



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

November 17, 2014

Jeff Rosenblum  
General Counsel  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2600  
Falls Church, VA 20530

**Re: Notice of Proposed Rulemaking: Separate Representation for Custody and Bond Proceedings  
RIN No. 1125-AA78, EOIR Docket No. 181**

Dear Mr. Rosenblum,

The American Immigration Lawyers Association (AILA) submits the following written comments in response to the Executive Office for Immigration Review's (EOIR), notice of proposed rulemaking, "Separate Representation for Custody and Bond Proceedings," published in the Federal Register on September 17, 2014. Established in 1946, AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. citizens, lawful permanent residents, and foreign nationals in proceedings before EOIR. We appreciate the opportunity to comment on the Proposed Rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

**I. Overview**

AILA commends EOIR for endeavoring to increase representation of detained aliens by permitting a representative to enter a separate appearance in immigration court for the discrete task of securing a bond or release from detention, without requiring the representative to continue to represent the respondent in all of his or her immigration proceedings. We agree that the amendment to the regulation, as proposed, will facilitate pro bono representation and will ultimately result in more detained respondents having access to representation. Once released, we note and are encouraged by the fact that there is a greater likelihood that respondents will retain counsel to represent them moving forward.<sup>1</sup> The potential impact on improving court

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<sup>1</sup> See Separate Representation for Custody and Bond Proceedings, 79 FR 55659, 55659 (Sept. 17, 2014) ("Of the 90,316 initial case completions [from FY 2011 to FY 2013]...for detained aliens who were released, only 25,426 aliens, or 28 percent, were unrepresented.")

efficiencies as a result of a net increase in representation rates will serve the court, the represented parties, and the public well.

While we support the proposed rule, we also believe that an attorney also should be able to provide representation that is limited in scope or purpose, if the limitation is reasonable under the circumstances and the client gives informed consent. Toward that end, the proposed rule should be expanded to allow representation that is limited to a specific purpose or proceeding, such as a motion to reopen, motion to change venue, motion to remand, motion to recalendar, and other such limited purposes.

## **II. Representation for Limited Purposes**

While EOIR acknowledges that an increase in the number of individuals who are represented in bond and custody determinations will benefit the agency, we note that there are other types of proceedings before EOIR that would also benefit from increased representation. For example, many matters before EOIR not only require complex knowledge of substantive immigration law, but also technical knowledge of complicated procedures, such as service upon opposing counsel, completion and attachment of accompanying applications, payment of filing fees, biometrics capture, etc. Unrepresented individuals are not likely to be familiar with these details and may seek representation from a lawyer for a distinct and finite purpose, such as a motion to reopen, motion for change of venue, or motion to remand, to name a few. Expanding the rule to allow for appearances that are limited in scope would increase the amount of respondents that are represented overall.

### **A. The Model Rules of Professional Conduct Support Appearances for “Limited Purposes” When Appropriate and With Client Consent**

Rule 1.2(c) of the Model Rules of Professional Conduct states: “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” This “unbundling” of legal services is beneficial to all consumers, and EOIR should not hold clients and lawyers in matters when limited representation has been agreed upon. Additionally, allowing attorneys to limit their representation to only certain stages of proceedings (i.e., motions to reopen or to change venue) would encourage pro bono counsel to represent more individuals without imposing long-term burdens that might dissuade them from providing representation at all. As noted in a 2012 report to the Administrative Conference of the United States (ACUS), “limited appearances within the representation-deprived removal adjudication system may be better than no representation, if the respondent understands the limits it entails.”<sup>2</sup>

### **B. Individuals and Representatives May Limit the Scope of Representation Based upon the Goals, Costs, and Circumstances of Representation.**

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<sup>2</sup> Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, page 66 (June 7, 2012), available at <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.

A regulation that does not allow for limited appearances attempts to regulate activity that has traditionally fallen under the authority of state bars. Generally, the scope of representation is defined by the written retainer, representation agreement, or engagement letter entered into between the attorney and the client. The contents and limitations on such agreements have traditionally been governed by the rules of professional conduct as adopted by the individual state bar associations and interpreted under state contract law. EOIR should defer to the appropriate rules of professional conduct and state law when accepting appearances for limited purposes.

### **C. *Matter of Velasquez* Does Not Prohibit Limiting the Scope of Representation**

We respectfully disagree with the statement in the Supplementary Information that *Matter of Velasquez* prohibits limited appearances in immigration proceedings.<sup>3</sup> In *Velasquez*, the BIA held that an attorney's concession of deportability during the course of a motion to change venue was binding on the alien in subsequent proceedings, even where the first attorney was only retained to represent the respondent in bond and change of venue proceedings. Instead, we agree with the ACUS report that *Velasquez* stands for the proposition that respondents may be bound by the actions of any counsel who appear in their case.<sup>4</sup> Therefore, contrary to EOIR's assertions, *Velasquez* does not stand in the way of broadening the rule to permit limited purpose representation if the limitation is reasonable under the circumstances and the client gives informed consent

### **III. Conclusion**

We appreciate the opportunity comment on this proposed rule, and we look forward to a continuing dialogue with EOIR on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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<sup>3</sup> 19 I&N Dec. 377 (BIA 1986).

<sup>4</sup> Benson & Wheeler, 66.