy**

CLINIC is concerned that this rule will also weaken the Legal Orientation Program (LOP) and Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC), and may be a precursor to ultimately dismantling the programs.

Many of CLINIC's affiliates partner directly with EOIR to implement the LOP and LOPC programs. These programs have become an important means of protecting the rights of immigrants.

The LOP offers legal education and referrals for free and low-cost legal representation to detained noncitizens.<sup>25</sup> The program helps noncitizens to navigate the complex immigration court system. DOJ's own evaluation of the program determined that LOP saves valuable time and resources for both the detainee and the U.S. government.<sup>26</sup>

The LOPC similarly provides legal education and referrals for free and low-cost legal representation, but provides these resources to the caregivers of unaccompanied children in removal proceedings before EOIR. The program informs the children's custodians of their responsibilities in ensuring the child's appearance at all immigration proceedings, and protecting the child from mistreatment, exploitation, and trafficking, as provided under the Trafficking Victims Protection Reauthorization Act of 2008.<sup>27</sup>

Despite the documented benefits of the LOP, there have been recent efforts to eliminate the LOP and related programs.<sup>28</sup> While the attempt to end these programs was couched as an attempt to assess the efficiency of the programs,<sup>29</sup> advocacy groups and Members of Congress called attention to the absurdity of this stated rationale and alleged that instead the effort to end the LOP was an attempt to degrade due process protections.<sup>30</sup> In response to backlash from Congress and the advocacy community, the Administration reversed course.<sup>31</sup>

In light of the efforts made by the administration that undermine the due process rights of immigrants,<sup>32</sup> CLINIC remains concerned about the future of the LOP and LOPC programs.

---

<sup>25</sup> Legal Orientation Program, [www.justice.gov/eoir/legal-orientation-program](http://www.justice.gov/eoir/legal-orientation-program) (last updated Apr. 25, 2018).

<sup>26</sup> Legal Orientation Program Cost Savings Analysis- April 2012, <https://www.justice.gov/eoir/office-of-legal-access-programs-reports>.

<sup>27</sup> Legal Orientation Program for Custodians of Unaccompanied Alien Children, [www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children](http://www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children) (last updated Apr. 13, 2018).

<sup>28</sup> Maria Sacchetti, *Justice Dept. to halt legal-advice program for immigrants in detention*, WASHINGTON POST, April 10, 2018, [www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef\\_story.html?noredirect=on](http://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html?noredirect=on)

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Press Release, Senator Robert Menendez, Menendez Urges DOJ to Restart Legal Orientation Program (April 18, 2018), [www.menendez.senate.gov/news-and-events/press/menendez-urges-doj-to-restart-legal-orientation-program](http://www.menendez.senate.gov/news-and-events/press/menendez-urges-doj-to-restart-legal-orientation-program).

<sup>31</sup> Opening Statement of Attorney General Jeff Sessions Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, Washington, DC (April 25, 2018), [www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee](http://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee).

<sup>32</sup> For example, in implementing the so-called Migrant Protection Protocols (otherwise known as the Remain in Mexico policy), this Administration has made it extremely difficult for noncitizens to obtain legal representation in

CLINIC worries that moving OLAP (and with it the LOP) to the Office of Policy, an office that is responsible for politically motivated policy directives, at a time when this Administration has already indicated its desire to eliminate the LOP, may represent an effort to further weaken the LOP and related programs, if not to entirely eliminate them. As such, CLINIC opposes the move outlined in the interim regulation.

#### **IV. The Director of EOIR should not have the authority to issue decisions on cases before the Board of Immigration Appeals (BIA)**

The interim final regulation gives the Director of EOIR the authority to adjudicate any case in which the adjudication cannot be completed by the BIA within regulatory timeframes due to workload management issues. CLINIC strongly opposes this proposed provision, as it appears to be a veiled attempt to interfere with the impartial adjudication of BIA cases, rather than a solution to workload management issues.

CLINIC is especially concerned with the BIA's ability to continue to provide fairness and due process to all. Catholic social teaching tells us that seeking justice leads to lives of dignity and peace. To that end, CLINIC provides training to affiliates around the country on effective advocacy before the BIA. CLINIC is invested in the BIA ensuring fairness and justice for all, including the least among us.

CLINIC opposes permitting the EOIR Director to adjudicate BIA cases. It is unclear how allowing the Director to adjudicate long-pending BIA cases would meaningfully address concerns about timely adjudication. The Director lacks the time that would be necessary to adjudicate all the BIA cases that extend beyond the 90-day or 180-day adjudication deadlines, and as such would need to choose only certain cases to adjudicate. The proposed regulation contains no protections to ensure that the Director's choice of cases to adjudicate is not influenced by political considerations. It also allows the Director, acting alone, to issue precedential decisions. This provision upends the longstanding practice of requiring three Board Members to issue a precedential decision, and would facilitate the politicization of precedent.<sup>33</sup>

Concerns about workload management and specifically about cases pending for long periods of time would be better addressed by appropriately staffing the BIA, rather than by allowing the Director to weigh in. EOIR should hire a sufficient number of Board Members, Attorney Advisors, Judicial Law Clerks, and support staff<sup>34</sup> to ensure that BIA staff do not have

---

their removal proceedings, and has expressly prohibited access to counsel during interviews to determine whether the individual should be forced to remain in Mexico during their immigration proceedings. *See, e.g.*, Ben Harrington & Hillel R. Smith, CONGRESSIONAL RESEARCH SERVICE, "Migrant Protection Protocols": Legal Issues Related to DHS's Plan to Require Arriving Asylum Seekers to Wait in Mexico 3 (2019), <https://fas.org/sgp/crs/homsec/LSB10251.pdf>.

<sup>33</sup> Indeed, the Attorney General's ability to render single-adjudicator precedential decisions has led to the extraordinary politicization of precedential decisions. *See, e.g., Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018).

<sup>34</sup> Importantly, the agency is strictly prohibited from taking political leanings into account in hiring decisions. *See, e.g.*, U.S. Department of Justice Office of Inspector General and Office of Professional Responsibility, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General 135 (2008), <https://oig.justice.gov/special/s0807/final.pdf> (noting that "both Department policy and federal law prohibit discrimination in hiring for career positions on the basis of political affiliations.").

overwhelmingly large caseloads.<sup>35</sup> Such enormous caseloads make it impossible for the Board to address all cases in a timely manner and more importantly, such large caseloads, in combination with the pressure to complete cases quickly, create serious due process concerns.<sup>36</sup>

Concerns about workload management could also be addressed through initiatives for improving staff retention. Case processing times at the BIA are adversely affected by the loss of experienced employees who have developed years of experience adjudicating complex cases. EOIR should focus on staff retention to ensure that experienced staff members who are able to efficiently adjudicate complex matters do not leave the BIA in large numbers, resulting in significant losses of institutional knowledge and expertise. Recent hiring practices have indicated that the Board of Immigration Appeals has deprioritized retaining experienced and knowledgeable attorneys.<sup>37</sup> CLINIC supports efforts to improve staff retention as a means of ensuring timely case adjudication while ensuring that the decisions comport with due process and fundamental fairness. Retention of experienced, high quality staff will play a more significant role in efficiently adjudicating case than allowing the EOIR Director to do so.

EOIR's decision to allow the Director, who holds an inherently political position, to adjudicate BIA cases is unreasonable, as the administrative role of the Director does not qualify him or her to render such decisions consistently with BIA's historic decisions. EOIR has not explained why it did not consider other options for achieving timely case adjudication, including by appropriately staffing the BIA. The addition of a single additional adjudicator – the EOIR Director – would not make a meaningful impact on the volume of BIA cases decided. It would, however, open the door to allow political considerations to unfairly affect case adjudication and set precedent decisions.

## **V. Other legal questions raised by the interim rule and the process by which the agency promulgated it**

### **a. The agency's decision-making process lacked transparency and stakeholder input.**

---

<sup>35</sup> The BIA's caseload has substantially increased. The BIA received 49,522 cases in FY2018. This represents a 47.6 percent increase in cases from FY2017. *See EOIR's FY 2018 Statistics Yearbook*, prepared by EOIR's Office of Planning, Analysis, and Statistics, [www.justice.gov/eoir/file/1198896/download](http://www.justice.gov/eoir/file/1198896/download).

<sup>36</sup> In particular, time constraints imposed by large caseloads can reinforce implicit biases, resulting in inaccurate and unfair adjudications. *See Fatma Marouf, Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 431 (2011). These implicit biases are more likely than ever to seep into case adjudication because of the new case completion quotas applied to Immigration Judges. *See EOIR Performance Plan for Adjudicative Employees*, [www.abajournal.com/images/main\\_images/03-30-2018\\_EOIR\\_-\\_PWP\\_Element\\_3\\_new.pdf](http://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf) (noting that an Immigration Judge must complete at least 700 cases per year to get a satisfactory performance review). Therefore, it is now even more important for the BIA to carefully consider due process issues.

<sup>37</sup> Recent vacancy announcements indicate that new attorney advisors will be eligible for promotion up to only a GS-13 on the federal pay scale. *See, e.g.,* Vacancy Announcement Attorney Advisor (Immigration), Executive Office for Immigration Review, Board of Immigration Appeals, EOIR-18-0055 [www.justice.gov/legal-careers/job/attorney-advisor-immigration-1](http://www.justice.gov/legal-careers/job/attorney-advisor-immigration-1) (last updated May 22, 2018). Previously attorney advisors were eligible for promotion up to a GS-15. Such changes in promotion potential will negatively impact retention of experienced attorneys in Attorney Advisor roles. For further discussion of this issue, *see Jeffrey Chase, EOIR's Hiring Practices Raise Concerns*, OPINIONS/ANALYSIS ON IMMIGRATION LAW (May 27, 2018), [www.jeffreychase.com/blog/2018/5/27/eoirs-hiring-practices-raise-concerns](http://www.jeffreychase.com/blog/2018/5/27/eoirs-hiring-practices-raise-concerns).

CLINIC is dismayed that the Department of Justice did not seek external stakeholder input prior to the effective date of the interim rule, August 26, 2019. Failure to seek stakeholder input indicates that the agency has devalued transparency, and fails to see the importance of both OLAP's current functions and the BIA's impartial adjudication of the cases that come before it. The regulation does not represent an administrative, even perfunctory, change. Instead, the interim rule intentionally minimizes significant restructuring that bakes political decision-making into the structure of EOIR.

Subsuming OLAP's name, staff, and functions under the Office of Policy is an extreme and consequential change far beyond the seemingly bureaucratic reasons given in the Interim Rule. Eliminating the name which includes the words "Legal Access Programs" and replacing it with "Policy" speaks volumes about EOIR's intent—this name change makes plain that EOIR no longer values access to legal representation and the benefits of legal representation for both noncitizens and the government.

The Interim Rule states, "Finally, because EOIR has determined that there is no need for OLAP to remain in the Office of the Director, this rule transfers OLAP's responsibilities to a division in the Office of Policy . . .". EOIR's claim that it could find no reason for OLAP to remain in the Office of the Director is not credible, as it had placed the office there in 2011. The Office of Policy has no history of increasing access to counsel, managing programs encompassing requests for proposals, awarding congressionally appropriated funds, or managing federal grants. Furthermore, external stakeholders have never suggested that OLAP's placement in the Office of the Director hindered its purposes or that OLAP's mission would be better served elsewhere.<sup>38</sup>

In the past, EOIR held both internal conversations about future changes to programs such as OLAP and the R&A Program, and many external stakeholder meetings on these topics. Those earlier discussions did not reveal a need to move OLAP, and certainly did not envision moving those programs to an office that is intended to evaluate policy changes, not make adjudicatory decisions. To the contrary, for many years, EOIR staff and external stakeholders were in steady agreement that any new regulations needed to expand access to counsel while preventing unauthorized practice of law. In this round of rulemaking, the agency chose to forego obtaining any stakeholder input before implementing very consequential changes.<sup>39</sup> Indeed, as further explained below, the agency should have gone through the notice and comment process rather than issue the regulation as an interim final rule effective immediately.

Similarly, the section of the Interim Rule allowing the EOIR Director to adjudicate BIA cases is not a perfunctory change. Indeed, allowing a political appointee to intervene in adjudications that should be impartial constitutes a major threat to the due process rights of immigrants appearing before the agency and, at a minimum, gives the appearance of impropriety. The public should

---

<sup>38</sup> CLINIC has chaired the Recognition and Accreditation Working Group, an assembly of nonprofits, since 2013. In the Working Group meetings, there has never been a suggestion that OLAP's placement in the Office of the Director was problematic or that OLAP could better effectuate its mission if it were part of a different office.

<sup>39</sup> Emails released in response to a FOIA request filed by CLINIC demonstrate a desire to move as quickly as possible to get the Office of Policy up and running, and fully staffed. The agency did not consider the need for public input.

have been given the opportunity to provide input on this proposal before its implementation. Instead, the agency made this change without providing any forewarning to the public or opportunity for objections.

CLINIC is deeply troubled by the agency's decision to make such significant changes without seeking public input before the rule's effective date.

**b. The proposed changes should have gone through notice and comment rulemaking**

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.”<sup>40</sup> Indeed, the Administrative Procedures Act creates only limited exceptions to the requirement that rules go through Notice and Comment.<sup>41</sup>

As explained above, EOIR's interim rule includes matters of great importance and affects the due process rights of the individuals who appear in proceedings before the agency. Public input on the impact of these changes is essential to proper agency decision-making. Accordingly, EOIR's changes should have gone through notice and comment rulemaking under the Administrative Procedure Act, rather than being treated as a rule of management or personnel.<sup>42</sup> Similarly, this rule should not be exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date, as it substantially impacts the individuals who appear before the agency.

**c. EOIR's proposed changes are inconsistent with the requirements of the Administrative Procedures Act**

The Administrative Procedure Act states that an agency action is unlawful if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>43</sup> The Supreme Court has explained how to analyze an agency decision using this standard, explaining an “agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.”<sup>44</sup>

Moving OLAP to the Office of Policy diminishes the importance and uniqueness of the R&A program and other access to legal counsel programs. It also diminishes the role of the Director, while strangely elevating a Policy Director. This is counter-intuitive from an organizational management viewpoint, and it seems anomalous for an Office of Policy to manage grants, disseminate public education, and award professional certifications. EOIR has not provided any cost-benefit analysis of this reorganization, nor any comparison of how this organizational

---

<sup>40</sup> Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, CONGRESSIONAL RESEARCH SERVICE (March 27, 2017), <https://fas.org/sgp/crs/misc/R41546.pdf>.

<sup>41</sup> See 5 U.S.C. § 553.

<sup>42</sup> *Id.*

<sup>43</sup> 5 U.S.C. § 706.

<sup>44</sup> *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.* 463 U.S. 29 (1983).

structure compares with that of other federal agencies. The thin rationale stated in the interim rule for this significant reorganization demonstrates the arbitrary and capricious nature of the agency's reorganization, and reveals a more apparent, political motivation.

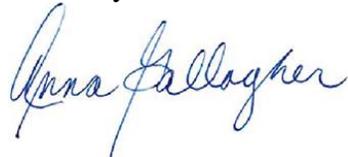
EOIR has also failed to establish a rational connection between allowing the Director to adjudicate cases and its stated goal of ensuring timely case adjudication. The agency failed to explain why it rejected other more obvious methods for achieving its goal of timely case adjudication, and its sparse explanation for the chosen course of action is insufficient to demonstrate that it was the product of reasoned decision-making. Moreover, the agency has abused its discretion in promulgating this regulation by establishing procedures that allow impermissible political considerations to seep into case adjudication.

## **VI. Conclusion**

For the above stated reasons, CLINIC strongly opposes moving OLAP to the Office of Policy and allowing the EOIR Director to adjudicate long pending BIA cases. Neither of these changes will improve administrative efficiency, and neither of these changes will ensure justice, protection, or humane treatment for immigrants. Instead, these changes open the door to impermissible political considerations taking the place of impartial case adjudication and create additional barriers for low-income immigrants who seek access to justice.

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Anna Gallagher, Executive Director, at [agallagher@cliniclegal.org](mailto:agallagher@cliniclegal.org) should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive, flowing style.

Anna Gallagher  
Executive Director  
Catholic Legal Immigration Network, Inc.