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CLINIC Policy Brief: The Severely Under-Resourced R&A Program is an Essential Tool to Meet Growing Needs for Affordable Immigration Legal Services

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Sadia's Story

"Sadia came to the United States as a refugee in 2012. At the time, forced to flee for safety, she was unable to bring her two boys with her. Once Sadia was resettled, she immediately began working with an accredited representative at Catholic Community Services of Utah to petition for her children to join her in her new country. Today, Sadia and her children are nearing the end of their five-year separation. The case is in its final stages and she is just waiting for their flights to be booked. Without her accredited representative, Sadia said that being able to see her children again "would not have been possible [...] my children would not have been approved. It would be devastating." If Sadia had the opportunity to speak to members of the administration in charge of the R&A program, she would want them to know that the legal assistance she received at Catholic Community Services of Utah is "an important part of the refugee process." She said, "There are so many other people in my situation and these are vital services that people like me who cannot afford to go to a private attorney need...these services must not be disrupted." Sadia added that in addition to petitioning for her children, her accredited representative helped her with her permanent residency and then citizenship. Sadia is thankful that she is safe now, but she is waiting for her children. She wants everything for them in their new country, in particular, the education they have missed while seeking safety. She thinks about the upcoming moment at the airport when she will see them again. Without hesitation, Sadia said, "That will be the happiest moment of my life."

CLINIC POLICY BRIEF: THE SEVERELY UNDER-RESOURCED R&A PROGRAM IS AN ESSENTIAL TOOL TO MEET GROWING NEEDS FOR AFFORDABLE IMMIGRATION LEGAL SERVICES

In This Paper: Overview • What is the R&A Program? • Why an Efficient R&A Program is Essential to Justice • Roadblocks Impeding the R&A Program • Policy Recommendations

OVERVIEW

The Biden Administration and the Department of Justice, or DOJ, have a program at their fingertips called the Recognition and Accreditation Program, or R&A Program, that has operated since the 1950s to increase the number of qualified immigration legal representatives available to serve low-income immigrants. However, the program is currently severely underfunded and under-resourced, bringing the credentialing of new legal representatives to a virtual standstill. As the Biden administration pushes toward its goal of legalization for DACA recipients, Temporary Protected Status holders, and other immigrant populations, increasing the capacity of nonprofit legal services organizations is necessary to ensure that those populations have access to counsel, and therefore access to justice. The R&A program also contributes to both socioeconomic and racial equity, as it helps sorely needed legal expertise reach remote locations and provides opportunities for members of racial and ethnic minority groups to become accredited representatives and serve their communities in their native language and with cultural competence. Restoring an efficient and effective R&A program is a required first step that must take place before pursuing immigration reforms in the legislature and within agencies to ensure that the nonprofit legal services community is ready to meet the increasing demand for services.

"The R&A Program is currently severely underfunded and under-resourced."

WHAT IS THE R&A PROGRAM?

The R&A program was first established in 1958 to address a major due process and access to justice issue in our immigration legal system: that immigrants frequently cannot secure legal representation, and sometimes for that reason alone are not able to successfully prove their case. In the world of immigration, the stakes are often unbearably high. A piece of paper or an immigration judge's decision can carry the weight of life or death. The court's decision may determine whether or not a child will finally be safe. The court's decision may mean

the difference between family separation and unity. Research has shown that the difference-maker in these situations is access to representation.¹ Despite these grave consequences, immigrants are not guaranteed legal representation. The R&A program helps to increase the number of competent, affordable legal representatives available to help immigrants achieve a just result.

To build capacity to serve the most vulnerable, the R&A Program allows non-attorneys who have sufficient training and experience in immigration law to receive credentials from the Department of Justice, or DOJ, as Accredited Representatives. Accredited Representatives represent low-income and indigent people in immigration applications and petitions before the Department of Homeland Security, or DHS, and in immigration court before the Executive Office of Immigration Review, or EOIR. They must work for an organization that has been designated by the DOJ as a Recognized Organization, which ensures that they are nonprofit entities serving low-income immigrants and charging low or no fees for their services.

“Accredited Representatives represent low-income and indigent people in immigration applications and proceedings.”

DOJ’s stated purposes for the program include the following:

- Increasing the availability of non-lawyer representation for underserved and lower-income immigrant populations.
- Promoting effective and efficient administration of representation before DHS and EOIR.
- Combating the unauthorized practice of law and related fraudulent activity.²

There are currently more than 750 organizations recognized by the DOJ and nearly 2,000 accredited representatives providing high-quality immigration legal services to low-income immigrants³. This program is essential to ensuring that immigrants have access to legal representation.

WHY AN EFFICIENT R&A PROGRAM IS ESSENTIAL TO ACCESS TO JUSTICE

Those who do not have access to legal counsel may not be able to navigate the legal system on their own in order to achieve a just and fair result. The reasons why people may not have access to legal counsel include: they do not have enough money to pay attorney’s fees, they may be in a remote area where there are no qualified immigration attorneys or nonprofit organizations to help them at a low cost, or the nonprofit organizations may not have sufficient capacity to help all of the people in need.

“Those who do not have access to legal counsel may not be able to navigate the legal system on their own in order to achieve a just and fair result.”

A functional and efficient R&A program increases the number of qualified legal representatives available to serve the rising number of low-income immigrants who are trying to achieve a just result in their immigration case. It is a core American value that justice should be applied equally, regardless of one’s wealth and regardless of one’s physical location. Increasing the capacity of nonprofit legal service organizations to represent more low-income immigrants in their communities helps to ensure that people have access to counsel and therefore access to justice.

The R&A program also contributes to racial equity, as it provides opportunities for members of racial and ethnic groups to become accredited representatives themselves and to serve their communities in their native language and with cultural competence. For individuals who may not have had the opportunity to attend law school due to socioeconomic and systemic racial barriers, the R&A program provides an opportunity to put their skills and aptitudes to work to reduce those barriers for others.

Immigrants who have representation are significantly more likely to be successful in their cases than those who are unrepresented. In immigration court, only 37 percent of respondents have legal counsel. Among detained immigrants that number decreases to 14 percent.⁴ A universal representation project in New York City demonstrated that when detained immigrants in removal proceedings were given legal representation, their odds of winning their cases increased by 1,100 percent.⁵ When immigrants do not have legal representation, many who are eligible for relief are nonetheless deported — sometimes into dangerous situations and separated from their families — simply because they are not experts in U.S. immigration law and do not have access to an attorney to assist them. This is an injustice that plays out every day in the United States. Increasing capacity at nonprofit legal services organizations helps to improve the rate of representation in order to ensure that all immigrants receive due process and to advocate for just and fair results in their cases. Broader access to counsel also benefits EOIR and DHS in that paperwork and evidence are more expertly assembled and filed and can be processed faster and more efficiently.

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If low-income immigrants and their families did not have access to low- or no-cost immigration legal services, they would attempt to manage their cases themselves. Inexpertly filed cases before DHS and pro se appearances (representing oneself) before EOIR can lead to:

- Mistakes in paperwork that government officials must identify and correct,
- Immigration judges and USCIS Contact Center employees needing to spend time educating each person individually as they have questions.
- Missing supporting documentation that must be requested and collected at various stages throughout the process through the Request for Evidence process.

Having sufficient attorneys and accredited representatives to serve low-income immigrants and their families leads to improved efficiency in case processing for DHS and EOIR. Access to counsel will be especially important as the Biden administration plans to legalize DACA holders, essential workers, and various other immigrant populations, and as Afghan refugees and asylum seekers fleeing from danger in the many ongoing global emergencies need assistance with their cases and in reuniting their families.

“Broader access to counsel also benefits the government in that paperwork is more expertly filed and can be processed faster and more efficiently.”

It is essential that the R&A program is effective and efficient in order to promote: access to counsel, access to justice, socioeconomic and racial equity, and smooth processing of cases before DHS and EOIR.

ROADBLOCKS IMPEDING THE R&A PROGRAM

The R&A program has come to a virtual standstill within the last year. Some applications for new accredited representatives at CLINIC affiliated organizations have been pending for approximately 15 to 17 months, when that processing time would have been 3 to 4 months previously.⁶

“Processing times have increased from 3 to 4 months up to 15 to 17 months.”

The following problems contribute to these backlogs and difficulties faced by applicants for recognition and accreditation:

- The Office of Legal Access Programs, or OLAP, where the R&A program is housed, is severely underfunded and understaffed.

- OLAP currently only has one adjudicating attorney and two legal assistants to adjudicate a massive backlog of 697 pending accreditation applications and 218 pending recognition applications.⁷
- The employees assigned to OLAP are changed frequently, so OLAP loses institutional knowledge, and frequently needs to train new employees.
- As with all programs worldwide, the COVID-19 pandemic contributed partially to the current backlogs, however, with so few employees and such limited experience, OLAP's situation has worsened even after operations resumed.
- In 2019, OLAP was moved within the DOJ organizational chart from the Office of the EOIR Director into the EOIR Office of Policy — an office that is not well equipped to administer this program and exposes it to political influence.⁸
 - The primary goal of the EOIR Office of Policy is to conduct regulatory review and development; the administration of the R&A program is unrelated to the process of regulatory review and development.
 - The EOIR Office of Policy implements the political will of the incumbent administration with regard to immigration courts. That political will, no matter what administration is in the White House, should not have such direct influence over this essential program. The program must be as independent of political shifts as possible and have stable leadership and direction.
 - It is a significant conflict of interests to have EOIR personnel who are involved with the policy and practice of adjudicating immigrant clients' cases also involved in determining whether their representatives are granted credentials.

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- In 2020, the DOJ Office of the Inspector General, or OIG, conducted an audit of the R&A program.⁹ The conclusions of the audit contain several recommendations that are contrary to the word and the intention of the R&A regulations.¹⁰ OLAP has already implemented some of these recommended changes, and they are creating unnecessary burdens for applicants and nonprofit organizations, causing confusion, and adding further delay to the backlogs.

“Several recommendations in the OIG audit are contrary to the word and intention of the R&A regulations, and they create unnecessary burdens for applicants.”

- At the same time that OLAP’s staff was cut to a skeletal level, these audit recommendations are significantly increasing OLAP’s workload, exacerbating the backlogs and long processing times.

“At the same time that OLAP’s staff was cut to a skeletal level, implementing the audit recommendations significantly increases OLAP’s workload, exacerbating the backlogs and long processing times.”

- Based on the audit, EOIR is in the process of making several other significant changes to the R&A program that are contradictory to or exceed the requirements of the R&A regulations without going through the official regulatory public notice and comment process.
- The 2016 regulations governing the R&A program touted their flexible approach that enabled applicants to meet the requirements of the program in many different ways in order to achieve the goal of increasing capacity while acknowledging the challenging conditions under which these organizations work. The current changes would severely reduce that flexibility, increase burdens on applicants and nonprofit organizations, and hamper the equity that flexibility achieved among diverse organizations in areas that are urban, remote, poverty-stricken, or disadvantaged through systemic racial bias.
- OLAP has already started conducting background checks on all applicants for accreditation due to the audit recommendations, whereas previously, background checks were only conducted where the record raised some question of an applicant’s character and fitness.
 - OLAP has indicated that the backlog and long processing times are partially attributable to conducting research related to these background checks.¹¹
 - The R&A regulations allow OLAP optionally to consider background checks in adjudications, but having contemplated the use of background checks, they chose not require them for all applicants. It is inappropriate for EOIR to implement such a significant change to case processing that far exceeds regulatory requirements without going through the official regulatory public notice and comment process.
- Based on audit recommendations, EOIR is considering setting mandatory training hours and topics of training rather than using the flexible case-by-case standard chosen and established

by the 2016 regulators. This would significantly increase burdens on applicants and nonprofit organizations. But there only appears to be an informal opportunity to comment and no official regulatory change being contemplated.

- EOIR is requiring additional evidence to be submitted for several criteria of the applications because they are no longer giving credence to signed attestations from officers of the nonprofit organization, despite the regulation's explicit provisions determining that attestations should be considered as evidence.
- The R&A program institutes policy changes to the program by making changes to a Frequently Asked Questions page on their website, often without previous notice and comment.¹² The changes being made at OLAP are significant and some are even contrary to the regulations. EOIR occasionally requests feedback informally but is not being held accountable to take this feedback into consideration when it makes changes to the program.

Luis' Story

Luis first became an accredited representative seven years ago while working as an immigration advocate in Oregon. He explained, "I wanted to become an accredited representative because I saw an opportunity to help my community in a deeper way. I didn't have the means to go to law school and the accreditation route gave me the opportunity to practice law when I otherwise wouldn't have." As a new accredited representative, Luis was able to help young people across Oregon obtain Deferred Action for Childhood Arrivals, or DACA, changing their lives and creating new opportunities for them. Over the years, as an accredited representative, Luis has helped thousands of people. He said, "Recognition and Accreditation has been around for over 50 years. Its intent is to serve low-income, indigent individuals. [...] If we were to see R&A disappear, we would be taking away the little due process and access to counsel that the most vulnerable individuals have available to them." One story stands out in his mind: "A few years ago, I met a woman at a detention center who had suffered a miscarriage while detained. Because of my accreditation, I was able to gain access to the detention center to work closely with her to support her not only in the legal matter, but also as an advocate, raising up her story. Ultimately, I was able to help get her released from detention." Luis continued, "It is stories like these of people who would not have been able to pay for a private attorney that continues to solidify my belief that R&A is meeting the needs of individuals who are invisible to most of us." He adds that R&A also creates access for people who are immigrants themselves and have gone through processes firsthand to become legal advocates for others. "That kind of representation matters," he said.

POLICY RECOMMENDATIONS

1. DOJ should provide sufficient funding to have multiple full-time attorneys on staff at OLAP to adjudicate R&A applications, and the necessary legal assistants to support them. The number of attorneys and support staff should be sufficient to expeditiously eliminate current backlogs and remain at an appropriate level to process the volume of applications the agency is receiving within its historical 3 to 4 month time frame.
2. For purposes of transparency and accountability, OLAP should post current processing times on its webpage and hold regular stakeholder engagements to report on its progress and expected timeframe for eliminating the backlogs.
3. Core OLAP staff members should not be “rotated” among other functions within EOIR. Maintaining consistent staff members would:
 - a. keep institutional knowledge within OLAP,
 - b. facilitate consistency in adjudications, and
 - c. prevent conflicts of interest with other EOIR offices that influence the policy and practice of adjudicating the immigration court cases of the applicants’ clients.
4. There is currently a pending rule in the DOJ Spring 2021 regulatory agenda that seems intended to move OLAP out of the EOIR Office of Policy. We recommend that DOJ prioritize the implementation of this regulation and that the regulation either move OLAP back into the Office of the Director or into a new Office created for R&A and programs like it to ensure that they are independent and isolated from political influence.
5. DOJ should thoroughly compare the results and recommendations of the OIG audit with the text and intentions of the R&A program regulations and decline to immediately implement, or continue to implement, any OIG recommendations that would make significant changes to the program, unless and until a full regulatory change with notice and comment is undertaken.
6. Any future changes to the R&A program that significantly impact stakeholders should not be implemented through the FAQ document on OLAP’s website. They should be issued as policy memos and be subject to notice and comment with accountability for considering stakeholder feedback to eliminate unnecessary burdens on applicants and inefficient practices that unreasonably delay adjudications.

CONCLUSION

Immigration reform is already underway in the legislature and in repeals of restrictive policies at DOJ and DHS. However, the nonprofit legal services system *first* needs the R&A program to be functional and efficient in order to increase its capacity to handle these imminently-eligible applicants for permanent residence and family reunification of refugees and asylees. DOJ must ensure that the program is sufficiently staffed to eliminate the backlogs and long processing times currently existing at OLAP, and is continuously supplied with the resources needed to process applications in a 3 to 4 month timeline. DOJ must also prioritize moving OLAP out of the EOIR Office of Policy in order to insulate it against political influence and conflicts of interest

with court policy and adjudications personnel. Finally, DOJ must review the problematic OIG audit results and recommendations, withdraw any changes already under way, and only implement them after a full public notice and comment period in order to fully consider the impacts on stakeholders with regard to burdens in the application process and delays in timely adjudication of applications.

“DOJ must ensure that the R&A program is sufficiently staffed to eliminate backlogs and process applications in a 3 to 6 month timeline.”

Once the R&A program is running efficiently and adjudications are processed in a timely manner, CLINIC and our network of nonprofit immigration legal services organizations will be able to significantly increase capacity to serve the low-income immigrants in their community. We look forward to working with DOJ to ensure that immigrants have due process, access to justice, and achieve just and fair results in their immigration cases.

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- ¹ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015)2, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review; JENNIFER STAVE ET AL., VERA INST. JUST., *ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY* (New York: Vera Institute of Justice, 2017), 28, available at vera.org/publications/new-york-immigrant-family-unity-project-evaluation.
- ² See Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59,514, 59,514 – 59,595 (Oct. 1, 2015).
- ³ See, *Recognized Organizations and Accredited Representatives Roster*, DEP’T JUST., justice.gov/eoir/page/file/942301/download (last visited Sept. 16, 2021) and *Accredited Representatives Roster*, DEP’T JUST., justice.gov/eoir/page/file/942311/download (last visited Sept. 16, 2021).
- ⁴ EAGLY *supra* note 1, at 2.
- ⁵ STAVE *supra* note 1, at 28.
- ⁶ As of August 2021, emails to OLAP at R-A-Info@usdoj.gov are met with an automatic response that states that OLAP is “currently processing recognition applications and simultaneously-filed accreditation applications that we received in April 2020,” demonstrating a 17 month processing time. Please contact the author for information on file about historic processing times of 3 to 4 months.
- ⁷ Remote Engagement with the Office for Legal Access Programs, DOJ (Sept. 15, 2021).
- ⁸ See CLINIC Comment in Response to *Organization of the Executive Office for Immigration Review*, 84 Fed. Reg. 44,537 (interim rule published Aug. 26, 2019), available at cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-eoirs-reorganization.
- ⁹ Audit Division, Department of Justice, *Audit of the Executive Office for Immigration Review Recognition and Accreditation Program (2020)* available at <https://oig.justice.gov/sites/default/files/reports/20-109.pdf>.
- ¹⁰ Letter from Catholic Legal Immigration Network, Inc. to James McHenry, Director, U.S. Department of Justice and Jason R. Malmstrom, Assistant Inspector General for Audit, Office of the Inspector General, U.S. Department of Justice (Nov. 19, 2020) (On file with author).
- ¹¹ Information provided in an engagement between OLAP and stakeholders on 9/15/2021.
- ¹² *Recognition and Accreditation Program Frequently Asked Questions*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, icor.eoir.justice.gov/en/faq/ (last visited Sept. 22, 2021).