November 30, 2015

Ms. Jean King
General Counsel
Office of the General Counsel
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

RE: Comments on the Proposed Rule for Recognition of Organizations and Accreditation of Non-Attorney Representatives [RIN 1125-AA72; EOIR Docket No. 176]

Dear Ms. King:

On behalf of the American Bar Association (ABA), I submit the following comments addressing several key aspects of the “Proposed Rule for Recognition of Organizations and Accreditation of Non-Attorney Representatives.”

The ABA is deeply committed to ensuring fair treatment and access to justice under the nation’s immigration laws and has consistently recognized the importance of representation in immigration cases to help noncitizens understand and effectively navigate the complexities of the U.S. immigration system. To help facilitate access to representation, the ABA supports increasing the number of pro bono lawyers available as well as the capacity and competency of Board of Immigration Appeals (BIA) recognized agencies and accredited non-attorneys. Therefore we applaud the proposed rule’s goal “to increase the availability of qualified representation for primarily low-income and indigent persons while protecting the public from fraud and abuse by unscrupulous organizations and individuals.” However, there are several provisions in the proposed rule that we would recommend revising in order to further strengthen the recognition and accreditation process.

First, we would advise the Executive Office for Immigration Review (EOIR) to establish certain parameters to prevent unqualified individuals from improperly handling cases. The ABA recommends that recognized agencies be required to have a structure in place for attorney supervision, or alternatively, a meaningful attorney relationship that would allow for continuous mentoring and technical support. We recommend that the criteria set forth in Matter of EAC, Inc, 24 I&N Dec. 556 (BIA 2008) for an agency to demonstrate that it has adequate knowledge through attorney supervision or through a meaningful relationship with an attorney be applied to the new rule. If the agency already has an attorney or attorneys on staff, it must demonstrate that these attorneys will be competent in supervising the accredited representative. If the agency does not have an attorney on staff, we suggest that that the agency show evidence of formal arrangements with a competent attorney or attorneys to
provide trainings, consultations, mentoring, and other assistance. The agency may also establish a meaningful attorney relationship by entering into an arrangement with another recognized organization with competent attorneys on staff to access its expertise through mentoring, consultations and other technical support. Due to the importance of the presence or availability of a qualified attorney, we do not endorse the alternative criteria set forth in Matter of EAC, supra, that would allow an agency to demonstrate adequate knowledge in circumstances where there is no attorney. Those instances involve situations where the agency already has an accredited representative or is seeking recognition for one. There can be no substitute for supervision through a qualified attorney or through a meaningful attorney relationship.

We also recommended that EOIR require that accredited representatives attend a minimum of two meaningful immigration legal trainings each year, in addition to the proposed course on the fundamentals of immigration law, procedure, or practice. The trainings should be on a topical subject of immigration law and procedure relevant to the services to be provided by the representative. In addition, we suggest that EOIR provide instruction that representatives should be assigned cases relevant to their skill and experience level.

We support the addition of the new requirement that recognized agencies have federal tax-exempt status and note that it is consistent with the ABA’s prior recommendation. We also support the decision to remove the nominal fee structure from the new rule. However, we would like to clarify a prior recommendation that an agency demonstrate that a meaningful portion, as opposed to substantial amount, of its budget come from non-fee sources of support. A “meaningful portion” does not mean a majority of the agency’s budget, whereas “substantial amount” could lend itself to that interpretation. The reason that the ABA has suggested a “meaningful portion” lens is to allow agencies to use alternative measures to manage their operating costs and maintain the ability to offer legal services to low-income and indigent clients, such as sliding scale and “low bono” services. Our primary focus with this language is that the final standard applied not be unduly burdensome for organizations. Additionally, we note that for the decided upon standard there needs to be a mechanism that would allow for monitoring and transparency to ensure that the target population is being reached. Moreover, we also support a broad interpretation and application of the public interest waiver.

We note that the proposed rule conflicts with the operating realities of recognized organizations in a way that would make it difficult for agencies to ensure they have adequate capacity and can efficiently manage their operations in times of transition. The proposed rule requires that an organization have at least one accredited representative on staff in order to be recognized, to maintain recognition, and to have its recognition renewed, and in so doing, it bars an organization comprised of only attorneys from becoming a recognized organization. We oppose the implementation of this requirement. As previously noted, the ABA supports the establishment of a supervisory attorney or mentor relationship between the recognized agency or with the accredited representative directly. These provisions of the proposed rule conflict with the creation of that relationship and also impact an organization’s ability to manage

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1 We also wholeheartedly endorse the proposal in note 37 that an organization associated with an attorney who provides mentoring and technical support is expected to demonstrate the degree of interaction and association with the attorney, and to state if the attorney charges a fee. The ABA also supports the EOIR’s concerns regarding recognition being misused to facilitate for-profit referrals or unlawful fee sharing arrangements with private attorneys.
staff transition and to increase its capacity to provide additional services. Some organizations made up exclusively of attorneys may want to apply for recognition in order to attract non-attorneys and apply for their accreditation, thus enabling the organization to expand its capacity to provide services to underserved immigrant populations. This provision of the proposed rule also fails to take into account the often high turnover rate at non-profit organizations. The rule should be flexible in allowing for temporary periods with no accredited representatives before losing the recognized designation.

Finally, we are concerned that the proposed requirement for a 3-year renewal period for agency recognition and individual accreditation will impose an unnecessary administrative burden on non-profit service providers. We recommend that the rule not impose an arbitrary renewal deadline as the Executive Office of for Immigration Review, through the Office of Legal Access Programs, will have the authority to review accreditation and recognition status at any time.

We look forward to working with you as EOIR considers comments and finalizes the new rule governing recognition of organizations and accreditation of individuals. If you have any questions or need additional information, please don’t hesitate to contact Tanisha Bowens-McCatty with the Commission on Immigration at 202-662-1007 or Kristi Gaines in the Governmental Affairs Office at 202-662-1763. Thank you for your consideration of our comments.

Sincerely,

Thomas M. Susman
Director
Governmental Affairs Office