October 25, 2019

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


Dear Ms. Alder Reid:

On behalf of the American Bar Association (ABA), I submit the following comments in response to EOIR Docket No. 18-0502, the Interim Rule and request for comment on Organization of the Executive Office for Immigration Review (EOIR), 84 Fed. Reg. 44537 (Aug. 26, 2019) (hereinafter, the Interim Rule).

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Through its Commission on Immigration, the ABA provides continuing legal education to the legal community, judges, and the public on immigration topics; and develops and assists in the operation of pro bono legal representation programs. We use our experience and subject matter expertise to advocate for improvements to immigration law and policy.

Given its commitment to due process and fundamental fairness, the ABA has concerns regarding adverse impacts that the Interim Rule may have on: (1) access to legal information and services for noncitizens; and (2) full and fair administrative review of immigration adjudications.

Access to Legal Services and Information

The ABA understands EOIR’s concern for the efficient functioning of the immigration adjudication system. However, the fair and efficient operation of the immigration court system is fundamentally linked to the issue of access to counsel and legal information. The ABA consistently has emphasized the importance of increased access to legal services and legal information for noncitizens in immigration proceedings because these services help noncitizens to navigate a complicated area of the law which, in turn, assists courts in making better informed and more efficient decisions.
Until the publication of the Interim Rule, the Office of Legal Access Programs (OLAP) within EOIR administered several programs that increase access to information and representation for noncitizens in immigration proceedings. These programs include: the Legal Orientation Program (LOP); the Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC); the National Qualified Representative Program (NQRP); and the Recognition & Accreditation Program (R&A). The ABA can unequivocally attest to the value these programs provide to both noncitizens and the courts. The ABA operates two direct service projects in California and Texas that have extensive experience providing LOP and LOPC services. These two projects also appear on EOIR’s list of organizations qualified to provide pro bono legal services in immigration proceedings and employ non-attorney representatives accredited by the R&A program. Finally, our California project represents noncitizens suffering from mental illness through the NQRP.

The Interim Rule is concerning because it eliminates OLAP and transfers its functions to the Office of Policy within EOIR without ensuring that EOIR will continue to prioritize the important programs OLAP administered. For example, the Interim Rule removes prior regulatory language, 8 C.F.R. § 1003.0(f)(1), that provided OLAP with the authority to “[d]evelop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law[.].” See 84 Fed. Reg. at 44,542. This language is replaced in new 8 C.F.R. § 1003.0(e)(1) with a passing reference to the Assistant Director of Policy’s duty to “supervise and administer EOIR’s pro bono and legal orientation program activities[.]” Id. at 44,541.

The ABA hopes that this reorganization of EOIR’s internal structure will not impact the agency’s commitment to the vitality of programs that facilitate access to legal information and representation for noncitizens. Any changes that would result in restricting access to or politicizing the implementation of these important programs would be of great concern to the ABA.

Full and Fair Administrative Review

While recognizing the importance of the efficient processing of immigration cases, the ABA also has emphasized that any efforts to improve efficiency must not compromise the quality and fairness of the administrative adjudication process. We have concerns, however, that the Interim Rule’s delegation of authority from the Attorney General to the EOIR Director to adjudicate appeals that are not completed within the time limits prescribed by regulation will undermine full and fair administrative review of immigration decisions. 84 Fed. Reg. at 44,539; 8 C.F.R. § 1003.1(e)(8).

The ABA has long supported the relaxation of these regulatory time limits so that the Board of Immigration Appeals (“Board”) is able to issue thoughtful, well-reasoned decisions. It also would enhance the perceived legitimacy and fairness of the Board by assuring noncitizens and their counsel that their arguments were fully considered. However, rather than providing the Board with more flexibility to make such decisions, the Interim Rule delegates the Attorney General’s existing authority to truncate the traditional administrative review process to the EOIR Director – an official who, unlike the Attorney General, is not subject to Senate confirmation.
The Interim Rule’s delegation of authority to the Director also is concerning because it provides him or her authority identical to that of the Board. 8 C.F.R. § 1003.1(e)(8)(ii). This includes the authority to refer a pending case for review and adjudication to the Attorney General, and now under this Rule, to the EOIR Director, and to issue a precedent decision.¹

The ABA recently expressed concern about the process for referral of cases to the Attorney General set forth in 8 C.F.R. § 1003.1(h) because it does not provide clear standards for the types of cases that can be referred, or ensure adequate notice and input from parties and the public. For these reasons, the ABA has urged the Department of Justice to engage in formal rulemaking to establish certain standards and procedures governing the process by which the Attorney General may certify cases. We also have cautioned that the referral authority should be used sparingly, and only to review Board decisions issued in the course of the ordinary administrative appeals process.

The ABA is therefore troubled by the authority delegated to the EOIR Director by the Interim Rule, because it allows EOIR to pre-empt the process of full agency review by referring cases to the Director that have not been decided by the Board. As the administrative body responsible for providing clear and uniform guidance to DHS, immigration judges, and the public on the relevant law, the Board, not the EOIR Director (or the Attorney General), should be responsible for issuing appellate decisions. This is especially true for decisions that have the potential to create new precedent or revisit longstanding doctrine. Allowing the Director, who is appointed by the Attorney General, to refer cases to him- or herself without incorporating more transparency and due process safeguards into the process threatens to undermine the legitimacy of the immigration adjudication process.

For these reasons, the ABA suggests that a more prudent course would be to equip the Board with the resources necessary to adjudicate decisions in a timely manner. The Department of Justice also should promulgate regulations setting forth standards that will govern those rare occurrences where pending cases are referred to the EOIR Director or the Attorney General for decision.

Thank you for considering our views.

Sincerely,

Judy Perry Martinez

¹ The ABA previously has expressed that Board review of decisions by three-judge panels should be the default form of adjudication. Moreover, given the binding nature of its decisions, id. § 1003.1(g), only the Board should decide whether a decision is precedential.