



THE CITY OF NEW YORK  
OFFICE OF THE MAYOR  
NEW YORK, N.Y. 10007

**BITTA MOSTOFI**  
COMMISSIONER  
OFFICE OF IMMIGRANT AFFAIRS

October 25, 2019

*Via electronic submission*

**RE: Department of Justice, Executive Office for Immigration Review  
EOIR Docket No. 18-502, RIN No. 1125-AA85  
A.G. Order No. 4515-2019, 84 FR 44537  
Organization of the Executive Office for Immigration Review  
Public Comment Opposing Interim Rule**

To Whom It May Concern:

The City of New York (“the City”) appreciates the opportunity to comment on the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), proposed interim rule, Organization of the Executive Office for Immigration Review, RIN No. 1125-AA85, published in the Federal Register on August 26, 2019. This rule will have a detrimental impact on the City of New York by compromising access to justice and due process for immigrant New Yorkers without any apparent justification.

The New York City Mayor’s Office of Immigrant Affairs (MOIA) presents this comment in opposition to the proposed changes. MOIA promotes the wellbeing of the city’s immigrant residents through programs, policy recommendations, and community engagement efforts that facilitate their successful integration into the civic, cultural and economic life of New York. Using this multipronged approach, MOIA works to eliminate barriers to opportunity, promote immigrant rights, expand civic engagement, and further the empowerment of immigrant New Yorkers. This includes supporting immigrant access to justice.

The interim rule threatens to increase barriers for immigrants by fundamentally weakening the Department of Justice Recognition and Accreditation program (“R&A Program”) within the Office of Legal Access Programs (“OLAP”). The interim rule further jeopardizes the stability of existing legal services programs serving New York City residents as well as the continuity of ongoing representation of individuals in immigration proceedings. While this program has nobly sought “to promote the effective and efficient administration of justice before DHS and EOIR...

for underserved immigrant populations,”<sup>1</sup> the rule now seeks to move it into the Office of Policy<sup>2</sup>, a political office created by the Attorney General in 2017 that carries out the immigration policy agenda of the current administration, and to strip the immigration court system of independence. The rule further confers unparalleled authority to the director of the Executive Office for Immigration Review (“EOIR”) to have precedent decision-making power in certain Board of Immigration Appeals (“BIA”) cases. Such power creates an inherent conflict by allowing one individual appointed by the Attorney General to undermine the critical role of the BIA.

The R&A program under OLAP has been essential for the City to build capacity for representation for immigrant New Yorkers. OLAP’s success is due in part to an almost twenty year history of expertise and experience in operation of programs that promote increased legal representation of immigrants, and the R&A program has existed for more than sixty years.<sup>3</sup> R&A was placed under OLAP in January of 2017, after extensive internal and external discussion as well as formal notice and comment. Indeed the Mayor’s Office of Immigrant Affairs submitted comment in November of 2015 which highlighted support for the transfer of the R&A program from the BIA to OLAP, stating:

“As OLAP’s mission is to facilitate access to legal information and counseling and to increase the rates of representation of individuals in immigration matters, we are in strong support of placing the R&A program under OLAP’s direction. We hope this change will also help facilitate increased efficiency and effectiveness in the application and oversight process.”<sup>4</sup>

The transfer of R&A to OLAP placed it appropriately alongside several other programs run by OLAP since 2000 that foster legal representation for immigration, including: (i) the national qualified representative program (NQRP) which provide Qualified Representatives (QRs) to certain unrepresented and detained people who are found to be mentally incompetent to represent themselves in proceedings; (ii) the maintenance of the list of pro bono attorneys that is required to be distributed in immigration courts to people in removal proceedings; (iii) the operation of the legal orientation program as well as the program for custodians of unaccompanied minors;

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<sup>1</sup> EOIR, Recognition of Organizations and Accreditation on Non-Attorney Representatives, 80 Fed. Reg. 59514 (Oct. 1, 2015)

<sup>2</sup> <https://www.justice.gov/eoir/office-of-policy>

<sup>3</sup> Among the first recognized legal services programs under the R&A program was the Connecticut Institute for Refugees and Immigrants in 1958, which continues to deliver legal services today for immigrants with a six person staff of accredited representatives. EOIR, Recognition and Accreditation roster, <https://www.justice.gov/eoir/page/file/942301/download>. R & A was initially operated by the Board of Immigration Appeals within the Justice Department. In 2000, OLAP (then known as the legal orientation and pro bono programs) was established in the Office of the EOIR Director, administering programs that promoted legal representation for immigrants in removal proceedings by offering legal education on rights and responsibilities by pro bono legal services providers. In 2016, after more than five years of notice and comment procedures it was decided to move the R & A program under OLAP and away from the Board of Immigration appeals. 81 Fed. Reg. 92346 (Dec. 19, 2016). See 77 Fed. Reg. 9590 (Feb. 17, 2012) (notice of two public meetings on possible changes with R & A program).

<sup>4</sup> Department of Justice of the United States of America, Executive Office of Immigration Review, Comment Letter on Proposed Rule to Recognition of Organizations and Accreditation of Non-Attorney Representatives, submitted Dec. 16, 2015.

and iv) the immigration court help desk, which provides pro se assistances to individuals in immigration court.

DOJ EOIR now seeks to arbitrarily reorganize EOIR operations by placing R&A within the Office of Policy. The Office of Policy was created by the Attorney General in 2017 for purposes of moving forward the administration’s immigration policy agenda. 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>5</sup> While the office was created in 2017 with a stated responsibility “for all agency policy and regulatory review and development<sup>6</sup>” as well as “strategic planning<sup>7</sup>” this rule effectively gives it legitimacy by delegating regulatory authority to the office for the first time. The Office of Policy is responsible for attacks on due process for immigrants such as EOIR’s interim final rule “Asylum Eligibility and Procedural Modifications,” EOIR Docket No. 19-0504, also known as the “asylum ban,” a policy that would make individuals ineligible for asylum if they crossed the southern border without having applied for relief in a country they traveled through— regardless of the validity of their underlying claim.<sup>8</sup>

The Department of Justice claims this is simply a “reorganization,” so that it may evade the notice-and-comment requirement. However, this change is far more significant than a simple reallocation of responsibilities. The publication of the rule as an interim final rule further violates the Administrative Procedures Act due to the failure to provide prior notice and the opportunity to comment to the public. This is glaring considering that the matter at hand involves a substantive program change that will have an adverse impact on thousands of immigrants and the non-profit programs that represent them.

For these reasons, we call upon EOIR to immediately withdraw the interim rule in order to protect the R&A program, preserve due process, and maintain the sound separation of EOIR from the BIA.

**New York City has a strong and vested interest in legal access programs, in which the current DOJ Recognition and Accreditation program is a central component**

New York City is the ultimate city of immigrants, with immigrants making up almost 40% of its population, and over 3.2 million people. This immigrant population is deeply tied to the City as a whole. For example, nearly 60% of New Yorkers live in households with at least one immigrant.<sup>9</sup> Recognizing that New York is not only a city of immigrants, but also a city that thrives because of our immigrant communities, this mayoral Administration has increased and enhanced access to legal assistance for immigrants by investing over \$30 million dollars in a continuum of free legal service programs for immigrant New Yorkers for fiscal year 2020.

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<sup>5</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>6</sup> <https://www.justice.gov/eoir/office-of-policy>.

<sup>7</sup> <https://www.justice.gov/eoir/office-of-policy>.

<sup>8</sup> Department of Justice of the United States of America, Executive Office of Immigration Review, Comment Letter on the interim final rule Asylum Eligibility and Procedural Modifications, submitted Aug. 16, 2019.

<sup>9</sup> *Id.* at 23.

Together with the New York City Council, the City of New York has invested over \$50 million in immigration legal services.

The City's investment includes ActionNYC, a citywide community-based immigration legal services program which has provided free, safe and high-quality immigration legal services across the five boroughs of the City since its launch in 2016.<sup>10</sup> ActionNYC is accessible to immigrant New Yorkers through a citywide hotline and accessible service locations. At the heart of ActionNYC is the innovative use of the Community Navigator model, a powerful tool to increase access to immigration legal assistance and build capacity to deliver culturally and linguistically competent immigration legal services.<sup>11</sup> In this model, a community navigation team, comprised of an attorney and non-attorney "community navigators" provide comprehensive immigration legal services, including in many cases ongoing legal representation by accredited representatives authorized through the DOJ Accreditation and Recognition process.

ActionNYC "community navigators" are employed at over a dozen DOJ-recognized nonprofit organizations across New York City. In order to develop the expertise of the non-profit organizations and the individuals who provide legal services, the City works with ActionNYC providers to connect them with rigorous and ongoing training in immigration law, and all ActionNYC sites and community navigators receive support to obtain and maintain U.S. Department of Justice (DOJ) Recognition and Accreditation.

ActionNYC's Community Navigator model has allowed for an unparalleled increase in capacity for immigration legal services in New York City. The DOJ Recognition and Accreditation program has been a cornerstone of New York City's ActionNYC initiative, a program that has provided legal advice and representation in over 18,000 cases since July 1, 2016.<sup>12</sup> Accredited navigators provide full legal representation in straightforward immigration matters including adjustment of status applications, green card renewals, citizenship applications, DACA renewals and TPS renewals. DOJ accreditation allows navigators not only to represent their clients in submission of applications, but also to appear as their representatives before USCIS at adjudication interviews and appointments. Additionally, navigators are equipped to provide screenings and ongoing consultations for more complex cases, for which they provide referrals to other City-funded programs. Through ActionNYC's legal technical assistance, at least twelve organizations and twenty-four navigators have obtained DOJ Recognition and Accreditation with at least one additional organization and eight additional navigators currently seeking accreditation this year.

As the City continues to direct resources towards supporting immigrant New Yorkers in immigration proceedings, it relies on OLAP to have a transparent and efficient process.

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<sup>10</sup> NYC Office of Civil Justice, 2018, *NYC Office of Civil Justice Annual Report*, [https://www1.nyc.gov/assets/hra/downloads/pdf/final\\_2018\\_ojc\\_report\\_march\\_19\\_2019.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/final_2018_ojc_report_march_19_2019.pdf).

<sup>11</sup> NYC Mayor's Office of Immigrant Affairs, March 2018, *State of Our Immigrant City Annual Report*, [https://www1.nyc.gov/assets/immigrants/downloads/pdf/moja\\_annual\\_report\\_2018\\_final.pdf](https://www1.nyc.gov/assets/immigrants/downloads/pdf/moja_annual_report_2018_final.pdf).

<sup>12</sup> NYC Office of Civil Justice, 2018, *NYC Office of Civil Justice Annual Report*, [https://www1.nyc.gov/assets/hra/downloads/pdf/final\\_2018\\_ojc\\_report\\_march\\_19\\_2019.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/final_2018_ojc_report_march_19_2019.pdf).

However, rather than promoting effective and efficient administration of justice, the Interim Rule weakens due process and impedes access to justice.

### **New York City has a vested interest in preserving due process in appeals, which requires maintaining the independence of the BIA**

A significant portion of the City's \$50 million investment in legal services for immigrant New Yorkers is directed towards complex immigration cases. Specifically, the City funds three key programs tasked with addressing complex affirmative and defensive cases - the Immigrant Opportunity Initiative (IOI), the New York Immigrant Family Unity Project (NYIFUP), and the Immigrant Child Advocates Relief Effort (ICARE). IOI, which is geared toward more complex immigration matters, including a growing number of asylum applications and removal defense work, has provided legal assistance to immigrant New Yorkers in over 10,000 cases in FY2018, and is funded by the City at \$22.1 million in FY2020. NYIFUP, a universal representation network for low-income immigrants who are in detention and face removal, is funded at \$16.6 million in FY2020. And ICARE, which provides legal services to unaccompanied immigrant children entering and living in the City and seeking relief from removal, is funded at approximately \$4.0 million in FY2020.

Together, these programs seek to provide comprehensive representation in complex cases for the most vulnerable members of our community, and this representation often extends through appeals to the BIA. The City strives to sure ensure that individuals who would otherwise go unrepresented receive fair treatment under the law, and that includes providing zealous representation for cases on appeal in many cases. Given the City's substantial investment in these programs, the City has a clear interest in preserving the integrity and fairness of the appeals process.

Most stunning in the interim rule is the allowance of the EOIR director to decide appeals filed at the Board of Immigration Appeals if adjudication exceeds time limits of 90 days (for single Board member cases) or 180 days (if a three-member panel is assigned). There is no supporting study or data in the interim rule to support the need for this unprecedented delegation of power to someone who is simply an office administrator for EOIR and not a judge.<sup>13</sup> Obstructing review by the BIA is an astonishing attack on due process. It allows for arbitrary decision-making and opens the door wide open to abuse of power by a court administrator. The City has invested millions of dollars to ensure that immigrant New Yorkers are afforded the utmost due process in immigration proceedings, because the outcomes in these cases can be the difference between life and death. This rule is a direct attack on the very due process protections that the City has committed resources towards preserving.

### **Conclusion**

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<sup>13</sup> There is no evidence provided that the BIA regularly exceeds the 90/180-day time limits prescribed in 8 C.F.R. §1003.1(e)(8) or that there is an overwhelming backlog – even had there been, the obvious solution is one of increasing resources and staffing to the BIA

For the reasons articulated above, we call upon EOIR to withdraw the interim rule, to protect the R&A program and ensure due process by maintaining the sound and critical separation of EOIR from the BIA.

Sincerely,

A handwritten signature in black ink, appearing to be 'Bitta Mostofi', written in a cursive style.

Bitta Mostofi  
Commissioner  
NYC Mayor's Office of Immigrant Affairs