

## **BIA RECOGNITION OF NONPROFIT AGENCY OFFICES AND ACCREDITATION OF STAFF AT THOSE OFFICES**

### **INTRODUCTION**

The federal regulations at 8 CFR §§ 292.1 and 1292.1 list six categories of people who may *represent* foreign nationals for immigration purposes. The two most common categories are attorneys and Board of Immigration Appeals (BIA) *accredited representatives*. This article focuses on the process by which a nonprofit agency can apply for *recognition* by the BIA to provide immigration legal services and the process by which a BIA-recognized agency can apply for BIA-*accreditation* for its staff so that they will not be engaged in the unauthorized practice of law.

Only federal law authorizes who can *represent* foreign nationals for immigration purposes, who can *practice* before the U.S. Department of Homeland Security (DHS) and before the Executive Office for Immigration Review (EOIR) immigration courts and the Board of Immigration Appeals, and who can *prepare* immigration cases before the DHS and EOIR. In effect, the federal law describes who can provide *legal* services to foreign nationals for immigration purposes.

Even though some states might have laws or some cities might have ordinances that regulate *immigration consultants* who provide “immigration” services, only federal law can authorize who provides immigration “legal” services. Therefore, beware of so-called “immigration consultants,” or “*notarios*,” who are providing legal services under the auspices of a state law or city ordinance because they might be involved in the *unauthorized practice of law*.

### **WHY OBTAIN AGENCY RECOGNITION AND STAFF ACCREDITATION?**

There is immense concern about the unauthorized practice of immigration law. Many lower-income individuals turn to immigration consultants, travel agents, or *notarios* to process their immigration papers. When ill-trained and/or unscrupulous consultants attempt to provide services that they do not have the legal authority or knowledge to provide, the consequences can be devastating. Nonprofit immigration legal service programs devote a significant portion of program time to correcting mistakes of unauthorized practitioners.

In order to avoid engaging in the unauthorized practice of law, it is particularly important that nonprofit immigrant legal service organizations apply for BIA recognition for their agencies and BIA accreditation for their staff. BIA-recognition and accreditation helps to assure high quality legal representation.

In the absence of an attorney, all offices where immigration cases are being handled must receive BIA-recognition and all non-attorney staff doing immigration legal work must become accredited. If non-attorneys are providing immigration legal services while working for a travel agency or a so-called *notario*, then they are engaged in the

unauthorized practice of law. Even if the non-attorney staff of a nonprofit immigration legal service organization are providing legal services without the agency being recognized or if the non-attorney is not BIA-accredited, then s/he is engaged in the unauthorized practice of law.

For attorney-driven agencies, having an attorney allows the rest of the staff (e.g., paralegals) to function under that attorney's supervision. The non-attorney legal staff, however, cannot be the actual legal representative for the clients. The requirement to provide legal services under the supervision of an attorney is a state-law issue. Attorney-driven agencies should look to their state professional responsibility rules for guidance on their responsibilities regarding non-attorney assistants.

Although attorney-driven agencies are not required to apply for BIA-recognition and accreditation, such agencies should consider applying for BIA recognition for the agency and accreditation for the non-attorney legal workers because it will give the agency more flexibility to have non-attorney staff with more responsibility and autonomy – and in turn allow the agency to expand the provision of legal services. A BIA accredited representative will have more autonomy than an unaccredited legal worker because the BIA accredited representative can be the named and official legal representative of the client rather than working as a legal assistant for an attorney.

### **WHAT IS THE PRACTICE OF LAW FOR IMMIGRATION PURPOSES?**

The federal regulations at 8 CFR §§ 1.1(i) and 1001.1(i) define the term *practice* as:

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.

The term “Service” refers to the United States Citizenship and Immigration Services (USCIS), the United States Immigration and Customs Enforcement (USICE), and the United States Customs and Border Protection (USCBP). 8 CFR §§1.1(c) and 1.001(c). The term “Board” refers to the Board of Immigration Appeals (BIA). 8 CFR §§ 1.1(e) and 1.001(e). It also implicitly incorporates the immigration courts for purposes of *practice*. *Practice* includes assessing the facts of a case and advising someone concerning how to obtain an immigration benefit. See Legal Opinion, INS Office of General Counsel, HQCOU 90/15-C, April 13, 1999 [hereinafter “INS 1999 General Counsel Memo”] (reprinted in 77 Interpreter Releases 1398-99 (Sept. 25, 2000).

The federal regulations at 8 CFR §§ 1.1(k) and 1001.1(k) define the term, *preparation, constituting practice*, as:

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.

The federal regulations at 8 CFR §§ 1.1(m) and 1001.1(m) define the term *representation* before the Board to include *practice* and *preparation* as defined above. In practical terms, however, *representation* of foreign nationals for immigration purposes is before not only the Board but also the USCIS, the USICE, the USCBP, and the EOIR immigration courts.

Considering the concept of *representation* of foreign nationals for immigration purposes as incorporating *practice* and *preparation* activities before the DHS and the EOIR, an entity that is not a law firm cannot represent foreign nationals before the DHS or the EOIR unless it is recognized by the BIA. See INS 1999 General Counsel Memo supra. The *practice* of immigration law also includes “advising individuals concerning the selection, completion, and filing of Service forms, in addition to actually appearing before a Service Officer.” See Memorandum from INS Commissioner, Doris Meissner, entitled “Practice of law by unlicensed ‘immigration brokers,’” [hereinafter Meissner Memo] (January 18, 1995) (reprinted in 72 Interpreter Releases 538-39 (April 17, 1995)).

Practitioners should be aware that even though selecting and completing an immigration form, such as a Form N-400, Application for Naturalization, or a Form I-765, Application for Employment Authorization, might seem like a simple, non-legal service that they are providing for their clients, it is nevertheless a *legal* service that they are providing because it requires that the practitioner make a legal conclusion that the client is in fact eligible for the immigration benefit for which the practitioner selected the form. Accurately determining whether someone is eligible for an immigration benefit requires that the practitioner have “extensive knowledge of often complex immigration laws and their applicability to individual cases.” See Meissner Memo supra.

A common example of so-called “immigration consultants” or *notarios* harming the immigration cases of unsuspecting foreign nationals is when they file asylum applications on behalf of undocumented foreign nationals who do not fear persecution. Often such foreign nationals are merely looking for a way to regularize their status and obtain work authorization. They cannot read, speak, nor write English. The immigration consultants select and complete the Form I-589, Application for Asylum, either knowing that the foreign national does not fear persecution or not bothering to make a determination as to whether the foreign national fears persecution. The immigration consultant has the foreign national sign the asylum application but the foreign national does not understand what s/he is signing. The immigration consultant advises the foreign national that s/he will receive her/his “papers.” Although the foreign national may receive a work permit for having an asylum application on file with the government, eventually the asylum application will be denied because there is no fear of persecution. The result will be that the undocumented foreign national is placed into removal proceedings.

The sad thing about this scenario is that when such foreign nationals receive their work permits other undocumented foreign nationals in the community will approach the immigration consultant or *notario* to file the same sort of baseless asylum application because they believe that they will also get their work permit. Ultimately, unless they are actually qualified for the benefit for which they are applying, undocumented people will end up in removal proceedings for filing such applications.

Because the list of circumstances, whether criminal or immigration, that may put a foreign national into removal (i.e., deportation) proceedings is so extensive nowadays, practitioners must ensure that they screen clients for such offenses so that they do not file an application for someone who may appear eligible for a benefit but who is in fact barred because of some previous offense. Screening for such bars is an essential part of *practice* that “immigration consultants” are not authorized to provide.

### **ATTORNEYS**

For those attorney-driven agencies that are providing immigration legal services, it is worth noting a few points about the regulation of attorneys. This information is supplemental to the information necessary for agencies to apply for BIA recognition.

In general, each state in the United States regulates who can practice law in the respective state. Most often the regulation of the practice of law in each state is carried out through the licensing of attorneys. To practice law in that state, an attorney generally must be licensed in that state.

Immigration law is not state law. Instead, it is federal law. Therefore, usually, if a person is licensed as an attorney in at least one state of the United States or the District of Columbia, then s/he can practice federal immigration law in any other state without having to seek licensing in the other state. See generally, 8 CFR §§ 1.1(f) and 292.1(a)(1) and 1001.1(f) and 1292.1(a)(1) and 5 U.S.C. §500(b).

Before practicing immigration law in a state where the attorney is not licensed, however, the attorney should verify her/his authority to practice immigration law – and any limitations imposed on that authority -- in that state so as not to run afoul of the state attorney licensing regulations. For example, some states may require that attorneys who are not licensed to practice law in that state must include a notice with their professional materials or advise clients at the start of cases that “practice is limited to immigration law.” This restriction is geared toward warning potential clients that the attorney can provide legal advice in only one area. Similarly, it is aimed at preventing out-of-state attorneys from holding themselves out to potential clients as having authority to practice the law of the state where they are not licensed.

## **HOW DOES A PROGRAM APPLY FOR BIA AGENCY SITE RECOGNITION AND STAFF ACCREDITATION?**

This process is straightforward and relatively simple. Gathering the documents, writing the letter of request, and completing the one-page form can all be accomplished in a day. Once the BIA receives the application, however, adjudication time varies. It can take a few months to a year for a decision, but CLINIC is advocating with the BIA to try to get the process to move more quickly. To save time, agencies may file recognition and accreditation applications at the same time in one letter.

### **I. ORGANIZATIONAL RECOGNITION BY THE BIA UNDER 8 CFR § 292.2(b) & § 1292.2(b)**

#### **A. REQUIREMENTS**

The requirements for agency recognition are the following:

- The organization must be a nonprofit religious, charitable, social service or similar organization.
- The organization may charge *nominal* fees.
- The organization must not charge excessive membership dues to persons receiving services.
- The organization must have adequate immigration knowledge, information, and resources at its disposal.
- The organization must have an independent existence apart from its proposed representative, i.e., the organization must be a legitimate nonprofit, charitable organization and not merely established to provide a means through which a non-lawyer can practice law. *Matter of Baptist Educational Services Center*, Int. Dec. 3210 (BIA, 1993).

#### **B. PREPARING THE RECOGNITION APPLICATION FOR THE AGENCY OFFICE**

CLINIC recommends that the application packet include the following:

- Completed form EOIR 31, Request for Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization, which can be found at: <http://www.usdoj.gov/eoir/formslst.htm> (last visited August 4, 2006). A separate Form EOIR-31 must be filed for each branch office of an organization which is seeking recognition. Therefore, if one agency has multiple offices spread out over a large geographic area and it wants all offices recognized, then it must submit an EOIR-31 for each location – and each location must demonstrate that it has adequate knowledge, information, and experience in immigration law.
- Copies of the organization's charter, articles, bylaws.
- Copies of a fee schedule for immigration legal services with a note that no one will be denied service based on inability to pay.

- Evidence of tax-exempt status, such as a copy of the organization's 501(c)(3) letter.
- Statement and listing of the organization's sources of funding and the amount of money that each source will account for. Please note that the BIA is requiring more specific information than it has been in the past. The Executive Director of your organization may list the sources of funding in a letter. For example:
  - \$30,000 – agency subsidies
  - \$10,000 – ABC Foundation
  - \$10,000 – United Way
  - \$15,000 – XYZ government grant
  - \$6,500 -- Fees (projected)
- A detailed statement of the experience, information, and knowledge of the organization on immigration. The statement should describe:
  - the number of staff, the experience of each staff member, the supervisory system and the system of quality control of staff work and the technical support organizations to which the organization belongs or has access, such as CLINIC.
  - A list of library resources which at a minimum should include current editions of the Immigration and Nationality Act and the Code of Federal Regulations and may also include manuals, such as CLINIC's practitioner's guides.
  - Periodicals on immigration law that the organization subscribes to such as the *Catholic Legal Immigration News*.
  - If the organization has Internet access that should also be mentioned, since advocates can use the USCIS, EOIR and other websites to locate immigration law regulations, cases, forms and obtain information through joining list-serves. Where appropriate indicate that all staff have access to the internet and that they are familiar with how to access the sites that have information about immigration law and procedure. List at least a half dozen websites that the agency uses for immigration law and procedure.
  - Staff resumes and letters of recommendation. Letters of recommendation can be particularly helpful if they come from leaders in the community who can write about how helpful the organization has been to the community or how important the organization's services are to the community. Letters of recommendation can also come from other agencies that collaborate with the organization and therefore can speak to the organization's workings. Letters of recommendation might also come from current or former clients, who can write about how the organization helped them in the past or is helping them now.
- Statement to support the staff's adequate immigration knowledge and experience.
- Copies of agendas for training sessions that the organization's staff has attended.

The suggested submissions regarding staff resumes, a statement about the staff's immigration knowledge and experience, and copies of agendas from training sessions that

the staff have attended are not essential to a BIA *recognition* application, because they pertain more to an *accreditation* application, but they might be helpful to a recognition application if they can convey to the BIA that the agency has access to adequate knowledge, information, and experience in immigration law and procedure. An agency simultaneously seeking BIA recognition and staff accreditation can do so in one letter and the staff's experience and knowledge in immigration law can be used to meet the requirement that the agency have experience and knowledge in immigration law.

File the original application at the BIA with a certificate of service showing that a copy has been sent to the local district director of the United States Citizenship & Immigration Services (USCIS) and a copy has been sent to the local Special Agent-in-Charge (SAC) of the United States Immigration and Customs Enforcement (USICE).

The mailing address for the Recognition and Accreditation Program Coordinator at the BIA is included on Form EOIR-31, Request for Recognition. If you have questions for the BIA Recognition and Accreditation Program Coordinator, you can call (703) 305-9385.

The address for the local USICE Special Agent in Charge can be found online at: <http://www.ice.gov/about/investigations/contact.htm> (last visited August 4, 2006).

The address for the local USCIS District Director can be found at: <http://www.uscis.gov/graphics/fieldoffices/index.htm> (last visited August 4, 2006).

### **WHAT ARE NOMINAL CHARGES?**

The federal regulations direct that in order to obtain BIA recognition, agencies must make "only nominal charges and assess no excessive membership dues for persons given assistance." 8 CFR §§ 292.2(a)(1) and 1292.2(a)(1). There is no formal definition of *nominal*. The Executive Office for Immigration Review (EOIR) stated that the *nominal* charge requirement ensures that recognized agencies "are in fact charitable, are serving low-income or indigent clients, and are not representing their clients for profit." Department of Justice, Request for Comment, "Executive Office for Immigration Review; Representation and Appearance," 60 Federal Register 57200-01 (Nov. 14, 1995).

The Board of Immigration Appeals has interpreted the term *nominal* as meaning "a very small quantity or something existing in name only as distinguished from something real or actual." Matter of American Paralegal Academy, Inc., 19 I&N Dec. 386 (BIA 1986). In American Paralegal, the BIA stated that merely because a nonprofit, religious, charitable, or social service organization charged substantially less than law firms, that was not the proper standard for determining whether such charges were *nominal*. To wit, merely because an agency charges less than what a private attorney commonly charges is not automatic proof that the agency is charging *nominal* fees.

American Paralegal holds that the creation of the *nominal* fee requirement was not

intended as a way for agencies to fund themselves. Nor was it intended as a way for people who can pay for services to off-set the expenses of those who cannot pay the fees. Therefore, agencies that rely exclusively on fees to run their program will presumably have difficulty obtaining BIA recognition. In practice, this does not mean that fees must be a pittance. Despite the ambiguity of the term *nominal charge*, fees may go up to several hundred dollars for more complex and/or labor-intensive services.

In light of the American Paralegal decision, agencies should consider some balance between *nominal* fees to cover costs of services and other funding sources, including grants from foundations and from the government as well as donations. Note that donations are not fees. Donations are something that is voluntarily given. Fees are paid in exchange for a service provided. Donations are not required by an agency in return for a service. A donation is a gift or contribution given to the agency with nothing expected in return.

An agency that seeks to apply for BIA recognition should consult with sister agencies in the community or region, which have BIA recognized status, to seek advice on fee charts. CLINIC field attorneys provide this assistance to member agencies. Moreover, when developing fee charts, agencies should include a prominent statement on the chart indicating that no one will be turned away for inability to pay. Essentially, this is an acknowledgement that agencies should have either a sliding fee schedule, installment payment plan, and/or a fee waiver process that will permit access to services by people who otherwise could not afford services.

The requirement that the applicant for recognition not charge “excessive membership dues for persons given assistance” in practice applies to agencies that charge membership dues (e.g., unions). For example, a union that charges membership dues to its union members should not make those dues inordinate or unreasonable. This particular requirement for BIA recognition generally will not apply to CLINIC member agencies because such agencies do not charge membership dues to clients.

## **II. INDIVIDUAL STAFF ACCREDITATION TO REPRESENT UNDER 8 CFR § 292.2(d) & § 1292.2(d)**

### **A. ELIGIBILITY**

The following are the requirements for staff accreditation:

- Must be applied for by a recognized organization or an organization which is applying for recognition at the same time.
- Must have experience and knowledge of immigration law.
- Must be of good moral character.

### **B. TYPES OF ACCREDITATION**

There are two levels of accreditation: (1) partial accreditation, where the staff member may represent people at USCIS interviews and examinations, and before the USICE and the USCBP; and (2) full accreditation, where the staff member may represent people before USCIS, USICE, USCBP, in Immigration Court, and before the BIA.

### **C. PREPARING THE APPLICATION FOR INDIVIDUAL STAFF ACCREDITATION**

There is no EOIR form for a request for accreditation for agency staff. A request can be submitted in a letter on the agency's letterhead. Assemble the following documents or take the following steps:

- Letter from agency director requesting partial or full accreditation of the staff member including statement that staff person has adequate experience and knowledge of immigration law and is of good moral character.
- Resume specifically documenting experience with, knowledge of, and training in immigration law.
- Letters of support are helpful; particularly if they are from other immigration law practitioners who can write first-hand about the staff person's experience with or knowledge of immigration law and the staff person's good moral character.
- File the original application at the BIA with a certificate of service showing that a copy has been sent to the local District Director of the USCIS and a copy has been sent to the local Special Agent-in-Charge of the USICE.

Another manual on this subject is the ABA's "BIA Accreditation and Entering Immigration Appearances." To order it send \$12.25 to: Commission on Immigration at the American Bar Association, 740 15th Street, Washington, D.C. 20005. Make check payable to "ABA Commission on Immigration." For more information on this publication call (202) 662-1005.

## **List of Attachments**

1. 8 CFR § 292.2 describing requirements for recognized agency status and accredited representative status (note this section is also duplicated at 8 CFR § 1292.2).
2. EOIR Fact Sheet on agency recognition and staff accreditation (revised as of March 20, 2006)
3. Application Form EOIR-31, Request for Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization (revised as of December 2005).
4. 8 CFR § 1003.101-03, excerpts from federal regulations on professional conduct for practitioners.
5. List of BIA precedent decisions dealing with BIA Recognition and Accreditation.
6. List of District Offices of the USCIS.
7. List of Special Agent-in-Charge offices of the USICE.