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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1292

[EOIR Docket No. 18-0301; RIN 1125-AA83]

Professional Conduct for Practitioners, Scope of Representation and Appearances

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Advance notice of proposed rulemaking with request for comment.

SUMMARY: The Department of Justice (Department) is evaluating the possibility of revising the rules and procedures governing representation and appearance during proceedings before the Executive Office for Immigration Review's (EOIR) immigration courts and Board of Immigration Appeals (BIA). The Department is considering whether to amend those rules to allow for, and identify the nature and scope of, authorized practitioners' limited representation of aliens before EOIR. The Department is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public suggestions for any such potential amendments to the relevant portions of EOIR's regulations.

DATES: The Department invites written or electronic comments from members of the public submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight Eastern Time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 18-0301 or

RIN 1125-AA83, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18-0301 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.

- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. Contact Telephone Number (703) 305-0289.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305-0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to submit written data, views, or arguments on all aspects of this ANPRM. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from any regulatory changes related to these matters.

Please note that all comments received are considered part of the public record and made available for public inspection at www.regulations.gov. Such information includes personally

identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONALLY IDENTIFIABLE INFORMATION" in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment and precisely and prominently identify the confidential business information of which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov*. Personally identifiable information and confidential business information provided as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the FOR FURTHER INFORMATION CONTACT paragraph above for the agency counsel's contact information specific to this rule.

II. Background

The Immigration and Nationality Act (INA) provides that aliens appearing before an immigration judge and on appeal before the BIA "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." INA § 240(b)(4)(A) (8 U.S.C. 1229a(b)(4)(A)); *see also* INA § 292 (8 U.S.C. 1362).

Attorneys in good standing and accredited representatives approved by EOIR are eligible to represent respondents in EOIR proceedings, as well as certain other persons as provided in 8 CFR 1292.1.

In order to represent an alien before EOIR, an attorney or representative must meet the regulatory requirements, including the filing of a Notice of Entry of Appearance as Attorney or Representative before the Immigration Court (Form EOIR-28) or a Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27), as appropriate. *See* 8 CFR 1003.3(a)(3), 1003.17, 1003.38(g), and part 1292. Representation continues in the proceedings for which an attorney or representative enters an appearance before EOIR, whether it is front of the immigration court or the BIA. The representation continues until and unless the immigration judge or the BIA, whichever applies, grants an oral or written motion to withdraw or substitute. *See* 8 CFR 1003.17(b), 1003.38(g), 1292.4(a).¹

Historically, EOIR did not permit limited appearances by attorneys and accredited representatives. That is, prior to a regulatory change published in 2015, an attorney or accredited representative who entered an appearance on behalf of a respondent for any purpose was deemed to be the person's representative for purposes of all of immigration court or BIA proceedings for which they entered an appearance, including bond proceedings and removal proceedings.

¹ In 2003, the Attorney General redesignated the previous regulations in 8 CFR parts 3 and 292, relating to EOIR, as 8 CFR parts 1003 and 1292 in connection with the abolition of the former Immigration and Naturalization Service and the transfer of its responsibilities to the Department of Homeland Security. 68 FR 9824 (Feb. 28, 2003). Under the Homeland Security Act, EOIR (including the BIA and the immigration courts) remains under the authority of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). 8 CFR 1292.4(a) (previously 8 CFR 292.4(a)) provides that withdrawal/substitution of counsel before the BIA is permitted in accordance with 8 CFR 1003.36 (previously 8 CFR 3.36). However, 8 CFR 3.36 (later 8 CFR 1003.36) was redesignated as 8 CFR 3.38 (later 8 CFR 1003.38) in April 1992. *See* 57 FR 11568, 11570 (Apr. 6, 1992). Thus, the correct reference in 8 CFR 1292.4(a) should be to 8 CFR 1003.38(g). Further, the reference to 1003.16 should be understood as a reference to 1003.17.

In 2015, the Department published a final rule to allow representatives “to enter an appearance solely to custody and bond proceedings before the Immigration Court” by amending 8 CFR 1003.17(a). 80 FR 59500 (Oct. 1, 2015). In response to a comment seeking a broadening of the limited scope of representation permitted, the Department noted that the regulations would still require “a representative of record to represent an individual in all aspects of each separate type of proceeding, unless the immigration judge grants a motion to withdraw or substitute counsel.” 80 FR 59501. Therefore, when an attorney or authorized representative enters an appearance before an immigration court, the appearance may be entered for representation in “custody or bond proceedings only, any other proceedings only, or for all proceedings” before an immigration judge. 8 CFR 1003.17(a).

In any case appealed to the BIA, the alien may also be represented by an attorney or representative. *See* 8 U.S.C. 1362. Representation before the BIA continues until and unless withdrawal or substitution of attorney or representative is permitted. *See* 8 CFR 1003.38(g), 1292.4(a).

In addition to the foregoing regulations dealing with appearances, the current EOIR regulations also include definitions pertaining to practice. *See* 8 CFR 1001.1(i) and (k):

(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 DHS, or any immigration judge, or the Board.

* * * * *

(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.

The Department is now considering further revision to EOIR's regulations governing the rules of practice and the scope of appearance and representation in proceedings before the immigration courts and the BIA.

III. Request for Public Comments

Before proposing any specific regulatory text for public comment, the Department is seeking preliminary input from the public. In addition to soliciting suggestions and comments in responses to the specific questions raised in this ANPRM, the Department is particularly interested in hearing from all those who have a stake in providing, receiving, or coordinating representation in the immigration court system. The Department is interested in hearing all views related to the possibility of expanding procedures for the limited representation of aliens in proceedings before EOIR.

Question 1: Should the Department permit certain types of limited representation currently impermissible under regulations? If so, to what extent? If not, why not?

Question 2: Should limited representation be permitted to allow attorneys or representatives to appear at a single hearing in proceedings before EOIR, possibly leaving the respondent without representation for a subsequent hearing on the same filing? If so, to what extent? If not, why not?

Question 3: Should limited representation be permitted to allow attorneys or representatives to prepare or file a pleading, application, motion, brief, or other document without providing further representation in the case? If not, why not? If so, should attorneys or representatives be required to identify themselves as the author of the document or should anonymity (i.e., ghostwriting) be permitted?

Question 4: If limited representation is permitted in proceedings before EOIR, should an attorney or representative be required to file a Notice of Entry of Appearance regardless of the scope of

the limited representation? If so, should a form separate from the EOIR-27 and EOIR-28 be created for such appearances?

Question 5: If limited representation is permitted, should attorneys or representatives certify to EOIR, either through a form or filings made, that the alien has been informed about the limited scope of the representation?

Question 6: If limited representation is permitted in proceedings before EOIR, to what extent should such attorneys or representatives have access to the relevant record of proceedings?

Question 7: To what extent could different approaches for limited representation impair the adjudicative process or encourage abuse or other misconduct that adversely affects EOIR, the public, or aliens in proceedings, or lead to increased litigation regarding issues of ineffective assistance of counsel?

Question 8: What safeguards, if any, should be implemented to ensure the integrity of the process associated with limited representation in proceedings before EOIR, and to prevent any potential abuse and fraud?

Question 9: What kinds of constraints or legal concerns with respect to limited representation may arise under state rules of ethics or professional conduct for attorneys who are members of the bar in the various states?

Question 10: Should EOIR provide that practitioners, as a condition of representing aliens in a limited manner, be required to agree to limit their fees in charging for their services?

Question 11: The Department is interested in gathering other information or data relating to the issue of expanding limited appearances in EOIR proceedings. Are there any additional issues or

information not addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.

Comments that will provide the most assistance to EOIR will reference a specific regulatory section, provide draft regulatory language, explain the reasons for the recommended amendment, and include data, information, or authority that support the recommended amendment.

IV. Statutory and Executive Order Review

This ANPRM has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), The Principles of Regulation, in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation, and in accordance with Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." The Department has determined that this ANPRM is a significant regulatory action under Executive Order 12866, section 3(f), and accordingly this ANPRM has been reviewed by the Office of Management and Budget. Pursuant to guidance issued by OMB, the requirements of E.O. 13771 do not apply to this ANPRM.

This action does not propose or impose any requirements. The ANPRM is being published to seek information from the public regarding the possibility of revising the rules and procedures governing representation and appearance during proceedings before EOIR's immigration courts and the BIA. The requirements of the Regulatory Flexibility Act (RFA) do not apply to this action because, at this stage, it is an ANPRM and not a "rule" as defined in 5 U.S.C. 601. Following review of the comments received in response to this ANPRM, if EOIR decides to proceed with a notice of proposed rulemaking regarding this matter, EOIR will conduct all relevant analyses as required by statute or Executive Order.

Dated: March 5, 2019.

James R. McHenry,
Director.

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