UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT ("NWIRP"), a nonprofit Washington public benefit corporation; and YUK MAN MAGGIE CHENG, an individual, Plaintiffs, v. JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JAMES MCHENRY,[1] in his official capacity as Acting Director of the Executive Office for Immigration Review; and JENNIFER BARNES, in her official capacity as Disciplinary Counsel for the Executive Office for Immigration Review, Defendants.	CASE NO. 2:17-cv-00716

DECLARATION OF STEVEN LANG

I, STEVEN LANG, Program Director of the Office of Legal Access Programs ("OLAP") for the U.S. Department of Justice, Executive Office for Immigration Review ("EOIR"), in Falls Church, Virginia, do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

[1]Under Federal Rule of Civil Procedure 25(d), current Acting Director of EOIR James McHenry is substituted for former Director Juan Osuna.

1. I am the Program Director of the Office of Legal Access Programs ("OLAP") within the Executive Office for Immigration Review ("EOIR") in the Department of Justice ("DOJ").

2. I have been OLAP Program Director since 2012. Prior to that, I served as the Coordinator of the EOIR Legal Orientation and Pro Bono Program since 2003, and as the Coordinator of the EOIR Pro Bono Program since April 2000. From May 1997 until February 2000, I served as the Attorney Coordinator of the American Bar Association's South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas. Prior to ProBAR, and since May 1994, I was in private practice in Houston, and was active in several pro bono efforts.

3. As OLAP Program Director, I manage the various programs and initiatives of OLAP, consisting of the Legal Orientation Program (LOP), Legal Orientation Program for Custodians (LOPC) of Unaccompanied Alien Children, Immigration Court Helpdesk (ICH), Self-Help Legal Centers, Model Hearing Program, National Qualified Representative Program, Recognition and Accreditation Program, List of Pro Bono Legal Service Providers, BIA Pro Bono Project, and other initiatives aimed to increase access to information and raise the level of representation for individuals appearing before the immigration courts and Board of Immigration Appeals. OLAP also provides technical advice and support to both immigration court staff and pro bono groups and other legal service providers to facilitate efforts to increase access to legal services for low income and indigent individuals. See https://www.justice.gov/eoir/office-of-legal-access-programs.

4. I have personal knowledge of the facts stated in this declaration and am competent to testify to the same.

Overview

5. EOIR has increasingly encouraged and facilitated the provision of qualified and responsible legal assistance to low income and indigent immigrant respondents before the immigration courts and the Board of Immigration Appeals ("BIA" or "Board"). EOIR primarily does this through OLAP. *See* 8 C.F.R. § 1003.0(f).

6. OLAP's mission has long been to increase access to information and raise the level of representation for individuals appearing before the immigration courts and Board of Immigration Appeals (BIA). *See* https://www.justice.gov/eoir/office-of-legal-access-programs.

7. Raising the level of representation before the immigration courts and BIA means increasing both the *availability* and *quality* of that representation. The problem is "two-fold," as Second Circuit Judge Robert Katzmann described.[2]

8. Increasing the availability of representation is vitally important. There is a critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before federal administrative agencies. *See, e.g.*, 80 FR 59514, 59429 (Oct. 1, 2015); 81 FR 92358 (Dec. 19, 2016).

9. As described below, OLAP has taken significant steps to address this shortage through a number of initiatives: by reforming the Recognition and Accreditation Program to authorize greater numbers of non-attorney professionals to represent indigent and low income immigrants through recognized nonprofit organizations; creating and overseeing the National Qualified Representative Program ("NQRP"), which appoints counsel to represent detainees with serious mental disorders or defects in removal proceedings; and facilitating the expansion of *pro bono* representation through reforming the List of Pro Bono Legal Service Providers (which is

[2] *See* Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 Cardozo L. Rev. 331, 332 (2011).

given to every individual in immigration court proceedings), creating and overseeing the BIA Pro Bono Project, and promoting best practices (such as those included under the immigration courts' 2008 "Guidelines for Facilitating Pro Bono Legal Services") with immigration court staff and pro bono groups. Additionally, in 2014, with strong support from OLAP, EOIR made regulatory changes to allow for separate appearances (a.k.a. "limited representation") in the specific context of custody and bond proceedings to encourage more attorneys and accredited representatives to represent respondents in those specific proceedings.

10. However, it is equally important to ensure the quality of representation for underserved populations in immigration cases. The historical problem of poor quality of representation in immigration courts and before the BIA; the particular vulnerability of immigrant populations, particularly low-income and/or limited English proficiency individuals; and the legal, financial, and emotional harm and exploitation perpetrated by *notarios* and other unauthorized individuals against vulnerable immigrant populations are all well-documented.

11. Accordingly, as EOIR has worked to increase the availability of representation for underserved populations in immigration cases, EOIR has also made certain that its initiatives at the same time raise the quality of representation provided. For example, as described below, the recently-implemented regulations governing the OLAP Recognition and Accreditation Program were designed not only to increase the capacity of current and new organizations to provide representation to low income and indigent individuals, but also to strengthen EOIR's oversight of these organizations and their accredited representatives that provide representation, to ensure that qualified individuals are accredited and that once accredited, they continue to meet the standards for accreditation and EOIR professional conduct rules. In addition, EOIR has promulgated safeguards to protect the integrity of OLAP's List of Pro Bono Legal Service Providers and to

ensure that practitioners on it comply with EOIR professional conduct rules. Also, EOIR provides individuals interested in providing *pro bono* representation with the training and tools to do so competently and confidently, through initiatives to assist pro bono groups train pro bono attorneys such as the OLAP Model Hearing Program. And EOIR's rule that implemented "limited representation" in the specific context of custody and bond proceedings strengthened safeguards to ensure disclosure of the scope of representation to immigration court respondents.

12. I describe below my concerns that an extension of the current temporary restraining order prohibiting enforcement of 8 C.F.R. § 1003.102(t) would harm respondents in proceedings before the immigration courts and the Board. This is because prohibiting enforcement of § 1003.102(t) would remove a key mechanism that enables EOIR to hold accountable attorneys and accredited representatives committing unethical and other sanctionable acts against vulnerable respondents, by requiring practitioners to identify themselves and accept responsibility under EOIR's professional conduct rules, and disallowing "ghostwriting."

EOIR's Efforts to Increase the Availability and Quality of Representation in Immigration Proceedings

Separate Appearances for Custody and Bond Proceedings

13. On October 1, 2015, EOIR promulgated a rulemaking that allowed a form of "limited representation"—i.e. separate appearances for custody and bond proceedings, as distinct from an immigration removal proceeding. *See* 80 FR 59,500 (October 1, 2015) (final rule); 79 FR 55659 (Sept. 17, 2014) (proposed rule); 77 FR 59567 (advance notice of proposed rulemaking).

14. Custody and bond proceedings are legally separate and apart from removal and deportation proceedings under EOIR regulations.[3] 79 FR 55660, *citing* 8 CFR 1003.19(d); *Matter of Guerra*, 24 I&N Dec 37, 40 n.2 (BIA 2006); *Matter of R–S–H-*, 23 I&N Dec 629, 630 n.7 (BIA 2003).

15. The rulemaking amended EOIR regulations to allow a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the individual's proceedings before the Immigration Court. 80 FR 59,500.

16. The rule was intended to encourage more attorneys and accredited representatives to agree to represent individuals who would otherwise appear pro se at their custody and bond proceedings. *Id.* Statements by public interest groups, such as the American Immigration Lawyers Association (AILA), and comments received in response to the advance notice of proposed rulemaking, indicated that increased representation was likely to happen, including by pro bono counsel. 79 FR 55660.

17. EOIR regulations still require representatives to file a notice of entry of appearance in a custody and bond proceeding. However, representatives can now indicate whether they are entering an appearance for custody and bond proceedings only. 79 FR 55660-61.

18. Multiple rationales for the rule specifically supported limited representation in separate custody and bond proceedings for detained respondents.

[3] Similarly, because an appeal to the Board of Immigration Appeals is also a separate proceeding, a practitioner can file a notice of appearance to the Board without being required to continue representation on remand to immigration court or appeal to the Circuit. *See* 8 C.F.R. 1003.38(g).

19. Because custody and bond proceedings are legally separate and apart from removal and deportation proceedings under EOIR regulations (as noted above), EOIR required a Notice of Entry of Appearance to be filed separately for different types of proceedings, with a representative of record required to represent a respondent in all aspects of each separate type of proceeding, unless the Immigration Court grants a motion to withdraw or substitute counsel. 70 FR 55,660.

20. Additionally, detained respondents were less likely to be represented in immigration proceedings. 79 FR 55659-60. EOIR found that public benefits of the rule included "increased representation of detained individuals... the amendment will make it easier for individuals who may not be able to afford to hire an attorney for all of their proceedings before the Immigration Court to at least be able to be represented during their custody and bond proceedings." 80 FR 59,501.

21. EOIR declined to expand the rule to allow for limited appearances within a removal proceeding, such as for motions to reopen, motions for change of venue, or motions to remand. 80 FR 59,500; *see also Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986) (holding that under INS regulations a representative cannot enter a "limited" appearance in removal proceedings).

22. EOIR noted concerns from commenters that a practitioner adequately explain the scope of his or her representation to his or her client, and obtained his or her client's consent to the limited representation. 80 FR 59,501. EOIR, to ensure that respondents would be aware of the limited scope of representation, reiterated that a check box on the EOIR-28 requires the practitioner to attest to the client's consent, and added language to clarify that EOIR's

disciplinary rules and procedures apply to practitioners entering an appearance before EOIR, including a limited appearance for custody and bond proceedings. *Id.*

Recognition and Accreditation Program

23. OLAP's Recognition and Accreditation Program authorizes non-lawyer representatives of non-profit religious, charitable, social service, or similar organizations to represent persons in proceedings before EOIR and the Department of Homeland Security (DHS).[4] *See* https://www.justice.gov/eoir/recognition-and-accreditation-program.

24. As of June 19, 2017, there are 948 recognized organizations, with 1,806 accredited representatives.

25. EOIR recently amended the regulations governing the Recognition and Accreditation Program in 2016, with the amendments effective on January 18, 2017. 81 Fed. Reg. 92346 (Dec. 19, 2016) (final rule); 80 Fed. Reg. 59514 (Oct. 1, 2015) (proposed rule); 77 FR 9590 (Feb. 17, 2012) (notice of two public meetings and request for comments).

26. The purpose of EOIR's rule was twofold—to increase the availability of representation for immigrants in proceedings, while ensuring the quality of such representation.

27. As EOIR stated, the purpose was "to promote the effective and efficient administration of justice before . . . EOIR by increasing the availability of competent non-lawyer representation for underserved immigrant populations"— while balancing "the potential increased availability of recognized organizations and accredited representatives with greater oversight and accountability for recognized organizations and accredited representatives." 80 Fed. Reg. 59514; *see also id.* at 59616 (stating the "express purpose of increasing capacity while

[4] Accreditation of non-lawyers affiliated with organizations to represent respondents in immigration proceedings has existed since the 1950s. *See, e.g.*, 23 FR 2672 (Apr. 23, 1958); 40 FR 23271 (May 19, 1975); 49 FR 44084 (Nov. 2, 1984).

maintaining adequate standards"). EOIR sought "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." *Id*. at 59514.

28. The rule pointed out that "legal, financial, and emotional harm and exploitation perpetrated by notarios and other unauthorized individuals against vulnerable immigrant populations is well-documented." *Id.* EOIR also stated that its rule would assist federal interagency, state and local, and private efforts to address notario fraud and the unauthorized practice of law "by seeking to increase the number of recognized organizations and the availability of authorized and qualified immigration practitioners for underserved persons, which, in turn, should reduce the likelihood that such persons become the victims of immigration scams involving the unauthorized practice of law." *Id.* at 59514-15 & ns. 2-5.

29. To accomplish its goals, EOIR's rule clarified the recognition and accreditation ("R&A") application processes, established greater oversight and accountability for recognized organizations and accredited representatives, and enhanced the management of the R&A roster.

30. Oversight and accountability of recognized organizations and accredited representatives remains essential. Accredited representatives must be affiliated with a recognized nonprofit or similar organization.[5] *See* 8 C.F.R. §§ 1292.11, §1292.12. But regrettably, not all accredited representatives affiliated with recognized nonprofit organizations provide competent representation, sometimes to the harm of their clients.

31. For example, in 2011, the Board of Immigration Appeals, which previously oversaw accreditation of representatives, declined to renew the accreditation of Robert "Father

[5] Specifically, the organization must be a "non-profit religious, charitable, social service, or similar organization that provides immigration legal services primarily to low-income and indigent clients within the United States, and, if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services," and a "Federal tax-exempt organization established in the United States." 8 C.F.R. § 1292.11(a).

Bob" Vitaglione, chairman of the organization Comité Nuestra Senora de Loreto Sobre Asuntos de Inmigracion Hispana, based in Brooklyn, New York. *See In re Reverend Robert Vitaglione* (BIA 2011), *attached as* Exhibit 1, *and available at* https://www.justice.gov/sites/default/files/eoir/legacy/2012/06/12/BIA_decision_5-6-12.pdf.

32. Father Bob had been an accredited representative for decades. However, by 2010, Father Bob was representing respondents in over 800 cases, and had failed to appear or appeared unprepared in roughly a third of his non-detained cases in immigration court. The BIA also found several specific examples of ineffective assistance of counsel.

33. The BIA noted Father Bob's "good intentions," and its "respect [for his] dedication to his vocation." But, the BIA found that it could not "excuse his failings as an accredited representative or overlook the impact his performance has had on the low-income and indigent aliens who have relied upon his services." And, while the BIA appreciated the "need for pro bono and low cost representation," the "potential unavailability of alternate representation does not relieve Rev. Vitaglione of his responsibility to provide competent representation in each case he accepts."

34. Additionally, on March 27, 2017, the Board suspended accredited representative Gloria Saucedo from practice before DHS. *See* Exhibit 2, *In re Gloria Dora Saucedo*, D2016-0313 (BIA 2017), *also available at* https://www.justice.gov/sites/default/files/pages/attachments/2017/03/28/saucedoimmediatesuspensionorder.pdf. Saucedo was convicted in a California court for engaging in unauthorized practice of law for many years, before she became an accredited representative affiliated with Hermandad Mexicana Transnacional in 2015. Also, on May 24, 2017, OLAP terminated the accreditation of Ali Paula. *See* Exhibit 3 (April 20, 2017, letter to Open Arms Community

Center); Exhibit 4 (May 24, 2017, letter to Open Arms Community Center terminating accreditation). Paula was permanently enjoined by the Supreme Court of Florida on October 22, 2015, for engaging in the unlicensed practice of law in Florida, before Paula was approved as an accredited representative on December 10, 2015. Additionally, OLAP placed Paula's sponsoring organization, Open Arms Community Center, on inactive status, since Paula was its only accredited representative.

35. Cases like Father Bob's, Gloria Saucedo's, Ali Paula's and others show a compelling need for sufficient oversight of representatives in immigration court and before the BIA, even those representatives affiliated with nonprofit organizations with a demonstrated commitment to helping immigrants. Sometimes, representatives lose the capacity to competently or ethically represent respondents to the detriment of their clients, or are convicted of crimes or disciplined by state bar authorities.

36. Additionally, the rule updates the disciplinary process to ensure that recognized organizations, not only their accredited representatives, are subject to disciplinary sanctions for conduct contrary to the public interest. *See* 81 FR 92356; 8 C.F.R. § 1292.19

37. For example, in *Matter of Baptist Educational Center*, 20 I&N Dec. 723 (BIA 1993), the Board withdrew an organization's recognition because the organization was engaging in for-profit referrals and fee sharing with private counsel.

Programs to Facilitate Pro Bono Representation

38. **List of Pro Bono Legal Service Providers**. OLAP administers the List of Pro Bono Legal Service Providers (the "List"). The List is central to EOIR's efforts to improve the level and quality of representation before its adjudicators, and it is an essential tool to inform individuals in proceedings before EOIR of available pro bono legal services. *See* https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.

39. The List is provided to all pro se individuals in immigration court proceedings. The List contains information on recognized non-profit or similar organizations that provide immigration legal services, other organizations providing pro bono services, pro bono referral services that refer individuals in immigration court proceedings to pro bono counsel, and private attorneys who have committed to providing at least 50 hours per year of pro bono legal services before the immigration court location where they appear on the List, where other organizations or pro bono referral services are not available. 8 C.F.R. § 1003.62. The List can be found at https://www.justice.gov/eoir/file/probonofulllist/download.

40. The regulations governing the List "aim to ensure that private attorneys on the List, and attorneys and accredited representatives who provide pro bono legal services for organizations on the List, satisfy EOIR's professional conduct standards."[6] 79 FR at 55664.

41. To address these concerns, the regulations require pro bono attorneys and accredited representatives to certify under penalty of perjury that they are not subject to a disbarment order under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). See 79 FR 55664; 8 CFR §§ 1003.62(a)(3), (b)(4), (d)(1). This practice is consistent with the declarations under penalty of perjury on EOIR's notice of appearance forms that the practitioner consents to EOIR's professional conduct rules. Id. at 55664.

42. Additionally, concerns had been expressed to the government and by the public that, for example, attorneys on the List were improperly advertising or soliciting for paying clients, or were misleading respondents as to their true willingness to provide *pro bono* services. 79 FR at 55664, 55666. The regulations now include provisions for termination from the *pro bono* list for such misconduct. 8 C.F.R. § 1003.65.

[6] EOIR's final rulemaking reiterated that "the existing EOIR disciplinary rules… are applicable to all attorneys and accredited representatives appearing before EOIR on behalf of any client." 80 FR 59506 n. 8.

43. Related to this lawsuit, EOIR's final rulemaking regarding the List distinguished attorneys and accredited representatives "who will *represent* clients pro bono before EOIR," from attorneys and accredited representatives "who will not enter appearances with EOIR, but who will perform [other] pro bono legal services in cases pending before EOIR *other than representing* clients," such as "conducting an intake interview." 80 FR 59507 & n. 13; 8 CFR § 1003.63(b)(2). This position is consistent with the definition of "representation" before immigration courts and the Board at 8 C.F.R. §§ 1.1(m) and 1001.1(m), which includes "practice" and "preparation" as defined in 8 C.F.R. §§ 1.1(i), (k) and 1001.1(i), (k), and my related 2011 Memorandum analyzing activities provided under the Legal Orientation Program (LOP) that do not constitute "representation," provided in this lawsuit at Dkt #14, Ex. B, and described further below at ¶¶ 66-69. Specifically, this position in EOIR's rulemaking regarding the List further supports that conducting an intake interview does not constitute "practice" and "preparation" as defined in 8 C.F.R. §§ 1001.1(i) and (k), and thus does not trigger a requirement to file a notice of entry of appearance under 8 C.F.R. § 1003.102(t).

Facilitating *Pro Bono* Representation in Immigration Court.

44. OLAP plays a key role in facilitating the provision of *pro bono* representation in immigration courts around the country.

45. A 2008 memorandum by the Office of the Chief Immigration Judge ("OCIJ"), *Guidelines for Facilitating Pro Bono Legal Services*, OPPM 08-01 (March 10, 2008), Exhibit 5, *and available at* https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf, provides guidance on how immigration courts and court administrators can encourage and facilitate pro bono legal services for respondents.

46. As the 2008 memorandum sets out, "[p]ro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented." OPPM 08-01, at 2.

47. The 2008 memorandum directs the designation of a "pro bono liaison judge" in each immigration court, who represents the judges of that court in interactions with outside entities regarding matters involving pro bono representation. OLAP interacts with the pro bono liaison judges around the country to facilitate the provision of *pro bono* legal assistance in each court. Every year, OLAP either meets with the judges as a group, or conducts a series of conference calls with the pro bono liaison judges in each court in order to familiarize each judge with their roles and scope of duties in facilitating access to pro bono legal services. One of these duties is to meet regularly with local pro bono legal service providers to discuss these issues. *Id.* at 3.

48. Additionally, the 2008 memorandum sets out guidance to take into account "the particular needs of pro bono representatives," including by denoting and tracking their *pro bono* appearance, giving pro bono representatives priority scheduling, encouraging flexibility in appearing by telephone or videoconference, encouraging pre-hearing statements and pre-hearing conferences, making court records available to pro bono organizations and representatives, and strongly encouraging the facilitation of pro bono representation whenever minors are involved..

49. The 2008 memorandum also recognizes that while it "is incumbent on every judge to facilitate pro bono representation," "[e]qually important, however, is that every judge must be careful to stay within the bounds of ethics and propriety." *Id.* at 6.

50. **Facilitating *Pro Bono* Representation at the BIA (the BIA *Pro Bono* Project)**. OLAP also administers the BIA Pro Bono Project, which helps to provide pro bono representation in appropriate cases to respondents with case appeals before the Board. See https://www.justice.gov/eoir/bia-pro-bono-project.

51. EOIR assists in identifying potentially meritorious case appeals based upon criteria determined by the partnering volunteer groups. Once cases are identified and reviewed, their summaries are then distributed via e-mail to pro bono representatives across the United States. Volunteers who accept a case under the Project receive a copy of the file, as well as additional time to file the appeal brief.

52. Since its start, the BIA Pro Bono Project has succeeded in securing pro bono counsel for well over 1,100 individuals around the country.

Model Hearing Program

53. The Model Hearing Program ("MHP") is an educational program coordinated by OLAP, to improve the quality of advocacy before the immigration courts, as well as to increase levels of pro bono representation. *See* https://www.justice.gov/eoir/model-hearing-program.

54. The program, implemented in 2001, provides hands-on immigration court training and is designed for attorneys, accredited representatives, law students, and law school graduates with little or no experience in immigration removal proceedings, who are interested in representing indigent immigrants on a pro bono basis in the immigration court.

55. OLAP facilitates coordination of the MHP between a sponsoring non-profit organization and an immigration court, and provides technical assistance where needed. Substantive training in a specific area of immigration law is provided by the non-profit organization sponsoring the MHP. This is followed by a model hearing presided over by an immigration judge from the local immigration court. The in-court model hearing focuses on

practice, procedure and advocacy skills. Participants commit to a minimal level of pro bono representation throughout the year, and may receive training materials and CLE credit. Since 2001, there have been well over 100 Model Hearings conducted.

National Qualified Representative Program

56. In April 2013, EOIR collaborated with the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") agency to initiate a new nationwide policy to provide enhanced procedural protections, including competency inquiries in immigration court, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings. *See* https://www.justice.gov/eoir/national-qualified-representative-program-nqrp.

57. As part of the Nationwide Policy's enhanced procedural protections, EOIR launched the National Qualified Representative Program ("NQRP"), a nationwide program to provide Qualified Representatives ("QRs") to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings. EOIR carries out the NQRP through a contract with the Vera Institute of Justice and local subcontracting legal service organizations to provide QRs where required.

58. The NQRP followed a federal district court ruling, *Franco-Gonzalez v. Holder*, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013), which found that the Rehabilitation Act required the appointment of a qualified representative to detainees determined to be incompetent to represent themselves due to a serious mental disorder or defect. Since April, 2013, over 800 qualified representatives have been appointed.

Increasing Access to Legal Information for *Pro Se* Immigrants

59. OLAP also implements several initiatives to increase access to information for individuals appearing before the immigration courts and Board of Immigration Appeals (BIA). These initiatives are described below.

Legal Orientation Program (LOP)

60. Since 2003, OLAP has carried out the Legal Orientation Program (LOP) to improve judicial efficiency and assist all parties in adult detained removal proceedings – unrepresented detained adults, the immigration court, Immigration and Customs Enforcement (ICE) and the detention facility. The LOP currently operates in 39 ICE detention facilities. *See* https://www.justice.gov/eoir/legal-orientation-program.

61. Through the LOP, representatives from nonprofit organizations provide comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals

62. The program is normally comprised of four components: (1) Group Orientations, which provide an interactive general overview of immigration proceedings, individual responsibilities, and available legal options , and are open to general questions; (2) Individual Orientations, where unrepresented individuals can briefly discuss their cases with experienced LOP providers and pose more specific questions; (3) Self-help Workshops, where those interested in pursuing various legal relief options or those who wish to voluntarily depart the country, are provided classroom-style training on specific topics (such as how to complete an asylum application or prepare for a bond hearing), and given self-help legal materials; and (4) Referral to Pro Bono Legal Services, where available.

63. In 2016, across the United States, the LOP served 42,610 detained individuals in INA § 240 removal proceedings, and an additional 10,376 individuals in other immigration

proceedings. Additionally and specifically, 16,094 individuals were provided individual orientations, 18,744 individuals were provided self-help workshops, and 1,508 individuals were referred to pro bono legal counsel.

64. Specifically, in the Tacoma Immigration Court, where NWIRP is the sole provider of the LOP program, the LOP served 2,835 detained individuals in INA § 240 removal proceedings, and an additional 596 individuals in other immigration proceedings. Additionally and specifically, 1,468 individuals were provided individual orientations, 126 individuals were provided self-help workshops, and 142 individuals were referred to pro bono legal counsel.

65. Experience has shown that the LOP has had positive effects on the immigration court process: detained individuals make more timely and better-informed decisions and are more likely to obtain representation; non-profit organizations reach a wider audience of people with minimal resources; and, cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention.

2011 Memorandum Distinguishing Orientation from Representation

66. On July 11, 2011, I issued a memorandum ("2011 Memorandum"), entitled "Legal Orientation Program: Guidelines—Orientation vs. Representation," setting forth guidance in distinguishing between services considered 'legal representation' and those considered 'legal orientation' for individuals providing contract services through the LOP.[7] This memorandum is attached as Exhibit 6 (and was previously Exhibit B to Defendant's Opposition to Plaintiffs' Motion for Temporary Restraining Order, filed May 11, 2017 (Dkt #14-2, Ex. B)). I issued the guidance memo to the Vera Institute, EOIR's contractor for the LOP, with the purpose that Vera

[7] The memorandum was issued to Oren Root, Director of the Center on Immigration and Justice at the Vera Institute of Justice. Vera Institute of Justice is the contractor for the Legal Orientation Program, and carries out LOP work through individual task orders issued to subcontractors, such as NWIRP.

Institute would incorporate this guidance into their subcontract agreements with local LOP providers (including NWIRP). I understand that this guidance has been part of every subsequent LOP subcontract.

67. The 2011 Memorandum is relevant to this lawsuit because it analyzes whether certain activities fall under the definition of "representation," *see* 8 C.F.R. §§ 1.1(m), 1001.1(m)—which, like 8 C.F.R. § 1003.102(t)(1), cross-references the terms "practice" and "preparation" as defined in 8 C.F.R. § 1.1(i), (k), and § 1001.1(i), (k), respectively.[8] Thus, activities that do not constitute "representation" under 8 C.F.R. § 1.1(m) or § 1001.1(m) should also not trigger the notice of appearance requirement under 8 C.F.R. § 1003.102(t).

68. In my 2011 Memorandum, I analyzed and set forth a list of activities that did not constitute "representation." These activities include:

a. Group orientations. Because a group orientation "is informational and non-specific to any particular individual's case," and "should cover general areas of law and procedure, and familiarize individuals with their legal rights, responsibilities and options in general terms," it is "not considered representation." 2011 Memorandum at 2-3.

b. Individual orientations. I concluded that a LOP presenter "may respond to specific concerns/questions of an individual, generally educating the individual in law and applicable procedure, as well as in the requirements for pursuing particular forms of relief," but should not "give legal advice concerning the individual's specific case." *Id.* at 3-4. However, I noted that "LOP providers

[8] *Compare* 8 C.F.R. § 1001.1(m) ("The term representation before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section.") *with* 8 C.F.R. § 1003.102(t) (failure to submit notice of entry of appearance is misconduct "when the practitioner: (1) Has engaged in practice or preparation as those terms are defined in §§ 1001.1(i) and (k)").

should familiarize themselves with their respective State Bar rules regarding actions which may form the basis of an attorney-client relationship." *Id.* at 3 n. 4.

c. Distribution of materials. I concluded that LOP presenters could distribute materials "relating to how a particular type of legal relief may be pursued, or standard sample motions and briefs," but could not perform the "preparation and/or provision of any case-specific written materials (i.e., those created or specifically tailored to the individual's particular circumstances)." *Id.* at 6.

d. Assistance in obtaining documents. I concluded that "assistance in obtaining documents does not constitute representation," but such assistance should "only be provided to unrepresented individuals who have independently determined that such documents are necessary for their immigration case, and who have made all diligent efforts to obtain these materials themselves." *Id.* at 6-7.

e. Assistance in Completing Legal Forms. I stated that "LOP presenters may assist unrepresented LOP participants with completing immigration forms," but cautioned that "LOP presenters should only provide such services in adherence to the guidelines" regarding individual orientations, and set forth additional guidelines, including that a presenter "may not advise the individual on how to answer a question based on a participant's particular factual situation and the applicable law." *Id.* at 7.

69. Plaintiffs in this lawsuit, and Plaintiffs' declarants, allege that many of these activities described in ¶ 68 trigger the notice of appearance requirement under 8 C.F.R. § 1003.102(t), under what Plaintiffs allege is an "all-or-nothing" or "compulsory representation rule." This is misleading and inaccurate. Under the analysis in my 2011 memorandum, these

activities described in ¶ 68 that do not constitute "representation" under 8 C.F.R. § 1.1(m) or § 1001.1(m) also should not trigger the notice of appearance requirement under 8 C.F.R. § 1003.102(t).

Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC)

70. The Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC) provides legal orientation presentations to the adult caregivers (custodians) of unaccompanied children in EOIR removal proceedings. *See* https://www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children.

71. The purpose of LOPC is to inform the children's custodians of their responsibilities in ensuring the child's appearance at all immigration proceedings, as well as protecting the child from mistreatment, exploitation, and trafficking, as provided under the Trafficking Victims Protection Reauthorization Act of 2008. EOIR works with the Department of Health and Human Services, Office of Refugee Resettlement, and non-government partners to carry out this program nationally.

72. Specifically, the LOPC educates custodians on the immigration court process and how it works; the importance of the children's attendance at removal hearings and consequences of failure to appear; the forms of immigration relief available to children in removal proceedings; and the custodians' responsibility to protect the children from mistreatment, exploitation, and human trafficking.

73. Similar to the LOP, through the LOPC representatives from nonprofit organizations provide comprehensive explanations about immigration court procedures along with other basic legal information to groups of individuals made up of custodians, the children in their care, and other family members. The program is comprised of four components: (1) Group

Orientations, (2) Individual Orientations, (3) Self-help Workshops, and (4) Referral to Pro Bono Legal Services, where available.

74. The LOPC is currently operating in 15 immigration court sites. In FY2016, the LOPC served the custodians of roughly 20,000 children who were released from federal custody and scheduled for immigration court hearings. The LOPC also operates the National LOPC Call Center to provide LOPC scheduling assistance, telephonic orientations, and other basic legal information to custodians of children who cannot attend a live LOPC.

Immigration Court Help Desk (ICH)

75. OLAP also oversees Immigration Court Helpdesks at immigration court locations in order to orient non-detained individuals appearing before the immigration court on the removal hearing process, and provide information to inform them about possible remedies and legal resources. The ICH provides in-person information sessions, self-help assistance to individuals without counsel, and information on available pro bono resources to unrepresented individuals. The ICH was launched in Summer 2016 at five immigration courts: Chicago; Los Angeles; Miami; New York City; and San Antonio. The self-help assistance provided by the ICH includes user-friendly legal materials and basic training on self-representation through group workshops.

Self-Help Legal Centers

76. Self Help Legal Centers, currently in place within 21 immigration courts, provide general written legal information as well as specific written information about the local immigration court to pro se respondents and other interested parties. *See* https://www.justice.gov/eoir/self-help-materials.

77. The centers provide user-friendly fill in the blank forms, including change of address and fee waiver forms, as well as self-help packets on various forms of relief, including

Asylum, Cancellation Removal, and Voluntary Departure, and answers to frequently asked questions about the local immigration court.

78. Self-Help Legal Centers can facilitate respondents' access to legal information, which in turn can increase court efficiency and improve outcomes in the immigration courts. As described in EOIR OPPM 08-01, materials provided at Self Help Legal Centers "have the ability to increase respondents' understanding of immigration laws, removal proceedings, and the implications of their pleadings." Respondents who have access to basic information require less assistance from court staff and are better prepared when they appear before an immigration judge. In addition, immigration judges can directly refer unrepresented respondents to the centers and the respondent can then obtain accurate and helpful information.

Concerns Regarding Temporary Restraining Order

79. As described above, since 2000, EOIR has developed and promoted a variety of programs and initiatives to assist indigent and low income immigrants with matters before the agency. Many of these efforts have involved working closely with nonprofit organizations, bar associations, private attorneys and other entities to help design innovative approaches to expand access to legal services – everything from basic legal information to intensive pro se assistance and appointment of legal counsel. Many thousands of individuals are effectively served every year through self-help/pro se assistance efforts operating in full compliance with federal regulations.

80. I am concerned that, respectfully, if this Court extended the current temporary restraining order that prohibits enforcement of 8 C.F.R. § 1003.102(t) into a preliminary injunction, doing so would harm many immigrants in proceedings before EOIR and the Board. This is because prohibiting enforcement of § 1003.102(t) would remove a key mechanism that enables EOIR to hold accountable attorneys and accredited representatives committing unethical

and other sanctionable acts against vulnerable respondents, by requiring practitioners to identify themselves and accept responsibility under EOIR's professional conduct rules, and disallowing "ghostwriting."

81. For example, unscrupulous, unethical, or incompetent practitioners would no longer be subject to discipline for hiding their identity through the practice of ghostwriting. Such practitioners could exploit a vulnerable foreign national respondent by charging for unnecessary and/or frivolous legal services, such as in pursuing legal relief that the immigrant is not eligible for, or in writing a legal brief that harms rather than helps the client's interests with little to no accountability for their actions. I am particularly concerned because ghostwriting is a tool by which unscrupulous attorneys, so called "jailhouse" lawyers, *notarios* and others committing the unauthorized practice of law commonly evade accountability for their actions.

82. Additionally, vulnerable respondents may be confused as to the scope of representation provided by a practitioner, and then appear at immigration proceedings expecting a lawyer who does not appear, resulting in the respondent having to proceed without legal assistance he or she thought would be provided, and additional continuances, delay, or an order of removal. Or, unscrupulous practitioners may take advantage of that confusion by charging the immigrant respondent for a full case when the practitioner has no intention of representing the respondent throughout. Relatedly, such unscrupulous practitioners could hide these activities from accountability through ghostwriting.

83. Or, practitioners would no longer be required to attest under penalty of perjury their compliance with EOIR's professional conduct rules, including rules that require disclosure of the scope of representation to the respondent. (Notably, when EOIR instituted limited

representation in custody and bond proceedings, EOIR added language to this attestation as a safeguard. 80 FR 59,501.)

84. While most nonprofit organizations like NWIRP are not unscrupulous organizations, and most nonprofit organizations do not employ unscrupulous practitioners, the current 8 C.F.R. § 1003.102(t) does not carve out nonprofit organizations or their practitioners from its coverage. Accordingly, if enforcement of 8 C.F.R. § 1003.102(t) continued to be enjoined, any practitioner could take advantage of EOIR's non-enforcement to evade accountability for his or her actions. In any case, 8 C.F.R. § 1003.102(t) remains essential to ensure identification of the few practitioners from nonprofit organizations who become incompetent or unethical, as such practitioners can still have a harmful impact on a large number of people, as Father Bob had.

85. While EOIR theoretically could engage in rulemaking to extend limited representation to a single immigration removal proceeding, or distinct phases within it, or carve out different rules of practice for practitioners affiliated with nonprofit organizations, such changes should only come about through formal rulemaking. Such changes would raise complex issues that necessitate safeguards as to the quality of representation.

86. Such a rulemaking, given EOIR's legitimate concerns about ensuring the quality of representation in immigration proceedings, would and should necessarily invite and consider comment from a wide range of stakeholders – including but not limited to nonprofit organizations – to address appropriate safeguards. Notably, EOIR proposed both its rules for recognition and accreditation and limited representation in custody and bond proceedings after EOIR solicited public comments, even before EOIR issued its notices of proposed rulemaking. *See* 80 FR 59515 & n. 9 (proposed recognition and accreditation rule), *citing* 77 FR 9,590 (Feb.

17, 2012) (notice of two public meetings and request for comments); 79 FR 55660 & n. 2 (proposed separate appearances rule), *citing* 77 FR 59567, 59569 (Sept. 28, 2012) (requesting public input as to whether to propose a separate appearances rule). Both rules were also improved by public comment after proposed rulemaking.

Conclusion

I declare under penalty of perjury of the laws of the United States and the State of Virginia that the foregoing is true and correct to the best of my knowledge and belief.

6/26/2017
Date

STEVEN LANG
Program Director, Office of Legal Access Programs
Falls Church, Virginia

Exhibit 1

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Comite Nuestra Senora de Loreto
Sobre Asuntos de Inmigracion Hispana
(Brooklyn, NY)

Date: MAY - 6 2011

Application for accreditation of representative pursuant to Title 8, Section 1292.2(d), Code of Federal Regulations

RE: Reverend Robert Vitaglione

Comite Nuestra Senora de Loreto Sobre Asuntos de Inmigracion Hispana ("Comite"), an organization recognized by the Board under 8 C.F.R. § 1292.2(a), has applied for a renewal of the accreditation of Rev. Robert Vitaglione as its representative under 8 C.F.R. § 1292.2(d). For the reasons set forth below, that application will be disapproved.

I. ACCREDITATION GENERALLY

Federal regulations restrict which non-attorneys can represent aliens in immigration matters before the Executive Office for Immigration Review (EOIR), which includes this Board and the immigration courts, and the Department of Homeland Security (DHS). *See* 8 C.F.R. § 1292.1. The vast majority of non-attorneys who are authorized to represent aliens in immigration matters are "accredited representatives" and work for a "recognized organization." *See* 8 C.F.R. § 1292.2. The purpose behind the recognition and accreditation program is to provide low-income or indigent aliens, who are unable to hire an attorney and unable to locate pro bono counsel, with an alternative to seeking legal advice from unscrupulous persons who engage in the unauthorized practice of law. *See, e.g., Canaveral Toban v. Ashcroft*, 385 F.3d 40 (1st Cir. 2004)(describing misconduct by a sham attorney but finding no prejudice); *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002)(describing misconduct of non-attorney immigration consultants leading to the issuance of an *in absentia* deportation order).

Pursuant to 8 C.F.R. § 1292.2(a), a recognized organization may apply for accreditation of a person of good moral character to act as its representative in representing aliens. An application for accreditation must demonstrate the representative's experience and knowledge of immigration law and procedure. *See Matter of EAC, Inc.* (Accreditation), 24 I&N Dec. 563 (BIA 2008). The purpose of evaluating the qualifications is to ensure that the interests of aliens are safeguarded and that only persons with the adequate knowledge and training can represent aliens in immigration matters. *See* 8 C.F.R. § 1292.2; *Matter of EAC, Inc.* (Accreditation), *supra*.

In applying for renewal of a representative's accreditation, the recognized organization must provide adequate information to assess the nature and extent of the representative's recent experience. The application should include evidence of continued broad knowledge of immigration law and procedure. Similar to continuing legal education for attorneys, accredited representatives

should have training subsequent to their last application. Furthermore, the renewal of accreditation status is predicated on the representative maintaining the skills necessary to represent aliens in immigration proceedings, i.e., adequate case preparation, timely filing of court papers, and effective case presentation. *See Matter of EAC, Inc.* (Accreditation), *supra.* Like all persons representing aliens in proceedings, the representative must be able to meet deadlines and manage the anticipated caseload. *See* 8 C.F.R. § 1003.102(q)(1). The burden of showing that the qualifications for accreditation continue to be met is on the applicant organization. *Matter of EAC, Inc.* (Accreditation), *supra.* The organization should maintain sufficient records to respond to inquiries from the Board.

II. APPLICATION HISTORY

A. Background

Rev. Vitaglione, in his position as the Comite Chairman, timely requested that the Board renew his status as an accredited representative.

The request was not supported by any documentation. Accordingly, the Board requested documentary evidence of his recent training and experience, but Comite provided only a general recommendation from a single judge in the New York City immigration court.[1]

While the application was pending, the Board received unfavorable information about the quality of Rev. Vitaglione's representation. On December 4, 2009, the Board was forwarded a copy of an anonymous complaint received by the Office the District Attorney of the County of New York, which claimed that an unaccredited individual might be serving as a "Supervisor/Immigration Counselor" of the applicant organization, which would be under Rev. Vitaglione's supervision. On March 9, 2010, the agency received an Immigration Practitioner Complaint Form (Form EOIR-44), alleging ineffective assistance of counsel when Rev. Vitaglione failed to inform the respondent of a hearing date and she was ordered removed in absentia. Additionally, the Board discovered in its own files documentation that Rev. Vitaglione had failed to meet multiple filing deadlines and, at least on one occasion, filed an appeal brief almost a year after the Board had rendered a final decision.

Given the gravity of this unfavorable information, the Board sent Comite all documentation related to each of the matters cited and provided the organization with an opportunity to respond. The application record contains a series of limited responses to these documents, the most recent of which being a letter received on June 26, 2009. In that response, Rev. Vitaglione explained that Comite did not maintain client records after an appeal had been dismissed and he would have to

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[1] Comite requested that the Board review EOIR computer records to confirm Rev. Vitaglione's continuing representation of many aliens in proceedings in three different immigration courts and asserted that his training and knowledge of immigration laws has never been questioned by a judge. However, the burden is on the applicant to maintain records and provide evidence in support of the application. *See Matter of EAC, Inc.* (Accreditation), *supra.*

"respond by memory," thus qualifying any answers he could provide. None of his responses adequately addressed our concerns.

B. Remand

Accordingly, we remanded the renewal application to DHS on June 16, 2010, pursuant to 8 C.F.R. § 1292.2(d), for DHS to conduct an investigation into the quality of Rev. Vitaglione's representation, to provide the findings of its investigation to the Board, and to provide the Board with a recommendation regarding the renewal application.

On November 12, 2010, the Board received an investigative report from DHS' Acting Chief Counsel for U.S. Immigration and Customs Enforcement. That report contained detailed findings of inadequate representation by Rev. Vitaglione.

DHS records reflect that, in June 2010, Rev. Vitaglione was the representative of record in a staggering 646 non-detained cases and 115 detained cases at the immigration court level. In 221 of his pending non-detained cases, or roughly a third of his non-detained caseload, Rev. Vitaglione had at some time failed to appear for a scheduled hearing (without first requesting or being granted a continuance) or appeared unprepared (e.g., had forgotten or misplaced the client file, failed to bring necessary documents or the application for relief). Also, DHS reports that Rev. Vitaglione was ineffective in several detained cases, providing six specific examples of how he had failed to handle a detained case properly.

Moreover, as of July 2010, Rev. Vitaglione also had 65 cases pending before the Board. According to DHS records, Rev. Vitaglione either did not file an appellate brief or filed one that was untimely in 37 of those cases – more than half of his appellate caseload.

DHS concluded that the evidence demonstrates that Comite does not have at its disposal adequate knowledge, information, or experience to effectively represent over 800 aliens and that Rev. Vitaglione does not possess adequate skills for effective litigation, including the ability to advocate a client's position at a hearing. DHS recommended that the Board disapprove the application.

C. Response

On February 1, 2011, Comite responded to the DHS investigative report. Comite conceded that Rev. Vitaglione may not have appeared in roughly 30% of his cases without notice to the court. Rev. Vitaglione attributed these failures to appear to the conflict between his pastoral duties and his court duties, explaining that his obligations as a clergyman take precedence. Rev. Vitaglione also cited scheduling complications in explanation for his failures to appear, because his workload involves cases in different immigration courts.

On behalf of Comite, Rev. Vitaglione also conceded that the organization may have "overextended" itself due to the unavailability of pro bono counsel. In his own words, Rev. Vitaglione has "accepted the reality that he cannot cope with a system that has 6-7 judges

hearing master calendar cases nearly every day," and he acknowledges that he has so many cases scheduled daily that he cannot physically represent all of his clients. In response to this situation, Comite reports it now has a panel of pro bono attorneys to help Rev. Vitaglione to reduce the caseload.[2] He also said he would retire within two or three years and explained that Comite will take no new cases after November 30, 2010.

III. ANALYSIS

As indicated above, the burden is on the applicant organization to demonstrate that its representative's accreditation should be renewed. Comite has not met that burden.

The purpose of evaluating the qualifications for accreditation of representatives is to ensure that the interests of aliens are safeguarded and that the persons given assistance receive adequate representation. *Matter of EAC (Recognition)*, 24 I&N Dec. 556, 557 (BIA 2008). An accredited representative must be able to litigate effectively, to advocate his client's position at a hearing before an Immigration Judge or on appeal to this Board, and to file timely briefs, motions, and appeals. *Matter of EAC (Accreditation)*, *supra*, at 564. Indeed, the regulations require all immigration practitioners to meet certain standards of professional conduct, and particular failings – such as the failure to act with reasonable diligence and promptness, failure to control and manage caseload, and repeated failure to appear for hearings – are unacceptable. *See* 8 C.F.R. § 1003.102(q). Where an accredited representative cannot serve his clients adequately, he should refer them elsewhere. *See Matter of EAC (Accreditation)*, *supra*, at 564.

Based on the record before us, we are not persuaded that Rev. Vitaglione continues to provide adequate representation to Comite's clients. Rev. Vitaglione has not managed his caseload responsibly, and he has not advocated effectively in a large percentage of his cases. His clients depend on him to appear for court, to prepare for court, and to file timely papers and applications for relief; and yet the application record contains more than ample evidence that he frequently fails to meet his clients' needs. We appreciate that Rev. Vitaglione has pastoral duties that sometimes interfere with his court obligations. While we respect Rev. Vitaglione's dedication to his vocation, we cannot excuse his failings as an accredited representative or overlook the impact his performance has had on the low-income and indigent aliens who have relied upon his services.

The Board appreciates the need for pro bono and low cost representation in the community that Comite serves. However, the Board cannot grant or extend accreditation to a non-attorney unless we are confident that that individual can effectively advocate on behalf of aliens in proceedings and will demonstrate due diligence in their representation. The potential unavailability of alternate representation does not relieve Rev. Vitaglione of his responsibility to provide competent representation in each case he accepts.

[2] Comite has not provided the Board with evidence of such an arrangement.

Accordingly, while we recognize Rev. Vitaglione's good intentions and appreciate his years of dedication to his community, we cannot renew accreditation where there is so significant a record of inadequate representation.

IV. CONCLUSION

The applicant organization has not adequately addressed the concerns raised by DHS and has not met its burden of showing that the Rev. Vitaglione's status as an accredited representative should be renewed. The following order will therefore be entered:

ORDER: The application for renewal of accreditation of Reverend RobertVitaglione for appearances before the DHS, the Immigration Courts, and this Board is disapproved.

FOR THE BOARD

Exhibit 2

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: D2016-0313 Date: MAR 27 2017

In re: GLORIA DORA SAUCEDO, ACCREDITED REPRESENTATIVE

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

PETITION FOR IMMEDIATE SUSPENSION

ON BEHALF OF DHS: Catherine M. O'Connell, Disciplinary Counsel

ON BEHALF OF EOIR: Jennifer J. Barnes, Disciplinary Counsel

ON BEHALF OF RESPONDENT: Mark S. Rosen, Esquire

The respondent became an Accredited Representative of Hermandad Mexicana Transnacional on September 9, 2015.[1] On August 25, 2016, she entered a plea of nolo contendere to engaging in the unauthorized practice of law in violation of section 6126(a) of the California Business and Professional Codes. The Superior Court of California, County of Los Angeles, accepted the plea on the same date and found the respondent guilty of this crime.

Consequently, on December 6, 2016, the Disciplinary Counsel for the Department of Homeland Security ("Disciplinary Counsel for the DHS") petitioned for the respondent's immediate suspension from practice before that agency. The Disciplinary Counsel for the Executive Office for Immigration Review then asked that the respondent be similarly suspended from practice before the Board of Immigration Appeals ("Board") and the Immigration Courts.

The respondent, through her attorney, filed an answer and opposition to the petition for immediate suspension, the Notice of Intent to Discipline and the motion for reciprocal discipline. The respondent also filed a declaration and a declaration from her attorney in support of her answer. In her documents, the respondent argues that her offense is not a serious crime as defined in 8 C.F.R. § 1003.102(h). She asserts that the plea bargain she entered in her criminal case specifies that the only crime she committed was counseling immigration applicants "in the manner that she has done for 25 years." She states that she never held herself out as an attorney and she never appeared before any courts; she only provided standard immigration consulting which included an initial discussion regarding eligibility for relief and advice regarding which form to use, where to go, and when. She claims that her actions were not morally wrong but were wrong only because she was not yet approved as an accredited representative.

[1] The Board's order dated September 9, 2015, indicates that the respondent's organization only requested that she be accredited to practice before the Department of Homeland Security (DHS). Accordingly, she was granted only partial accreditation.

The respondent also requests a hearing regarding the charges in the Notice of Intent to Discipline, and she points out that her conviction is on appeal. Accordingly, she notes that summary disciplinary proceedings cannot be concluded at this time.

The Disciplinary Counsel for the DHS has filed a response to the respondent's answer and opposition. In this response, the Disciplinary Counsel for the DHS contends that the respondent's offense qualifies as a serious crime under 8 C.F.R. § 1003.102(h). The Disciplinary Counsel for the DHS notes that the respondent misrepresented to the public that she was authorized to provide immigration legal advice for many years before she became an accredited representative. She was convicted for these acts under section 6126(a) of the California Business and Professional Codes, and the Disciplinary Counsel for the DHS maintains that her crime involved misrepresentation, deceit or dishonesty. The Disciplinary Counsel for the DHS also points out that the respondent's acts constitute "practice" or "preparation constituting practice" as defined in 8 C.F.R. § 1.2.

We agree with the Disciplinary Counsel for the DHS that the evidence before us at this time provides a sufficient basis for immediately suspending the respondent from practice as an accredited representative. *See* 8 C.F.R. §§ 1003.103(a)(1), (2) and (4) (discussing grounds for immediate suspension and including no requirement that a conviction be final to support immediate suspension). Accordingly, the petition will be granted.

We, however, will wait to rule on the Notice of Intent to Discipline and the respondent's challenges to that filing, including her request for a hearing, until the parties notify us that the respondent's conviction is final or has been overturned. 8 C.F.R. § 1003.103(b) (stating that summary disciplinary proceedings "shall not be concluded until all direct appeals from an underlying criminal conviction shall have been completed"). Further, because it does not appear that the respondent was approved to practice or practiced before the Board or the Immigration Courts, we will only suspend the respondent from practice before the DHS.

ORDER: The petition is granted, and the respondent is hereby suspended from practice as an accredited representative before the DHS pending final disposition of this proceeding. 8 C.F.R. § 1003.103(a).

FURTHER ORDER: The respondent is directed to promptly notify, in writing, any clients with cases currently pending before the DHS that the respondent has been suspended from practicing before these bodies.

FURTHER ORDER: The respondent shall maintain records to evidence compliance with this order.

FURTHER ORDER: The Board directs that the contents of this notice be made available to the public, including at appropriate offices of the DHS.

FOR THE BOARD

Exhibit 3

U.S. Department of Justice
Executive Office for Immigration Review
Office of Legal Access Programs

Recognition and Accreditation Program

April 20, 2017

Open Arms Community Center
5556 SW 8th Street
Coral Gables, FL 33134

USCIS Miami District Office
8801 NW 7th Avenue
Miami, FL 33150

Dear Open Arms Community Center,

On December 10, 2015, the Board of Immigration Appeals approved Ali E. Paula as a fully accredited representative based on an application filed by Open Arms Community Center, a recognized organization. The Office of Legal Access Programs (OLAP) has now learned that on October 22, 2015, the Supreme Court of Florida granted the Petition for Approval of Stipulation for Permanent Injunction and approved the Stipulation for Permanent Injunction, permanently and perpetually enjoining Ali Paula, Paula & Associations, P.A., and any employees or persons acting in concert with them from engaging in the unlicensed practice of law in the State of Florida. In the Stipulation for Permanent Injunction, Ali Paula was permanently and perpetually enjoined from

A. Holding out to the public or anyone else that they are attorneys or that they can render legal advice or services.
B. Rendering legal advice or services.
H. Advising persons and entities of their rights, duties, and responsibilities under Florida law, or Federal law, as those laws relate to any legal matter or any immigration and naturalization matters, including advising persons and entities as to various immigration benefits or statutes.
J. Advertising in any fashion which may lead a reasonable lay person to believe that Respondents offer to the public legal services, legal advice or personal legal assistance regarding immigration and naturalization matters and any other legal matters.
K. Advising persons and entities as to which particular immigration form or applications is suited to the needs of the persons and entities, how to fill out the form or application, or what supporting documentation should accompany the form or application.
L. Soliciting or receiving attorney's fees or fees for legal services.
M. Offering to provide legal services directly to the public.

Under the new rule on the Recognition and Accreditation Program (which went into effect on January 18, 2017) at 8 C.F.R. § 1292.17(a), the OLAP Director may administratively terminate a representative's accreditation. One basis for termination of accreditation is the individual's failure "to maintain eligibility for accreditation under § 1292.12, after the individual's organization has been notified of the deficiencies and has had an opportunity to respond." 8 C.F.R. § 1292.17(c)(6).

It appears that Ali Paula has failed to maintain eligibility for accreditation under 8 C.F.R. § 1292.12. Accredited representatives are required to have the character and fitness to represent clients of the organization and that "[c]haracter and fitness includes, but is not limited to, an examination of factors such as: Criminal background; prior acts involving dishonesty, fraud, deceit, or misrepresentation; past history of neglecting professional, financial, or legal obligations; and current immigration status that presents an actual or perceived conflict of interest." 8 C.F.R. § 1292.12(a)(1).

It is also required that the individual "[h]as not resigned while a disciplinary investigation or proceeding is pending and is not subject to any order disbarring, suspending, enjoining, restraining, or otherwise restricting the individual in the practice of law or representation before a court or any administrative agency." 8 C.F.R. § 1292.12(a)(4).

Pursuant to 8 C.F.R. § 1292.17(c)(6), the organization has the opportunity to respond to this notice prior to the termination of full accreditation. The organization will be given **30 days** from the date of this letter to respond.

Please also we aware that under 8 C.F.R. § 1292.14(a), the organization has the duty to promptly notify the OLAP Director in writing of certain material changes at the organization, including the eligibility for accreditation of any of the organization's accredited representatives. The organization must also promptly notify OLAP if it has any currently recognized office where there is no accredited representative who is providing immigration legal services at that office.

Sincerely,

Steven Lang
Program Director
Office of Legal Access Programs

Office of Legal Access Programs, 5107 Leesburg Pike, Suite 1900, Falls Church, VA 22041
R-A-Info@usdoj.gov

Exhibit 4

U.S. Department of Justice
Executive Office for Immigration Review
Office of Legal Access Programs

Recognition and Accreditation Program

May 24, 2017

Open Arms Community Center
5556 SW 8th Street
Coral Gables, FL 33134

USCIS Miami District Office
8801 NW 7th Avenue
Miami, FL 33150

Termination of Accredited Representative

Dear Open Arms Community Center,

On April 20, 2017, the Office of Legal Access Programs (OLAP) notified Open Arms Community Center that OLAP intended to terminate the partial accreditation of Ali Paula. OLAP provided 30 days for the organization to respond. As of May 24, 2017, OLAP has not received a response from your organization.

As we explained in our letter of April 20, 2017, the stipulation enjoining Ali Paula from rendering legal advice or services appears to restrict him in the practice of law or representation before a court or any administrative agency. 8 C.F.R. § 1292.12(a)(4). Based on the information currently before us, OLAP is terminating the full accreditation of Ali Paula. 8 C.F.R. § 1292.17(a).

Please be aware that under 8 C.F.R. § 1292.14(a), the organization has the duty to promptly notify the OLAP Director in writing of certain material changes at the organization, including the eligibility for accreditation of any of the organization's accredited representatives.

According to our records, Ali Paula was the only accredited representative at Open Arms Community Center. As such, Open Arms Community Center will be placed on inactive status. An organization on inactive status is precluded from providing immigration legal services unless it has an attorney on staff. 8 C.F.R. § 1292.16(h)(3)(i). As an inactive recognized organization, Open Arms Community Center will have two years from the date of this letter to apply for and have approved the accreditation of one or more representatives. 8 C.F.R. § 1292.16(h)(3)(i).

Sincerely,

Steven Lang
Program Director
Office of Legal Access Programs

Exhibit 5

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

March 10, 2008

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: David L. Neal
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services

This Operating Policies and Procedures Memorandum (OPPM) replaces the guidance contained in the February 22, 1995 memorandum entitled "Pro Bono Activities."

Table of Contents

I. Introduction

Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice. This Interim OPPM provides guidance on how immigration courts and court administrators can encourage and facilitate pro bono legal services for respondents.[1]

II. Meaning of "Pro Bono"

As a general rule, a "pro bono representative" is an attorney or other representative specified in 8 C.F.R. § 1292.1 who provides legal representation without any present or future expectation of remuneration from the respondent (other than filing fees and nominal costs). Uncompensated initial consultations or initial court appearances, with the ultimate intention or goal of compensation by the respondent, are contrary to the spirit of pro bono representation. While an attorney or representative may be regularly compensated by an employing firm or organization, representation should be provided solely and honestly for the public good.

III. Facilitating Pro Bono Representation

A. Pro Bono Liaison Judge and Pro Bono Committee

A judge in each court should be designated the "pro bono liaison judge," who represents the judges of that court in interactions with outside entities regarding matters involving pro bono representation.

In addition to designating a pro bono liaison judge, courts of appropriate size and location should consider creating a pro bono committee. Committees may include, as appropriate, other judges, the court administrator, attorney advisors, judicial law clerks, and/or other interested court staff. Each court with a pro bono committee should consult its Assistant Chief Immigration Judge (ACIJ) regarding the judge and staff composition of its committee and the length of each committee member's term. For continuity's sake, the pro bono liaison judge and/or committee members should serve terms of one year or longer. Ideally, the pro bono liaison judge position (and the pro bono

[1] This Interim OPPM was generated from the recommendations by the EOIR Committee on Pro Bono, which consisted of immigration judges, court administrators, the Acting Chairman of the Board of Immigration Appeals, the Coordinator of the Legal Orientation and Pro Bono Program, and other EOIR staff. The committee met with non-profit organizations, bar associations, private law firms, the Department of Homeland Security, the Office of Refugee Resettlement in the Department of Health and Human Services, and the United Nations High Commissioner for Refugees. The Office of the Chief Immigration Judge expresses its gratitude for the committee's hard work and dedication.

committee membership as well) should rotate between judges, but the decision to rotate a liaison judge or committee member is left to the ACIJ and that court.

The pro bono liaison judge, together with the court administrator, should meet regularly with local pro bono legal service providers to discuss improving the level and quality of pro bono representation at the court. Such meetings should be used to develop and refine local procedures to encourage pro bono representation, bearing in mind the particular needs and circumstances of each court. Pro bono liaison judges should encourage and, insofar as appropriate, facilitate discussion between government and pro bono counsel. They should also consult with the EOIR Legal Orientation & Pro Bono Program (LOPBP) to strengthen the agency's public outreach and to better coordinate the agency's support of pro bono representation.

B. Training for Pro Bono Counsel

Pro bono training conferences, the Model Hearing Program (coordinated through the LOPBP), and similar efforts are effective ways to increase the available pool of pro bono representatives. Judges and pro bono committee members are encouraged to play an active part in pro bono training programs on immigration courtroom practice and procedure, where appropriate and authorized. When a judge is interested in participating in such a program, the judge must promptly forward the invitation (and any additional information) to his or her ACIJ for supervisory authorization and thereafter request approval from the EOIR Ethics Office. Judges should not accept invitations prior to receiving authorization and approval.

C. Courtroom Practices

Although EOIR is committed to completing cases promptly, the particular needs of pro bono representatives who appear before the immigration courts should also be taken into consideration. Judges are strongly encouraged to be flexible with pro bono representatives, particularly in the scheduling of hearings and in the setting of filing deadlines.

1. Pro Bono Appearances

Judges should ask representatives appearing pro bono to identify themselves as such. Pro bono representatives should be asked to annotate the Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) to reflect pro bono representation. Absent that annotation, judges should ask representatives to identify themselves orally on the record as appearing pro bono (e.g., "Jane Doe, appearing pro bono on behalf of John Smith").

When a pro bono representative enters an appearance, the court should enter the words "pro bono" in the comments field in CASE. An accurate electronic record is critical to track and to verify genuine pro bono representation.

2. Scheduling of Pro Bono Cases

Judges should be mindful of the inherent difficulties in the recruiting of pro bono representatives and the burdens pro bono representatives assume for the public good. To facilitate pro bono representation, judges are encouraged to give pro bono representatives priority scheduling at master calendars when requested.

With respect to individual calendars, judges should be cognizant of the unique scheduling needs of law school clinics operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives. Because clinics and pro bono entities often face special staffing and preparation constraints, judges should be flexible and are encouraged to accommodate appropriate requests for a continuance or to advance a hearing date.

3. Pre-Hearing Statements and Conferences

Pursuant to 8 C.F.R. § 1003.21, judges may require pre-hearing statements, including stipulations of fact. Pre-hearing statements can be especially valuable in pro bono cases, where the representative's time and resources might be limited. Judges should also encourage pre-hearing conferences between the parties to narrow the issues and to prompt the timely submission of evidence, which foster both more efficient proceedings and more efficient use of limited pro bono resources.

4. Appearance by Telephone or Video Conference

As discussed above, judges should be mindful of the difficulties and burdens facing pro bono representatives. Accordingly, judges should be flexible when a pro bono representative seeks to appear telephonically or through video conferencing (also known as televideo and VTC).

As respondents are often detained in locations that are not readily accessible, video conferencing is an attractive means for a pro bono representative to communicate with his or her client. Where EOIR video conferencing is available in conjunction with a scheduled hearing and the request to use the equipment is reasonable, courts may allow representatives to use EOIR video conferencing equipment to communicate briefly with respondents. However, courts should be careful that the use of video conferencing by representatives not disrupt court operations, and courts must be vigilant and responsible regarding the expenses associated with the use of any telecommunication equipment.

D. Legal Orientations and Group Rights Presentations

Judges and courts are encouraged to support legal orientations and group rights presentations, whether or not funded by the LOPBP. Non-profit organizations that provide such programs can greatly assist local pro bono efforts to disseminate critical legal information, prepare respondents for master calendar hearings, screen respondents for eligibility for relief, and identify cases for referral to pro bono counsel. These programs serve a vital role in providing detained respondents with access to basic legal services. They also provide a benefit to the court in that respondents better understand the proceedings when they enter the courtroom.

Judges and court administrators can facilitate orientation and rights presentations in a variety of ways. For example, liaison judges and court administrators should be attentive to operational issues for the presenters of these programs. Also, where appropriate, reasonable, and available, immigration courtrooms and EOIR video conferencing equipment may be made available to pro bono organizations to conduct presentations. Furthermore, within the bounds of reason and propriety, courts could share information that will help presenters to assemble detainees and to tailor their presentation to the specific audience.

Given the value of such programs, courts should encourage and facilitate the development of orientation and rights presentations for non-detained respondents as well.

E. Access to Respondent Information

Upon reasonable request, immigration court records should be made available to pro bono organizations and representatives, where court resources allow and the sharing of information is not prohibited by law (e.g., attorney-client privilege, the Privacy Act, 8 C.F.R. § 1208.6). Courts should support pro bono operations in their efforts to identify potential pro bono cases and, with respondents' written authorization, may share non-classified information prior to a formal entry of appearance.

If a court is concerned that an organization or representative is requesting information for a motive or purpose other than the identification of pro bono clients, the court should consult its supervising ACIJ and, as appropriate, the LOPBP Coordinator.

F. Self-Help Legal Materials

Self-help legal materials prepared by the LOPBP are valuable to anyone appearing without counsel. These materials, which are regularly reviewed and updated by the LOPBP contractor staff and EOIR's Office of the General Counsel, have the ability to increase respondents' understanding of immigration laws, removal proceedings, and the implications of their pleadings.

Approved materials are available from the LOPBP and, insofar as it is practical, courts should make these available to the public as well. Courts could make materials available upon request at the filing window and/or, if the materials are available electronically, distribute or post flyers specifying where those materials are located on the Internet.

Please note that the LOPBP welcomes comments and suggestions from judges, court administrators, attorney advisors, judicial law clerks, and other court staff on how to improve existing self-help legal materials. However, anyone in the courts who develops self-help legal materials for their location must first provide a draft to the LOPBP and the appropriate ACIJ for approval.

G. Minor Respondents

Given the particular vulnerability of minor respondents, judges are strongly encouraged to facilitate pro bono representation whenever minors are involved. Judges are reminded to employ the child-friendly practices described in OPPM 07-01 (Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children). Many of those practices can and should be applied to any case involving a minor, whether unaccompanied, accompanied, detained, or non-detained.

IV. Handling Pro Bono Cases Ethically

It is incumbent on every judge to facilitate pro bono representation. Equally important, however, is that every judge must be careful to stay within the bounds of ethics and propriety.

When encouraging pro bono representation, judges should be mindful neither to pressure representatives to appear pro bono nor to penalize representatives who do not wish to handle pro bono cases. Pro bono representation should be truly voluntary, and attorneys and other representatives should not feel compelled to appear on specific cases.

As issues regarding Department ethics and agency policy frequently arise in this area, individual judges, pro bono liaison judges, and pro bono committees should consult their supervising ACIJ and the EOIR Ethics Office. Such consultations will ensure that new programs and/or new practices are permissible. Judges are also encouraged to review their current practices and consult headquarters personnel as appropriate.

V. Conclusion

The best practices listed above are certainly not exhaustive. Judges, court administrators, attorney advisors, judicial law clerks, and all court staff are invited to submit suggestions — both to the Office of the Chief Immigration Judge and to the LOPBP — on how to encourage and facilitate pro bono representation.

Exhibit 6

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

Office of Legal Access Programs

5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

July 11, 2011

MEMORANDUM TO: Oren Root, Director
Center on Immigration and Justice
Vera Institute of Justice

FROM: Steven Lang, Program Director
Office of Legal Access Programs

SUBJECT: Legal Orientation Program
Guidelines - Orientation vs. Representation

The purpose of this memo is to provide guidance in distinguishing between services considered 'legal representation' and those considered 'legal orientation' for individuals providing contract services through the Executive Office for Immigration Review's (EOIR) Legal Orientation Program (LOP). The LOP is currently carried out through individual task orders issued under a GSA contract (known collectively as "the Contract") with the Vera Institute of Justice. While government funds under the Contract may be used for services considered legal orientation, those services considered legal representation cannot be covered by Contract funds.

The Statement of Work (SOW) of Task order #36 under Fiscal Year 2011 funding states at Section B that Contract funds "may not be used to provide 'representation' within the meaning of 8 C.F.R. § 1.1(m), and as restricted by § 292 of the Immigration and Nationality Act , 8 U.S.C. § 1362."[1] While "legal orientation" is not defined in the Immigration and Nationality Act

[1]Section 292, 8 U.S.C. § 1362: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." This section is also echoed at 8 C.F.R. § 1003.16(b): "The alien may be represented in proceedings before an Immigration Judge by an

(INA), nor at Title 8 Code of Federal Regulations, "representation" is defined at 8 C.F.R. §§ 1.1(m) and 1001.1(m): "The term *representation* before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section."

> 8 C.F.R. §§ 1.1(i) and 1001.1(i) - "The term *practice* means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board."
>
> 8 C.F.R. §§ 1.1(k) and 1001.1(k) - "The term *preparation*, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure."

There are five specific tasks under Section A of the SOW, as well as three other associated services not mentioned in the SOW that need to be examined in light of such restrictions.

1. Group Orientations - SOW Sections A(5) and A(6)
2. Individual Orientations - SOW Section A(9)
3. Acknowledgement of Non-Representation - SOW Section A(10)
4. Distribution of Materials - SOW Section A(12)
5. Self-Help Workshops - SOW Section A(13)
6. Assistance in Obtaining Documents
7. Assistance in Completing Legal Forms
8. Legal Representation and other advocacy under non-LOP funding

1. Group Orientations

> *A(5) - Provide group orientations to all detained aliens, who are or may be placed in immigration removal proceedings, (with reasonable exceptions to be approved by the COTR), prior to their initial Master Calendar Hearing in the Immigration Court... Group orientations will review the range of rights available to detained aliens in immigration proceedings, and alert these individuals to their alternatives or the lack thereof.*
>
> *A(6) … The presenters will respond to general concerns of individuals in group question and answer periods held during the group orientations.*

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attorney or other representative of his or her choice in accordance with 8 C.F.R. part 1292, at no expense to the government."

The group orientation is informational and non-specific to any particular individual's case. It should cover general areas of law and procedure, and familiarize individuals with their legal rights, responsibilities and options in general terms. As such, it is not considered representation. The presenter does not "appear in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client," nor is the presenter "studying the facts of a [specific] case" and giving "advice and auxiliary activities, including the incidental preparation of papers...."

2. Individual Orientations

> *A(9) - Provide individual orientations when requested by unrepresented individuals and as specified in the POP[2]. The individual orientations are intended to assist individuals in understanding their legal situations. The presenters may respond to specific concerns/questions of an individual regarding matters of immigration law and procedure. Individual orientations should be distinguishable from consultations with legal representatives to avoid the appearance of representation to the individuals.*

The purpose of the individual orientation is to elicit information from unrepresented individuals in order to assist them in understanding their legal situations, including the availability of potential relief from removal and release eligibility, as well as in distinguishing between meritorious cases and frivolous cases.[3] The presenter may respond to specific concerns/questions of an individual, generally educating the individual in law and applicable procedure, as well as in the requirements for pursuing particular forms of relief. The presenter should be very careful not to give legal advice concerning the individual's specific case.

Under regulations at 8 C.F.R. §§ 1.1(k) and 1001.1(k), "preparation constituting practice" (and thus representation) does not occur unless the legal representative (1) studies the facts of the case, (2) gives legal advice, *and* (3) performs other activities, such as the preparation of forms or a brief for the Immigration Court. Providing even one of these three services, though, may lead to circumstances in which an attorney-client relationship is created under local state bar rules (for example, if the attorney provides specific legal advice regarding a particular action), and could constitute the unauthorized practice of law if provided by a non-attorney/accredited representative. Under guidelines published by the American Bar Association (ABA), the existence of an attorney-client relationship is based on the "subjective understanding" of the potential client.[4]

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[2] Program Operation Plan (POP)

[3] Section 2(G) of the LOP Statement of Work copies the language from the original Senate version of the appropriation bill, stating that presentations were to "provide immigration detainees with essential information about immigration court procedures and the availability of legal remedies to assist detainees in distinguishing between meritorious cases and frivolous cases." See page 39 of the Senate Appropriation Committee Report from the Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act for Fiscal Year 2002 (P.L. 107-77).

[4] LOP providers should familiarize themselves with their respective State Bar rules regarding actions which may form the basis of an attorney-client relationship and make all diligent efforts to avoid these while performing LOP-contracted services. The following link provides information about various

For this reason, it is important to distinguish between *information provided as part of an individualized assessment* and *legal advice*. The Contract and regulations allow for the provision of information through an individualized assessment as long as such services do not include the giving of advice and other activities. The concept of *advice* is directive ("I suggest you apply for this relief") and not *informational* ("If you are interested in applying for this type of relief, this is what the Immigration Law requires").

In addition, individual orientations must be conducted in a manner that is clearly distinguishable to detainees from consultations with legal representatives to avoid the appearance of an attorney-client relationship (representation) to the individual, to other detained individuals, and to detention facility staff. Best efforts should be taken to hold the individual orientations during a time and at a location in the detention facility where consultations with legal representatives are not taking place. Moreover, relevant detention facility staff should be regularly reminded of the limited role of the presenter during the individual orientation in order to avoid any confusion.

3. Acknowledgement of Non-Representation

> *A(10) - Explain to all aliens receiving an individual orientation that the presenter is not their attorney or representative… The presenter shall also obtain written acknowledgment from the individual stating, in effect, that the individual understands the presenter is not his/her attorney or representative, that the individual has voluntarily given his/her information, and that there is no guarantee of pro bono representation in the individual's case.*

At the beginning of the individual orientation, the presenter should have all individuals sign a disclaimer acknowledging, in effect, that (1) they understand that the presenter is not their attorney or representative; (2) that they are willingly providing their personal information; (3) that they authorize its disclosure to other parties for the purpose of obtaining pro bono/volunteer legal assistance; and (4) that there is no guarantee of pro bono representation in their cases. Additionally, presenters should be aware of their responsibilities under the Privacy Act at 5 U.S.C. § 552(a) et. seq. and the confidentiality provisions at 8 C.F.R. §§ 208.6 and 1208.6.

State Bar definitions for the practice of law: http://www.abanet.org/cpr/model-def/model_def_statutes.pdf. The ABA's Model Rules of Professional Responsibility are available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. In particular, see Model Rule 6.5 "Nonprofit and Court Annexed Limited Legal Services Programs" which is applicable to all states except Oregon (which follows the Model Code). Those admitted to the California State Bar should review California's rules since it follows neither the Model Rules nor the Model Code. Finally, useful links for finding state law rules involving representation and the attorney-client relationship are the Cornell University Law School, American Legal Ethics Library, Comparative and Topical Index and State Law links at http://www.law.cornell.edu/ethics/comparative/ (index of comparative law) and http://www.law.cornell.edu/ethics/comparative/rules topical.html (topical index by State).

The following is sample language that can be provided to LOP participants prior to the start of an individual orientation session that may be helpful in both clarifying the role of the LOP subcontractor while obtaining written evidence that the participants were notified of this limited role. The sample language is as follows:

> Sample Acknowledgment Language for use at the beginning of an individual orientation session:
>
> I,_____, understand that *[name of LOP staff person*] from *[LOP Subcontractor]* is here to help inform me of my legal rights, help me understand the legal process, and assist me in finding a free attorney, if possible. *[Name of LOP staff person*] from *[LOP Subcontractor]* is not my attorney, and will not appear in court on my behalf. I understand that I should begin looking for a private attorney if I am able and want to be represented.
>
> I also understand that the information I give *[name of LOP staff person*] from *[LOP Subcontractor]* about my case may be given to other people for the purpose of obtaining free legal services with my case
>
> _____ _____
> Signature Date

If an individual in search of representation seems able to afford a private attorney, the presenter should not refer the individual to a particular attorney. However, the presenter may refer the individual to a bar-associated attorney referral service (e.g., the AILA Immigration Attorney Referral Service) or to an inclusive list of attorneys who represent individuals at the detention facility. LOP providers should not restrict which attorneys are included on this list. LOP staff are reminded that such general lists of immigration providers intended for distribution to detained individuals must first be reviewed by EOIR and may also require the approval of local ICE and the facility. Further, any list distributed by an LOP provider should not be on EOIR agency letterhead or the letterhead of any immigration court. The list must include a disclaimer stating that: (a) the list is being provided by the LOP provider as a courtesy, (b) there is no guarantee of representation by any of the listed attorneys, and (c) neither the Department of Justice nor EOIR controls, maintains, or screens the list, or endorses any individuals or organizations on the list. While EOIR may review the lists to ensure that they contain the proper disclaimers, EOIR cannot give guidance on or select who should be included on the lists. Finally, the maintenance and distribution of an attorney list is within the discretion of each LOP provider, and each provider should contact the relevant state bar association to confirm that the proposed list would not violate state bar restrictions on attorney advertising or referrals.

4. Distribution of Materials

> *A(12) - Distribute to individuals at the group orientation and individual orientation appropriate written legal orientation and other relevant and informative materials, as well as make available any relevant taped materials. All such materials intended for distribution under this agreement must be pre-approved by the COTR.*

Presenters may only distribute to individuals written and relevant taped materials that have been pre-approved by EOIR, such as those relating to how a particular type of legal relief may be pursued, or standard sample motions and briefs designed to assist unrepresented individuals appearing before the Immigration Court. However, the preparation and/or provision of any case-specific written materials (i.e., those created or specifically tailored to the individual's particular circumstances) may not be performed using LOP funding. In addition, case-specific written materials prepared using non-LOP funding may not be provided to individuals at the group orientation, individual orientation, or group workshop, and they should only be provided in a manner that is distinguishable to the individual and other detainees from activities covered by the Contract.

5. Self-Help Workshops

> *A(13) - Provide "self-help workshops" in accordance with the POP for unrepresented individuals interested in pursuing relief from removal (including voluntary departure), custody redetermination, or subject to special procedures (i.e. Temporary Protected Status, reinstatement of a previous order of removal/deportation, "reasonable fear" or "credible fear" proceedings, and aliens eligible for post-removal order review). The purpose of the self-help workshop is to inform and assist small groups of individuals in understanding the relevant law and procedures to be followed in pursuing particular forms of relief, custody redetermination, or in understanding special procedures in place, that may apply to their own legal situation…*

The setting of the self-help workshop should be that of a classroom, in which unrepresented detainees are trained to assist themselves in pursuing forms of legal relief, including the collection of information and documents and the preparation of papers. As legal professionals who hold themselves out as knowledgeable in immigration law, presenters cannot assist in the direct preparation of an individual's papers (which would constitute performance of "auxiliary activities" under 8 C.F.R. §§ 1.1(k) and 1001.1(k)), except regarding the clerical completion of forms as provided below. Self-help workshops should only be scheduled for multiple participants. In the event that only one of the scheduled LOP participants appears for a scheduled self-help workshop, the LOP presenter may proceed with the session as an individual orientation (and count it as such in the database). However, self-help workshops should not be initially scheduled for one individual.

6. Assistance in Obtaining Documents

LOP presenters may assist LOP participants in obtaining personal documents (such as medical or criminal conviction records) under LOP funding. However, such assistance should only be provided to unrepresented individuals who have independently determined that such documents are necessary for their immigration case, and who have made all diligent efforts to obtain these materials themselves. While assistance in obtaining documents does not constitute representation under the regulations cited above, LOP presenters are nevertheless cautioned that they may be held liable under other laws for any errors they commit in performing such services. It is recommended that before undertaking any such services: (1) the LOP participant provide to the presenter written authorization allowing the presenter to obtain the specified items on behalf

of the participant; (2) the LOP participant acknowledge in writing that the LOP presenter is not acting as his/her representative; and (3) the LOP presenters consult with their malpractice insurers to determine if performing such services subjects them to potential liability when not carried out successfully. It is also suggested that LOP presenters, where possible, assign such clerical tasks to other staff in order to distance themselves further from any appearance of representation, practice, or preparation activities.

7. Assistance in Completing Legal Forms

LOP presenters may assist unrepresented LOP participants with completing immigration forms under LOP funding. However, to ensure that the presenters do not engage in representation as defined by 8 C.F.R. §§ 1.1(m) and 1001.1(m), LOP presenters should only provide such services in adherence to the guidelines set forth above at section 2, as well as with the additional guidelines set forth below:

A. LOP presenters must limit these services to helping unrepresented participants fill in the blank spaces on immigration forms. The assistance must be clerical in nature, but can include general information on how to complete the form. The LOP presenter may translate what is written on the form and explain any language that is unclear. However the LOP presenter must fill in the blanks with the individual's answers and may not advise the individual on how to answer a question based on a participant's particular factual situation and the applicable law.

B. The LOP presenters may not select specific immigration forms for an individual to complete. Rather, presenters may provide information on various forms generally and how to complete them. Once an individual selects a form or is provided a form by an Immigration Judge, the LOP presenters may meet one-on-one with the individual to assist with filling in the blanks on such pre-selected forms.

C. After an individual completes the form with the assistance of the LOP presenter, the LOP presenter should read it back to the individual and ask the individual to confirm its accuracy. This read-back must occur before the individual signs the form stating that all the information on the form is true to the best of his/her knowledge. Additionally, the LOP presenter must sign the form as the preparer, if required by the form.

D. Supervising attorneys may review applications completed by another authorized representative or immigration assistant. However, the type of feedback the reviewer may give is limited. A reviewer may confirm that the individual has completed each line that is required to be filled in, that required signatures are given, and that the necessary attachments are present. The reviewer may not, however, provide advice on how to answer a question.

8. Providing Legal Representation

While LOP presenters are not prohibited under the Contract from providing direct legal representation using non-LOP funding, best efforts should be taken to carry out such legal representation services in a manner clearly distinguishable and separately accountable from LOP-funded services. In addition, legal representation of individuals identified through the LOP must be limited to pro bono work (i.e., no charge to the client beyond possible filing fees or other nominal expenses).

Similarly, presenters should refrain from any activities related to fund-raising, political/issue advocacy, impact litigation, or other legal support activities if performed in a manner that would not be clearly distinguishable from LOP-funded services. The key consideration is 'appearance' to the non-LOP individual.

If an LOP presenter is considering personally accepting a case for pro bono representation, she/he should consider the use of a third party (who may be on the subcontractor's staff) to broker the relationship. Under such an arrangement, the presenter would not appear to be in the position of deciding whether or not to accept the case.

***

This memo replaces any previous guidance to LOP presenters regarding permissible services under LOP funding. LOP presenters are further advised to be cognizant of the requirements of their respective state bars. If you have any additional questions concerning any of the issues explained above, please contact Steven Lang, Program Director of the EOIR Office of Legal Access Programs at 703-305-1295.