

## Solving Immigration Consultant Fraud Through Expanded Federal Accreditation

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### Introduction

Catalina Garcia Nuñez is a Mexican national who moved to the United States in 1989.<sup>1</sup> In 1996, the family that employed Nuñez as a nanny offered to sponsor her in the labor certification process,<sup>2</sup> which allows a foreigner to work in the United States.<sup>3</sup> Nuñez went to the office of “General Legal Services” for help.<sup>4</sup> Relying on a friend’s recommendation, and judging from the office’s busy waiting room, Nuñez believed the business was legitimate.<sup>5</sup> But the woman who owned and operated the business, Reyna Dorantes, was not a licensed attorney and was not authorized to offer legal services of any kind.<sup>6</sup> When Nuñez met with Dorantes, she told Nuñez that she had friends inside the Immigration and Naturalization Service (INS)<sup>7</sup> and that she could expedite Nuñez’s labor certification and immigration papers.<sup>8</sup> Nuñez gave Dorantes her background information and a first payment of \$1500.<sup>9</sup>

A month later, Nuñez returned to the office after being told to bring her Mexican passport and a second payment of \$1000.<sup>10</sup> Two months after the initial appointment, Dorantes called Nuñez and

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1. Nuñez v. Gonzales, 231 F. App’x 666, 667 (9th Cir. 2007).

2. Brief for Appellant at 4, Nuñez v. Gonzales, 231 F. App’x 666 (9th Cir. 2007) (No. 05-76361), 2006 WL 3879025 at \*1 [hereinafter Brief for Nuñez].

3. *Hiring Foreign Workers, Foreign Labor Certification*, U.S. DEPT OF LABOR, <http://www.foreignlaborcert.doleta.gov/hiring.cfm> (last updated Jan. 11, 2011).

4. Nuñez, 231 F. App’x at 667; Brief for Nuñez, *supra* note 2, at 4.

5. Brief for Nuñez, *supra* note 2, at 4.

6. Nuñez, 231 F. App’x at 667 n.2; Brief for Nuñez, *supra* note 2, at 4.

7. The INS is now the U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). See Homeland Security Act of 2002, Pub. L. No. 107-296 §§ 451, 471, 116 Stat. 2135, 2195, 2205; see also 6 U.S.C. §§ 252, 542 note (2006) (Reorganization Plan Modification for the Department of Homeland Security).

8. Brief for Nuñez, *supra* note 2, at 4.

9. *Id.* at 4–5.

10. *Id.* at 5.

told her that her "legal permanent residency was ready."<sup>11</sup> Nuñez went to the office and Dorantes returned her passport with a red stamp inside in exchange for a final payment.<sup>12</sup> Dorantes had forged the stamp, but she told Nuñez the INS had stamped the passport as temporary evidence of Nuñez's legal residency and that Nuñez's residency card would arrive in the mail in another twelve to twenty-four months.<sup>13</sup> Nuñez believed she was a legal permanent resident—she used her stamped passport to obtain a driver's license and social security card, and even to travel internationally.<sup>14</sup>

Unbeknownst to Nuñez, Dorantes had filed an application for asylum in her name.<sup>15</sup> The application contained false information, including statements that Nuñez had completed the application without assistance and that her home address was 3168 East Gage Avenue, Huntington Park, California, the address of "General Legal Services."<sup>16</sup> The INS processed the application and, in March 1997, initiated deportation proceedings against Nuñez.<sup>17</sup> An order to show cause, charging Nuñez and giving notice of her scheduled deportation hearing, was served on the Gage Avenue address.<sup>18</sup> Nuñez, unaware of the application or the hearing, failed to appear at the hearing and, in her absence, the immigration judge ordered her deportation to Mexico.<sup>19</sup>

A year after receiving her stamped passport, Nuñez called Dorantes to inquire why she had not yet received her residency card and whether she should renew the stamp.<sup>20</sup> Dorantes told Nuñez that she did not need to renew it and that it was common to wait for the card for up to two years.<sup>21</sup> After another year had passed and Nuñez still had not received her residency card, she went to visit Dorantes.<sup>22</sup> Instead of "General Legal Services," she found a vacant office. Dorantes had vanished along with the furniture, computers, files and telephones.<sup>23</sup> Nuñez consulted with

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11. *Id.*

12. *Id.*

13. Nuñez v. Gonzales, 231 F. App'x 666, 667 (9th Cir. 2007); Brief for Nuñez, *supra* note 2, at 5.

14. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 6.

15. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 7–8.

16. Nuñez, 231 F. App'x at 668 n.3; Brief for Nuñez, *supra* note 2, at 8.

17. Nuñez, 231 F. App'x at 667.

18. *Id.*

19. *Id.*

20. *Id.*; Brief for Nuñez, *supra* note 2, at 6.

21. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 6.

22. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 7.

23. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 7.

several attorneys; they all concluded that Dorantes had defrauded her by taking her \$3500 and forging the stamp.<sup>24</sup>

Nuñez hired another lawyer to begin the labor certification process again.<sup>25</sup> When the lawyer heard Nuñez's story, he requested her immigration records from the government.<sup>26</sup> Finally, Nuñez discovered that an asylum application had been filed in her name and that the government had responded by ordering her deportation, all without her knowledge, consent, or participation.<sup>27</sup> Nuñez heard rumors that Dorantes had also scammed other clients and then left the state.<sup>28</sup> Nuñez, on the other hand, was left with a deportation order, which she could not contest because the statute of limitations had run.<sup>29</sup>

Catalina Nuñez was a victim of immigration consultant fraud, often called "notario fraud." Immigration consultant fraud occurs when lay persons or notaries public hold themselves out as authorized to give legal advice and represent people in immigration matters.<sup>30</sup> The consequences are often devastating.<sup>31</sup> The fraudulent consultants may charge hefty fees without providing services in exchange;<sup>32</sup> or, as in the case of Catalina Nuñez, they may file incorrect or improper visa applications that alert the government to their client's illegal status and result in deportation proceedings.<sup>33</sup> Either way, the client loses hard-earned money and a chance at remaining in the country legally.<sup>34</sup> The latter form of fraud also harms the government. It burdens the immigration administration because it must spend time evaluating the false information supplied instead of processing proper applications.<sup>35</sup>

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24. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 7.

25. Nuñez, 231 F. App'x at 668; Brief for Nuñez, *supra* note 2, at 7.

26. Nuñez, 231 F. App'x at 668; Brief for Nuñez, *supra* note 2, at 7.

27. Nuñez, 231 F. App'x at 668; Brief for Nuñez, *supra* note 2, at 7–8.

28. Nuñez, 231 F. App'x at 667; Brief for Nuñez, *supra* note 2, at 7.

29. *See Nuñez*, 231 F. App'x at 668. The Board of Immigration Appeals (BIA) denied Nuñez's motion to reopen the case as untimely. *Id.* The immigration judge held that the statute of limitations should not be tolled due to fraud and ineffective assistance of counsel because Nuñez "failed to act with due diligence in discovering the notary's misconduct" and the BIA adopted the holding. *Id.* Nuñez appealed and the Ninth Circuit reversed the holding, finding exceptional circumstances meriting equitable tolling, and remanded her case to be reopened. *Id.* at 669.

30. *See Anne E. Langford, What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 116–17 (2004) (explaining the phenomenon of "notario fraud").

31. *See, e.g., id.* at 116.

32. *Id.* at 124.

33. Nuñez, 231 F. App'x at 667.

34. Langford, *supra* note 30, at 116, 124.

35. Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet*

It also burdens the courts because immigrants may appeal their deportation orders on the grounds of ineffective assistance of counsel, forcing the courts to expend resources to correct the misdeeds of unscrupulous immigration consultants.<sup>36</sup>

This immigration fraud occurs throughout the nation on a consistent basis. It has been widely documented by the media over the last decade.<sup>37</sup> While federal and state governments have enacted laws aimed at combating it,<sup>38</sup> these laws are under-enforced, in part because illegal immigrants who are victimized rarely report the fraud to the government.<sup>39</sup> Instead, the burden falls on community organizations such as non-profits, churches, and bar associations to fight the fraud by promoting awareness and soliciting complaints.<sup>40</sup> Despite their efforts, the problem persists.<sup>41</sup>

Instead of continued reliance on *post facto* enforcement, the government should turn its efforts to prevention. Immigration consultant fraud is fueled by an unmet need for accessible and affordable immigration services.<sup>42</sup> The need for the services they sell, combined with the vulnerability of the population they serve, enables these fraudulent consultants to be so successful.<sup>43</sup> Government training, accreditation, and regulation of immigration consultants, coupled with increased legal authority and profitability for the profession, would result in an influx of competent and accountable individuals to meet the needs of immigrant communities.<sup>44</sup> The federal government needs to stop immigration fraud where it starts. It can do this by embracing the role of immigration consultants in the community and in the system instead of trying to chase down its perpetrators one by one as the number of victims continues to grow.

Part I of this Article explores the source and scope of immigration consultant fraud. Part II summarizes the attempts of state and federal government and non-governmental organizations to eliminate immigration consultant fraud. Part III explains why, despite those attempts, the fraud persists and flourishes. Part IV

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*Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 6 (2004).

36. See, e.g., *Nuñez*, 231 F. App'x at 668.

37. See *infra* Part I.B.

38. See *infra* Parts II.A-B.

39. See *infra* Part III.

40. See *infra* Part II.C.

41. See *infra* Part III.

42. See Moore, *supra* note 35, at 9.

43. See *id.*

44. See *infra* Part IV.

sets forth a proposal for expanding the role of lawful immigration consultants and explains how such an expansion would decrease immigration consultant fraud.

## I. The Source and Scope of Immigration Consultant Fraud

### A. "Notario Fraud": How the Law Is Lost in Translation

Immigration consultant fraud is most commonly referred to as "notario fraud."<sup>45</sup> "Notary" literally translates into Spanish as "notario."<sup>46</sup> The two terms, however, are not equivalent. In many Spanish-speaking countries, a "notario publico" is a legal professional or specialist; they often have law degrees and/or hold a public office.<sup>47</sup> In contrast, a "notary public" in the United States is only authorized to authenticate signatures, administer oaths, certify documents, and perform limited official acts.<sup>48</sup> Notaries are not authorized to give legal advice or prepare legal documents, unless the notary is also a licensed attorney.<sup>49</sup>

It is easy to see how this discrepancy creates confusion among Spanish speakers as to a notary's legal qualifications and authority. Many notarios have chosen this term specifically to create a false impression, gain clients' trust, and charge higher fees for services they cannot legally perform.<sup>50</sup> In fact, the term has become so synonymous with this phenomenon in the United States that "notario" is often used to refer to any fraudulent immigration consultant.<sup>51</sup> The practice of defrauding people

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45. See, e.g., *About Notario Fraud*, AM. BAR ASS'N COMM'N ON IMMIGRATION, <http://new.abanet.org/Immigration/Pages/aboutnotariofraud.aspx> (last visited Apr. 21, 2011).

46. HENRY SAINT DAHL, MCGRAW-HILL'S SPANISH AND ENGLISH LEGAL DICTIONARY 409 (2006).

47. See Milagros Cisneros, *H.B. 2659: Notorious Notaries—How Arizona Is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287, 294 (2000) ("Latin notaries, in contrast to American notaries public, are state-appointed . . ."); Langford, *supra* note 30, at 120 ("[T]here is a high *de facto* correlation between having a law degree and being a notario."); *Esencia de la Funcion Notarial: Principales Actividades del Notario*, COLEGIO DE NOTARIOS DEL DISTRITO FEDERAL, <http://www.colegiodenotarios.org.mx/index.php?a=71> (last visited Apr. 12, 2011) ("[El notario] . . . es un especialista y un perito en derecho . . .").

48. BLACK'S LAW DICTIONARY 492 (3d pocket ed. 2006).

49. See *What Is a Notary?*, NAT'L NOTARY ASS'N, [http://www.nationalnotary.org/what\\_is\\_notary/index.html](http://www.nationalnotary.org/what_is_notary/index.html) (last visited Apr. 12, 2011).

50. Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 588–89 (2009). See *infra* Part II.A–B for discussion of how legislatures have reacted to persons holding themselves out as "notarios" by regulating the commercial use of the term.

51. See, e.g., *The Dangers of "Notario" Fraud*, COMM'N ON IMMIGRATION, AM.

seeking immigration documents is uniformly referred to as “notario fraud.”<sup>52</sup> This term is improper, however, because it mischaracterizes the problem. “Notario fraud” implies fraud perpetrated by notaries public upon Spanish-speaking immigrants when the problem is actually much broader in scope.<sup>53</sup>

### B. *The Many Faces of Fraud*

Immigration scams are orchestrated by a variety of individuals and organizations across the nation and they affect people of many different nationalities.<sup>54</sup> Immigration con artists can operate successfully as individuals out of their own homes or as part of a firm. Miriam Mercedes Hernandez worked out of her apartment selling immigration services for up to \$15,000 per person.<sup>55</sup> When her clients complained that she never performed the services promised and requested a refund, she threatened to have them deported and kept their money and documents.<sup>56</sup> Hernandez was brought to court and ordered to pay \$3 million in restitution and penalties.<sup>57</sup>

Immigration scams can also operate under a business, which lends perceived legitimacy to their operations.<sup>58</sup> As mentioned in the introduction, Dorantes operated out of an office under the business title “General Legal Services.”<sup>59</sup> For some, the fraud is so lucrative that they operate multiple businesses.<sup>60</sup> Edwin Rivera operated four companies that illegally purported to provide

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BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/notarios\\_info\\_piece\\_englishfinal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/notarios_info_piece_englishfinal.authcheckdam.pdf) (last visited Apr. 21, 2011) (“You may be the victim of a notario if: You sought assistance with your immigration case from someone who called themselves a: Notario[,] NotarioPublico[,] Visa Consultant[,] [or] Immigration Consultant . . .”).

52. See, e.g., *id.*

53. See *infra* notes 72–80 and accompanying text.

54. See *infra* notes 64–80 and accompanying text.

55. *People v. Hernandez*, No. 401160-09, 2010 WL 3843085 (N.Y. Sup. Ct. Feb. 25, 2010); Press Release, Office of the Attorney Gen., Attorney General Cuomo Obtains \$3 Million Court Judgment Against Queens Woman in Immigration Scam (Mar. 1, 2010), available at [http://www.ag.ny.gov/media\\_center/2010/mar/mar1a\\_10.html](http://www.ag.ny.gov/media_center/2010/mar/mar1a_10.html) [hereinafter *Cuomo Obtains \$3 Million Judgment*].

56. Petition of Attorney General ¶ 18, *People v. Hernandez*, No. 4011602009 (N.Y. Sup. Ct. Feb. 25, 2010), 2010 WL 6931743 at\*3; *Cuomo Obtains \$3 Million Judgment*, *supra* note 55.

57. *Cuomo Obtains \$3 Million Judgment*, *supra* note 55.

58. Langford, *supra* note 30, at 122.

59. *Núñez v. Gonzales*, 231 Fed. App'x 666, 666 (9th Cir. 2007).

60. Press Release, Office of the Attorney Gen., Attorney General Cuomo Shuts Down Seven Companies for Providing Fraudulent Legal Services to Immigrant Communities (Aug. 17, 2010), available at [http://www.ag.ny.gov/media\\_center/2010/aug/aug17a\\_10.html](http://www.ag.ny.gov/media_center/2010/aug/aug17a_10.html) [hereinafter *Cuomo Shuts Down Seven Companies*].

immigration services.<sup>61</sup> He advertised in newspapers, on radio shows, and on his website.<sup>62</sup> Rivera charged \$1500 for applications under an immigration “law” that was never passed.<sup>63</sup>

Unfortunately, immigration fraud is so widespread it occurs even in the institutions that seem most trustworthy. A non-profit immigrant services organization, American Immigrants Federation, advertised and sold “membership” for \$100 a year, then charged members thousands of dollars in exchange for services the organization was not authorized to perform and results it never delivered.<sup>64</sup> The organization agreed to pay \$1.2 million in restitution and shut down its operations; it had more than 20,000 customers.<sup>65</sup> Even more shocking are reports of religious officials defrauding immigrants.<sup>66</sup> Two pastors at a storefront Pentecostal church in Queens, New York charged between \$6000 and \$10,000 for the promise of a fictional green card supposedly earmarked for the church.<sup>67</sup> The pastors and an accomplice collected almost \$1 million from this scam.<sup>68</sup> When the visas never appeared and people demanded refunds, the pastors threatened deportation, stopped responding, and closed the church.<sup>69</sup> A religious leader who operated a Hindu temple in Milwaukee was accused of sponsoring fraudulent religious worker visas.<sup>70</sup> Using the temple as a front for his operations, he attempted to sponsor thirty-three such fraudulent visas and charged up to \$30,000 for each.<sup>71</sup>

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61. *Id.*

62. Kevin Murawinski, *Immigration ‘Lawyer’ Was Fraud—Spitzer*, DAILY NEWS (N.Y.), July 2, 2004, at 2, available at [http://www.nydailynews.com/archives/ny\\_local/2004/07/02/2004-07-02\\_immigration\\_lawyer\\_was\\_fra.html](http://www.nydailynews.com/archives/ny_local/2004/07/02/2004-07-02_immigration_lawyer_was_fra.html).

63. *Id.* (“Rivera charged \$1,500 to process applications regarding the Development, Relief and Education for Alien Minors Act of 2003 (‘DREAM Act’), a federal proposal that has not been enacted but that he claimed was passed on Nov. 25, 2003.”).

64. *New York City Nonprofit Agrees to Pay \$1.2 Million to Defrauded Immigrants*, 4 Workplace Immigr. Rep. (BNA) 290 (May 17, 2010) [hereinafter *Nonprofit Agrees to Pay \$1.2 Million*].

65. *Id.*

66. Kirk Semple, *Green Cards, Belief and Betrayal at a Storefront Church*, N.Y. TIMES, June 17, 2009, at A21, available at <http://www.nytimes.com/2009/06/17/nyregion/17scheme.html> (“[Immigration fraud is] especially insidious . . . when practiced by leaders of a church—the institution that many immigrants turn to for friendship and guidance in a foreign land.”).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Operator of Hindu Temple Arrested in Fraudulent Religious Worker Visa Scheme*, 4 Workplace Immigr. Rep. (BNA) 385 (June 28, 2010) [hereinafter *Operator of Hindu Temple Arrested*].

71. *Id.*

Victims of immigration fraud are more diverse than the phrase "notario fraud" suggests. Spanish-speaking immigrants are common targets because they are the largest immigrant group in the United States.<sup>72</sup> However, immigrants from all over the world are victims of immigration fraud. In addition to Spanish-speaking immigrants, targets of reported fraud include Chinese,<sup>73</sup> Vietnamese,<sup>74</sup> Indian,<sup>75</sup> Bangladeshi,<sup>76</sup> Romanian,<sup>77</sup> Haitian,<sup>78</sup> Jamaican,<sup>79</sup> and Trinidadian<sup>80</sup> immigrants. Although limited education and income may make some immigrants more vulnerable to fraud, all immigrants are at risk. Even Sascha Herrera, the college-educated wife of a Georgia state senator, received a deportation order as a result of bad advice from a notario.<sup>81</sup>

*C. Why Immigration Consultant Fraud Is So Prevalent:  
The Source of the Problem*

An unmet demand for affordable immigration services, coupled with a vulnerable client population, leaves immigration law particularly susceptible to unscrupulous entrepreneurs.<sup>82</sup> The large number of immigrants in the United States and their comparatively low levels of education, English language skills, and familiarity with the government create a surplus of clients in need of services. The need for affordable services is especially high given immigrants' above-average rates of poverty. Compounding this need is the population's vulnerability, attributable not only to the aforementioned factors but also to the fact that millions of

72. PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2007, tbl.3 (2009) available at <http://pewhispanic.org/files/factsheets/foreignborn2007/Table%203.pdf> (showing that the foreign-born population from Mexico was the largest of any region, representing 30.9% of all foreign-born persons in the United States in 2007).

73. See Shannon, *supra* note 50, at 589.

74. Krissah Williams, *For Immigrants, Help Can Be Risky; Maryland Lawmakers Move to Rein in Consultants Who Overreach and Sometimes Get Clients Deported*, WASH. POST, Apr. 23, 2005, at E1.

75. *Operator of Hindu Temple Arrested*, *supra* note 70.

76. Ann Mullen, *Exploiting Immigrants*, METRO TIMES (Nov. 5, 2003), <http://www2.metrotimes.com/editorial/story.asp?id=5587>.

77. *Id.*

78. Cuomo Shuts Down Seven Companies, *supra* note 60.

79. See Brian Kates, *Scammers Crush Immigrants' Hopes*, DAILY NEWS (N.Y.), April 15, 2001, at 6. Two alleged clergymen were charged with defrauding almost five hundred Caribbean immigrants out of at least \$500,000. *Id.*

80. *Id.*

81. Larry Copeland, *Lawmaker's Wife: Scam Led to Deportation Mix-Up*, USA TODAY, Dec. 6, 2006, at 3A.

82. Moore, *supra* note 35, at 9.



immigrants in need of legal help are in the United States without authorization and thus subject to deportation. Together, these factors create a market that is easy for fraudulent immigration consultants to exploit.

The potential client base for immigration consultants and attorneys exceeds their capacity to serve.<sup>83</sup> The foreign-born population in the United States is over thirty-one million.<sup>84</sup> The Department of Homeland Security estimates that more than ten million of those individuals are not authorized to reside here.<sup>85</sup> Many authorized immigrants seek legal help to adjust or renew their immigration status or petition for family members to be admitted, and unauthorized immigrants seek legal help to obtain authorization; both populations may also seek representation in deportation proceedings.<sup>86</sup> Because representation in immigration proceedings is a privilege and not a right,<sup>87</sup> immigrants must rely on the private sector for counsel.<sup>88</sup> Approximately one-half to two-thirds of immigrants facing immigration-status problems, excluding naturalization, use legal help.<sup>89</sup> Some immigration consultant businesses have tens of thousands of clients.<sup>90</sup> Even so, the need for legal services in immigration is not met.<sup>91</sup>

While immigrants can, and often do, navigate the law on their own, several factors increase their need for assistance. Immigration law is exceedingly complex, making it difficult for laypeople to decipher. One federal judge noted a “striking resem-

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83. Shannon, *supra* note 50, at 580 (“[I]t is clear to anybody who has examined the plight of immigrants in this country that those who need qualified legal assistance are poorly served by the currently available resources.”).

84. The estimated foreign-born population in the United States as of January 2009 was 31,220,000. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEPT OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 3 tbl.2 (2010).

85. The estimated unauthorized resident immigrant population in the United States as of January 2008 was 10,750,000. *Id.*

86. See ROBERT L. BACH, INST. FOR RESEARCH ON MULTICULTURALISM AND INT’L LABOR, BINGHAMTON UNIV., BECOMING AMERICAN, SEEKING JUSTICE: THE IMMIGRANTS’ LEGAL NEEDS STUDY 37–38 (1996).

87. See 8 U.S.C. § 1362 (2006) (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”).

88. Private attorneys and law firms serviced 55.2% of immigrants receiving legal help; community and legal aid agencies serviced 17.4%. BACH, *supra* note 86, at 47 tbl.14.

89. *Id.* at 39 tbl.9.

90. See *Nonprofit Agrees to Pay \$1.2 Million*, *supra* note 64.

91. Based on a 1993–1994 telephone survey of immigrants in five major cities, over twenty percent of immigrants wanted, but did not receive, legal help for immigration matters. BACH, *supra* note 86, at 42 tbl.11.

blance between [the immigration] laws . . . and King Minos's labyrinth in ancient Crete."<sup>92</sup> In addition, limited education poses an obstacle to understanding the immigration laws, as up to forty percent of immigrants do not have a high school diploma or the equivalent.<sup>93</sup> Finally, many immigrants do not speak English or do not speak it well.<sup>94</sup> These individuals must trust others to accurately translate and/or prepare immigration documents for them.

The client population in immigration law has a higher-than-average need for affordable legal services. Although many immigrants would like legal help, they may not be able to afford it.<sup>95</sup> In 2009, the median household income of non-citizen immigrants was \$36,089, almost \$15,000 less than that of native-born households.<sup>96</sup> The poverty rate for non-citizen immigrants is 25.1%, in contrast to 13.7% for the native-born population.<sup>97</sup>

While an unmet need for affordable immigration services makes the profession profitable, need alone does not explain the prevalence of fraud. The immigrant population's vulnerability enables immigration consultants to defraud clients and get away with it.<sup>98</sup> Many of the same circumstances that create a need for legal help also leave immigrants vulnerable. Limited education, low proficiency in English, low income, and illegal status all increase immigrants' vulnerability.<sup>99</sup>

Immigrants with low proficiency in English are more susceptible to fraud.<sup>100</sup> It is common for fraudulent immigration consultants to fabricate information on asylum applications,<sup>101</sup> just as

92. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

93. ANDREW SUM, IRWIN KIRSCH & KENTARO YAMAMOTO, *EDUC. TESTING SERV., A HUMAN CAPITAL CONCERN: THE LITERACY PROFICIENCY OF U.S. IMMIGRANTS* 51 (2004).

94. *Id.* (according to U.S. Census data from 2000, approximately 8.3 million immigrants did not speak English at all or did not speak it well).

95. Approximately two-thirds of low-income immigrants with legal problems cannot afford an attorney. BACH, *supra* note 86, at 56.

96. U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009*, at 8 (2010).

97. *Id.* at 15 tbl.4.

98. See Shannon, *supra* note 50, at 579–80 (“[I]mmigrants . . . are not only ill-equipped to navigate the system on their own but are easy prey for bad actors who victimize immigrants by charging ruinous fees for dubious, if not outright fraudulent and damaging, results.”).

99. See Moore, *supra* note 35, at 8–9.

100. Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1030 (1996) (“Latinos/as and other language minorities [are] the victims of choice for unscrupulous merchants who prey on their inability to understand the terms of the bargain.”).

101. Cf. BACH, *supra* note 86, at 52 (noting the coincidence of high numbers of

Dorantes did.<sup>102</sup> If clients do not read well or understand English well, it means they are not able to review or understand the documents they are signing, or the information those documents contain.

Low-income immigrants are more likely to be defrauded and less able to seek recourse. In Los Angeles, immigrants who receive public assistance are twice as likely to use a notario.<sup>103</sup> Also, if an individual with limited income is cheated, he or she may not be able to afford an attorney afterward to either try again or to correct the previous mistakes. Many immigrants lose months' or even years' savings to fraudulent consultants.<sup>104</sup>

The more than ten million unauthorized immigrants<sup>105</sup> who live under the constant threat of deportation are an especially vulnerable sector of the population. Immigrants who obtain legal help from notarios are "much more likely to be illegally resident in the United States than those who turn[] to more formal and traditional sources of legal help."<sup>106</sup> Particular communities are at higher risk. For example, in Los Angeles, 71.1% of undocumented immigrants used notarios or immigration consultants, in contrast to 48% of undocumented immigrants overall.<sup>107</sup>

## II. Attempts to Eliminate Immigration Consultant Fraud

Recognizing the pervasiveness of immigration fraud and its serious consequences, both the government and community organizations have responded to the problem. Federal law establishes minimum regulations for immigration assistance and provides for procedural remedies to fraud in immigration court.<sup>108</sup> State legislatures have passed more stringent and more particularized stat-

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Mexican immigrants using notarios to gain work authorization and the high numbers of fraudulent or frivolous asylum applications from Mexican immigrants).

102. *Núñez v. Gonzales*, 231 F. App'x 666, 668 n.3 (9th Cir. 2007); Brief for *Núñez*, *supra* note 2, at 8.

103. BACH, *supra* note 86, at 55 ("[Thirty-three] percent of immigrants who received public assistance obtained legal help from a notario, compared to 15.4 percent of immigrant households without aid.").

104. See, e.g., Gary Rivlin, *Dollars and Dreams: Immigrants as Prey*, N.Y. TIMES, June 11, 2006, § 3 (Sunday Business), at 1 (housekeeper and single mother "basically spent her entire life's savings"); Kirk Semple & Jenny Manrique, *Cuomo Widens an Investigation into Immigration Fraud*, N.Y. TIMES, May 29, 2009, at A18 (taxi driver from Ecuador lost nine months' pay).

105. See *supra* note 85 and accompanying text.

106. BACH, *supra* note 86, at 53.

107. *Id.*

108. See *infra* Part II.A.

utes seeking to regulate notaries and immigration assistance.<sup>109</sup> Community and professional organizations focus on promoting awareness and reporting, and on providing low-cost legal advice.<sup>110</sup>

#### A. Federal Law Regulating Representation in Immigration

The Code of Federal Regulations defines who is authorized to practice immigration law. With certain caveats, persons who may represent immigrants are attorneys, law students, or graduates; reputable individuals not receiving remuneration; and BIA-accredited representatives.<sup>111</sup> "Representation"<sup>112</sup> includes 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 documents, paper, application, or petition on behalf of another person or client,"<sup>113</sup> and "the incidental preparation of papers."<sup>114</sup> It does not include assisting in filling in blank spaces if the assistant receives only nominal remuneration and does not "hold himself out as qualified in legal matters or in immigration and naturalization procedure."<sup>115</sup> Thus, an immigration consultant is in violation of federal law if he or she gives advice on which application a client should fill out, how an application should be filled out, charges more than a nominal fee, or holds himself or herself out as qualified in immigration law. Under current federal law, the immigration consultant profession is very limited in scope and profitability. Although BIA-accredited representatives are entitled to represent aliens, the eligibility requirements are narrow and accredited representatives are still subject to some restrictions in their representative capacity. BIA-accredited representatives are representatives from "non-profit religious, charitable, social service, or similar organization[s]" that charge only nominal fees for their services<sup>116</sup> and have successfully applied for recognition<sup>117</sup> and accreditation.<sup>118</sup> An organization applies for recognition by filling out an application form and submitting, *inter alia*, supporting documentation demonstrating that it charges only

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109. See *infra* Part II.B.

110. See *infra* Part II.C.

111. 8 C.F.R. § 292.1(a) (2010).

112. *Id.* § 1.1(m).

113. *Id.* § 1.1(i).

114. *Id.* § 1.1(k).

115. *Id.*

116. *Id.* § 292.2(a).

117. *Id.* § 292.2(a)(1).

118. *Id.* § 292.2(d).

nominal fees<sup>119</sup> and that the organization has “adequate knowledge, information (ready access to adequate legal resources in its office), and experience.”<sup>120</sup> Once recognized, the organization may designate representatives to be accredited. To gain accreditation, an organization must submit a letter requesting either partial or full accreditation<sup>121</sup> and setting forth the proposed representative’s qualifications,<sup>122</sup> along with supporting documentation.<sup>123</sup> “Accredited Representatives are subject to the Rules of Professional Conduct for Practitioners” and may be

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119. Nominal fees “have been interpreted to mean a very small quantity or something existing in name only, as distinguished from something real or actual.” EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT’ OF JUSTICE, RECOGNITION AND ACCREDITATION PROGRAM OVERVIEW 11 (2010), *available at* [http://www.justice.gov/eoir/statspub/raroster\\_files/RA\\_Overview\\_%202010-10-07.pdf](http://www.justice.gov/eoir/statspub/raroster_files/RA_Overview_%202010-10-07.pdf) [hereinafter EOIR] (citing American Paralegal Academy, Inc., 19 I. & N. Dec. 386 (1986)). The BIA has not set dollar amounts for “nominal fees” but considers them on a case-by-case basis. *Id.*

120. The applicable regulation states:

Supporting documentation should include: Proof of adequate staffing and documentation of any supervision or assistance provided by attorneys, including proof of the immigration expertise of the attorneys; Resumes of employees; Letters of recommendation from relevant individuals; Certificates from training courses, conferences, or other educational activities; Description of the specific immigration legal services offered; Legal resource materials and a list of library resources.

*Id.* at 12.

121. Partial accreditation allows a representative to appear before the Department of Homeland Security (DHS) only; a fully accredited representative may appear before DHS, Immigration Courts, and the BIA. *Id.* at 19.

122. The letter must “[s]et forth the nature and extent of the proposed representative’s experience and knowledge of immigration and naturalization law and procedure.” *Id.* at 21. The statement of qualifications should include:

Resume and information regarding: Length of time that the individual has been with the organization[;] Training: Training certificates, and/or list of training/conferences/classes attended[;] details regarding the content of the training[;] Legal experience, including familiarity with the practice and procedure of immigration law before the DHS; and [an explanation of] how the individual will be able to use his or her skills effectively before the DHS . . . .

*Id.* at 24. If applying for full accreditation, the proposed representative must also submit:

Information regarding how the individual possesses skills for effective litigation and will be able to use his or her skills to represent aliens before the Immigration Courts, the Board, and the DHS[;] Information regarding the individual’s litigation skills (including for example the ability to perform legal research, draft briefs or motions, introduce evidence and question witnesses) and the individual’s familiarity with the practice and procedure of immigration law before [the Executive Office of Immigration Review] and DHS.

*Id.* at 25.

123. In addition to documentation supporting the statements regarding qualifications made in the letter, the proposed representative should also include letters of recommendation, *id.* at 23, and re-submit documentation supporting the organization’s recognition, *id.* at 22.

sanctioned for violating them.<sup>124</sup>

*B. State Law Regulating Notaries and Immigration Service Providers*

State laws have formed three basic approaches to the problem of fraudulent immigration consultants: Unauthorized Practice of Law (UPL) statutes, immigration consultant regulations, and notary regulations. Most states have statutes that prohibit and punish the unauthorized practice of law.<sup>125</sup> For some states, generalized UPL statutes are the only state laws that can be used to deter and prosecute fraudulent immigration consultants.<sup>126</sup> Other states have modified their UPL laws to specifically address the unauthorized practice of immigration law in response to immigration consultant fraud.<sup>127</sup>

Some states have elaborated on the federal law regarding representation in immigration matters by adding further safeguards in the form of immigration consultant statutes.<sup>128</sup> These laws typically define what constitutes "immigration assistance service," set parameters for the assistance, and describe unlawful acts and the corresponding penalties.<sup>129</sup> These laws impose a variety of additional, more specific requirements with which immigration consultants must comply. Minnesota, for example, requires that consultants post a notice, conforming to specific size and language, stating that they are not authorized to give legal advice. Minnesota law also prohibits assistants from describing themselves as a "notary" or an "immigration consultant." It also re-

124. *Id.* at 18; see 8 C.F.R. §§ 292.3, 1292.3 (2010) ("Professional Conduct for Practitioners—Rules and Procedures").

125. See, e.g., ALA. CODE § 34-3-1 (LexisNexis 2010); ALASKA STAT. § 08.08.230 (2010); ARIZ. REV. STAT. ANN. § 12-2701 (2003); CONN. GEN. STAT. § 51-88 (2005); FLA. STAT. § 454.23 (West 2007); HAW. REV. STAT. § 605-14 (1993); LA. REV. STAT. ANN. § 37:213 (2007); MASS. ANN. LAWS ch. 221, § 46A (LexisNexis 1999); NEV. REV. STAT. ANN. § 7.285 (LexisNexis 2008); 42 PA. CONS. STAT. ANN. § 2524 (West 2004); S.D. CODIFIED LAWS § 16-16-1 (2004); WIS. STAT. ANN. § 757.30 (West 2001).

126. See, e.g., ALA. CODE § 34-3-1; ALASKA STAT. § 08.08.230; FLA. STAT. § 454.23; MASS. GEN. LAWS ch. 221, § 46A; NEV. REV. STAT. § 7.285; WIS. STAT. ANN. § 757.30; WYO. STAT. ANN. § 33-5-117 (2009).

127. See, e.g., Immigration and Nationality Law Practice Act, ARIZ. REV. STAT. ANN. §§ 12-2701 to -2704 (elevating unauthorized practice of immigration law to a class 6 felony); see Cisneros, *supra* note 47, for analysis of the Immigration and Nationality Law Practice Act as a response to Arizona's widespread problem of notario fraud.

128. See, e.g., CAL. BUS. & PROF. CODE §§ 22440–48 (West 2008); 815 ILL. COMP. STAT. ANN. 505/2AA (West 1999); MICH. COMP. LAWS §§ 338.3451–71 (2004); MINN. STAT. ANN. § 325E.031 (West 1996); N.Y. GEN. BUS. LAW § 460-a to -j (McKinney 2010).

129. See, e.g., CAL. BUS. & PROF. CODE § 22441.

quires consultants to provide customers with contracts containing a description of services to be performed, corresponding compensation, and a statement that the consultant must return all of the client's documents, before providing assistance.<sup>130</sup> California's regulations are even more comprehensive. In addition to more stringent posting, contract, and receipt requirements, California requires fingerprinting and background checks. California consultants must file a \$50,000 bond with the state accompanied by a copy of a valid identification, a photograph, and personal and contact information. California posts consultants' bond compliance, photograph, and background check status on its website.<sup>131</sup>

Finally, some states have targeted immigration fraud through notary statutes.<sup>132</sup> These rules prohibit and/or require certain practices and apply only to notaries public. Some of these statutes are effectively notary-specific versions of UPL statutes, prohibiting notaries from giving legal advice or holding themselves out as legal consultants or immigration consultants.<sup>133</sup> Some states have posting or notice requirements that apply only to notaries who also choose to use the term "notario."<sup>134</sup> Other states prohibit notaries from using the term "notario" at all.<sup>135</sup>

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130. MINN. STAT. ANN. § 325E.031.

131. CAL. BUS. & PROF. CODE §§ 22440–48. California also has one of the most severe penalty structures; violations may result in civil penalties, criminal conviction punishable by fines and/or imprisonment, actual and treble damages, or injunction. *Id.* §§ 22445–48.

132. *See, e.g.*, ARK. CODE ANN. § 4-109-103 (West 2005); GA. CODE ANN. § 45-17-8.2 (West 2002); NEB. REV. ST. § 64-105.03 (2004); OR. REV. STAT. ANN. § 194.166 (West 2003 & Supp. 2010); TENN. CODE ANN. § 8-16-402 (2002); TEX. GOV'T CODE ANN. § 406.017 (West 2001).

133. *See, e.g.*, GA. CODE ANN. § 45-17-8.2, OR. REV. STAT. ANN. § 194.166; TENN. CODE ANN. § 8-16-402. The Georgia statute reads: "A notary shall not make claims to have or imply he or she has powers, qualifications, rights, or privileges that the office of notary does not authorize, including the powers to counsel on immigration matters and to give legal advice." GA. CODE ANN. § 45-17-8.2(a).

134. *See, e.g.*, ARK. CODE ANN. § 4-109-103. The statute requires notaries using the term "notario" in any advertisement to also include the following statement:

I AM NOT A LICENSED ATTORNEY AND CANNOT ENGAGE IN THE PRACTICE OF LAW. I AM NOT A REPRESENTATIVE OF ANY GOVERNMENTAL AGENCY WITH AUTHORITY OVER IMMIGRATION OR CITIZENSHIP AND I CANNOT OFFER LEGAL ADVICE OR OTHER ASSISTANCE REGARDING IMMIGRATION.

*Id.* § 4-109-103(a).

135. *See, e.g.*, NEB. REV. ST. § 64-105.03(6) ("A notary public who is not an attorney may not use the term notario publico or any equivalent non-English term in any business card, advertisement, notice, or sign.").

### C. *The Role of Community Organizations in Policing Immigration Consultant Fraud*

Community organizations play an important role in both preventing and remedying fraud. The American Bar Association Commission on Immigration, for example, founded the Fight Notario Fraud project.<sup>136</sup> This project aims to end immigration consulting fraud by providing the public with information on how to report fraud, facilitating the referral of individual victims to attorneys who might represent them *pro bono*, and providing attorneys with pleadings and other legal forms useful in pursuing a case against fraudulent immigration consultants.<sup>137</sup> Other community organizations help by providing free legal services, drop-in clinics, or hotlines for immigrants.<sup>138</sup> Most commonly, local and national organizations fight fraud through awareness campaigns and by directing complaints.<sup>139</sup>

## III. Reasons Why Immigration Consultant Fraud Persists

Although the federal government, state governments, and community organizations have all mounted defenses against fraud, it has continued seemingly undeterred and in the open.<sup>140</sup> The fraud persists because the laws are not properly tailored to the problem, the laws in effect are under-enforced, and the source of the problem—the unmet need for legal services—continues.

### A. *Misguided Laws and Regulations*

Both state and federal laws somewhat miss the mark. First, many states do not have laws directly addressing the problem and instead rely on general UPL statutes.<sup>141</sup> However, these statutes

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136. *Fight Notario Fraud*, AM. BAR ASS'N COMM'N ON IMMIGRATION, <http://new.abanet.org/Immigration/Pages/FightNotarioFraud.aspx> (last visited Apr. 8, 2011).

137. *Id.*

138. See, e.g., Leslie Casamir, *We'll Help You Become a Citizen*, DAILY NEWS (N.Y.), Apr. 17, 2005, at 21 (publicizing the week-long immigration help hotline sponsored by the Daily News and the City University of New York).

139. For example, the American Immigration Lawyers Association (AILA) has advocacy tools, such as public service announcements, available for public use on its website. *AILA—Unauthorized Practice of Law*, AM. IMMIGRATION LAWYERS ASS'N, <http://www.aila.org/issues/issue.aspx?docid=25960> (last visited Apr. 12, 2011). AILA also published a state-by-state guide to help victims take legal action against immigration consultants and notarios. *How and Where to File Complaints Against Notarios and Immigration Consultants*, AM. IMMIGRATION LAWYERS ASS'N, (Nov. 30, 2009), <http://www.aila.org/content/default.aspx?docid=26749>.

140. See *supra* Part I.

141. See *supra* note 125 (listing relevant state statutes).



historically lack public support because they are seen as being aimed at preserving a professional monopoly as opposed to protecting consumers.<sup>142</sup> Second, many states have approached the problem by regulating notaries public more stringently.<sup>143</sup> However, these laws are simultaneously under- and over-inclusive; the majority of individuals to whom these laws apply, namely notaries, are not engaged in fraud, and, because only some of those who do engage in immigration consultant fraud are actually notaries,<sup>144</sup> there are many individuals engaged in fraud who are not subject to the rules. Third, although the federal laws seek to allow qualified non-lawyers to represent immigrants through BIA accreditation, the attempt falls woefully short. Only 1039 individuals were BIA-accredited representatives as of November 2010,<sup>145</sup> compared to the approximately twenty-three million non-citizen immigrants living in the United States.<sup>146</sup> Fourth, various state laws may conflict with the federal laws, rendering them ineffective due to conflict preemption.<sup>147</sup>

### *B. Under-Enforcement of Current Laws*

Even more importantly, under-enforcement of both state and federal laws undermines their effectiveness. An important obstacle to proper enforcement is under-reporting. The victims of fraudulent immigration consultants are unlikely to report them since many of the victims are unauthorized immigrants.<sup>148</sup> Many of these undocumented victims, like Nuñez, are deported as a result of the consultant's fraud, making contact and cooperation with local law enforcement impractical.<sup>149</sup> More commonly, undocumented victims will not report these individuals for fear of disclosing their immigration status to government officials during the investigation and being deported as a result.<sup>150</sup> Finally, many im-

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142. Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 245-46 (1991).

143. See *supra* note 132 (listing relevant state statutes).

144. See *supra* Part I.B.

145. Recognition & Accreditation (R&A) Program, EXEC. OFFICE OF IMMIGRATION REVIEW, <http://www.justice.gov/eoir/statspub/raroster.htm> (follow "Accredited Representatives List" hyperlink) (last visited Apr. 3, 2011).

146. Approximately 10.8 million unauthorized immigrants were living in the United States as of January 2009. See *supra* note 85 and accompanying text.

147. See Moore, *supra* note 35, at 21-26.

148. See *id.* at 9.

149. Langford, *supra* note 30, at 124.

150. See *id.* at 134 (proposing safe harbor provisions for immigrants who report notarios or whose status is disclosed in the process of investigating a notario).

migrants, authorized or not, may not know how to report violations or to whom, and many harbor a distrust of government so they may not report violations anyway.<sup>151</sup> Even when complaints are made, it almost always falls to the state attorney general's office to investigate and prosecute the crime because few states have statutes providing a private cause of action.<sup>152</sup> However, only a few attorneys general have taken up the torch and begun to aggressively pursue immigration fraud.<sup>153</sup> In most states, the fraud is only classified as a misdemeanor, but recently some states, like Arizona, have re-classified it as a felony.<sup>154</sup> Enforcement on the federal level has been noticeably absent.<sup>155</sup> Some have suggested that the federal government chooses not to enforce the laws but instead utilizes the fraud against immigrant victims to flag them for deportation.<sup>156</sup>

### C. Failure to Address the Source of the Problem

Regardless of whether the laws are enforced after the fact, fraud will continue to exist until the source of the problem is sufficiently addressed. "[N]otarios have stepped forth to fill the gap between the demand [of] . . . immigrants for affordable and

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151. Robert A. Katzmman, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008).

152. See, e.g., CAL. BUS. & PROF. CODE § 22446.5 (West 2008) (allowing any individual, not just the defrauded immigrant, to bring a civil action against the immigration consultant).

153. In 2009, then-New York Attorney General Andrew Cuomo issued more than fifty subpoenas as part of a "sweeping investigation into immigration fraud." Press Release, Office of the Attorney Gen., Cuomo Launches Sweeping Investigation into Immigration Fraud Across the New York City Area (May 28, 2009), available at [http://www.ag.ny.gov/media\\_center/2009/may/may28a\\_09.html](http://www.ag.ny.gov/media_center/2009/may/may28a_09.html). Cuomo prosecuted several immigration consultants who scammed immigrants out of millions of dollars. See *supra* notes 55, 60. Texas Attorney General Greg Abbott launched a similar campaign against immigration fraud in 2003, filing twenty-three lawsuits in one year and encouraging the federal district attorneys to do the same, resulting in four criminal actions. Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. 387, 402 (2007).

154. See ARIZ. REV. STAT. ANN. §§ 12-2701 to -2704 (2009).

155. However, recent announcements by the federal government may foretell increased enforcement. See Press Release, Fed. Trade Comm'n, Immigration Scam Shut Down by FTC (Jan. 31, 2011), available at <http://www.ftc.gov/opa/2011/01/immigration.shtm> (announcing the FTC's first immigration fraud enforcement action); Suzanne Gamboa, *Feds Targeting Fake Immigration Lawyers*, ABC NEWS, Mar. 9, 2011, <http://abcnews.go.com/US/wireStory?id=13095768>.

156. In a California case, INS discerned a pattern of improper filings by a notario but, instead of investigating the notario, it flagged applications from the notario for denial of the requested benefits. See Moore, *supra* note 35, at 25 (citing Edwin Garcia, *Activists Who Fall Through the Cracks*, SAN JOSE MERCURY NEWS, Aug. 25, 2003, at 1A).

culturally and linguistically competent help from the legal community and the supply of such services.”<sup>157</sup> The lack of legal services available to the poor in this country is well documented;<sup>158</sup> this affects immigrant communities in particular because foreign-born are more likely to live in poverty than native-born and there is a high correlation between poverty and recency of arrival.<sup>159</sup> Immigrants, undocumented immigrants in particular, are most likely to find help through a referral by a family member or friend, and notarios are often part of the community and the immigrants’ networks, fueling their businesses and their clients’ trust in them.<sup>160</sup> Clearly, the lack of affordable and accessible legal help is the most significant factor in the persistence of immigration consultant fraud.<sup>161</sup>

#### **IV. Expanding and Legitimizing the Role of Immigration Consultants Through Federal Accreditation**

Expanding the boundaries of lawful immigration assistance would address the ongoing source of fraud by increasing the accessibility of competent, accountable immigration service providers. While increased enforcement and prosecution would be useful, post hoc measures can only do so much to eliminate fraud; legalizing and regulating immigration consultants would help prevent fraud by meeting the need that fuels it. Accomplishing this requires amending the current federal regulations, since they constitute the “floor” for regulation, and any state laws that directly conflict with the amended regulations. The federal government does not currently regulate immigration consultants. Rather, the regulations effectively prohibit the profession by defining representation broadly and excluding immigration consultants from those allowed to engage in representation.<sup>162</sup> Perhaps proving the inadequacy of the federal regulations, most states have put a gloss on them by enacting specific requirements and prohibitions for notaries and/or immigration consultants.<sup>163</sup> The federal government should expand and amend its current scheme for accrediting non-lawyer representatives to create a class of immigration consultants that can lawfully assist in certain legal matters, such as de-

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157. Langford, *supra* note 30, at 126.

158. *See id.* at 118.

159. *See id.*

160. *See id.* at 116.

161. Moore, *supra* note 35, at 3.

162. *See* 8 C.F.R. §§ 1.1(i), (k), (m), 292.1(a) (2010).

163. *See supra* Part II.B.

termining eligibility for and filling out visa applications, for reasonable compensation. Legitimizing immigration consultants allows the government to regulate them, ensuring competency and accountability. Under this scheme, the market that fraudulent consultants currently exploit would be flushed with knowledgeable professionals charging fair prices. While fraud and incompetency would undoubtedly persist, as they do to some extent in all sectors, they would no longer be the norm, but the deviation.

*A. Proposed Changes to the Federal Regulations*

1. Accessibility

The federal regulations should be amended to allow more non-lawyers to represent immigrants in basic matters. Currently, immigration consultants are only allowed to notarize and to "[fill in] blank spaces on printed Service forms."<sup>164</sup> Only persons from "non-profit religious, charitable, social service, or similar organization[s]" are eligible to advise and advocate for immigrants as BIA-accredited representatives.<sup>165</sup> The federal government should preserve BIA accreditation, but abdicate the strict eligibility requirement. This would create a larger class of non-lawyers engaging in legal representation while maintaining the government's regulatory control over them.

To increase the number of accredited representatives, the regulations must be amended to increase not only eligibility, but also profitability. Currently, non-lawyer representatives may receive only "nominal" consideration in exchange for their services.<sup>166</sup> This limitation serves a useful purpose, ensuring that the representatives mean to help and not merely to take advantage of immigrant clients. However, the same purpose would nonetheless be served if representatives were entitled to "reasonable" compensation instead.<sup>167</sup> Permitting reasonable compensation would encourage more individuals to become accredited representatives, as the profession could actually be a profitable one.<sup>168</sup> It would also benefit BIA-recognized non-profit organizations.<sup>169</sup> Such

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164. 8 C.F.R. § 1.1(k).

165. *Id.* § 292.2(a).

166. *Id.* § 1.1(k).

167. Alternatively, the EOIR could set maximum fees, like the Social Security Administration does. See Moore, *supra* note 35, at 31 n.181; see also Langford, *supra* note 30, at 134 (proposing replacing the nominal charge requirement with a maximum fee schedule to encourage more people to apply for accreditation).

168. Langford, *supra* note 30, at 134.

169. Moore, *supra* note 35, at 30. In 1995, the BIA proposed eliminating the

organizations could charge fees according to their clients' ability to pay, increasing their overall budget and thus the number of individuals to whom they can provide competent yet affordable services.<sup>170</sup>

These changes to the existing federal regulations would expand the immigration consultant profession by legitimizing it through government accreditation and by providing the opportunity for reasonable profits. However, expanding the number of service providers is not the only way non-lawyer representation would make immigration services more accessible. Eliminating the financial burden of earning a law degree means accredited representatives may charge lower rates and also may have lower earning expectations,<sup>171</sup> making their services more affordable than those of a lawyer. To the extent that most attorneys are non-Hispanic Whites while the largest immigrant groups in the United States are not,<sup>172</sup> eliminating the burden of earning a law degree should increase the likelihood that service providers come from within immigrant communities and/or have a first language other than English. Thus, increasing non-lawyer representation could make immigration services more accessible financially, linguistically, and culturally.

## 2. Competency

The most essential building block for a competent class of immigration consultants is proper training and education on immigration law. Currently, the BIA relies on non-lawyer applicants' experience with immigration law to establish their knowledge and competency.<sup>173</sup> While experience could remain an option for those who have it, a certification program<sup>174</sup> or a tech-

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nominal fee restriction, and the proposal was supported by the non-profit immigration law community as a positive change. *Id.*

170. *See id.*

171. Most law school graduates have more than \$80,000 in student loan debt, which costs them more than \$1000 a month for ten years to repay. AM. BAR ASS'N COMM'N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 9 (2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/lrap/download/s/lrapfinalreport.authcheckdam.pdf>. Sixty-six percent of students said that law school debt kept them from considering lower-paying public interest and government jobs. *Id.*

172. In 2000, 88.8% of lawyers were categorized as "White, not Hispanic." AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2009), *available at* [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer\\_Demographics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf).

173. *See* EOIR, *supra* note 119, at 12.

174. "In Detroit, the [INS] district office actually gave out certificates [to those

nical degree would provide reliable information and training to those who wish to become accredited representatives but have no prior experience in immigration law. This would provide an avenue for people to learn about and enter the profession by preparing them for accreditation. Such training could be provided directly by the government<sup>175</sup> or by public or private educational institutions.

To guarantee the competency of non-lawyer practitioners without overburdening the BIA, the accreditation requirements should be simplified: an accreditation exam would measure each applicant's knowledge efficiently and uniformly. Currently, individuals from BIA-recognized organizations apply for accreditation by submitting a letter, resume, and various supporting documentation showing their good moral character, training and experience, and access to legal resources.<sup>176</sup> While this process is commendably thorough, it is neither efficient nor uniform and it would require tremendous resources if the number of applicants for accreditation increased. Instead, the BIA should administer an exam testing individuals' knowledge of immigration law and professional ethics. This exam would be administered akin to any other professional or paraprofessional licensing exam, except that it would be administered federally, not by states, because immigration is a federal matter.<sup>177</sup>

Finally, to ensure ongoing competency, the BIA should preserve its renewal requirement for accreditation. Currently, accredited representatives must submit an application for renewal of accreditation every three years to maintain their status.<sup>178</sup> The requirement for renewal should be preserved to ensure that immigration consultants keep current on the law, but the process for renewal, like the initial accreditation process, should be amended. To ensure the representatives' continued professional integrity, the government should check for criminal activity and allegations of misconduct. To ensure the representatives' continued competency, the government should either require proof that consultants completed a certain number of continuing immigration education

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who completed its training sessions], indicating that the recipient was qualified to fill out specific forms. This conduct apparently occurs in other parts of the country." Moore, *supra* note 35, at 24–25 n.145.

175. "INS district offices have conducted training sessions for non-accredited, non-attorneys informing them of types of forms and benefits that may be provided." *Id.* at 24; see Ashbrook, *supra* note 142, at 276 n.222.

176. See *supra* notes 121–123 and accompanying text.

177. The Department of the Treasury and the Patent and Trademark Office both evaluate non-attorney competency for representation by administering exams. See Moore, *supra* note 35, at 32 & n.185.

178. 8 C.F.R. § 292.2(d) (2010).

hours or require them to pass the exam again. Either of these steps would be more efficient and uniform than the current application procedure.

### 3. Integrity and Accountability

To ensure the integrity of accredited representatives, applicants should be subject to certain minimum eligibility and practice requirements. To be eligible for accreditation, applicants should have to submit to fingerprinting and pass background checks.<sup>179</sup> This will help keep criminals and known frauds from legally entering the profession. Once accredited, there should be minimum practice requirements that representatives must comply with. For example, consultants may be required to conspicuously post statements of the services they are not authorized to provide,<sup>180</sup> or, given the well-documented confusion surrounding the term “notario,”<sup>181</sup> the government might prohibit any immigration consultant from using the term in advertising or self-description.<sup>182</sup> Such requirements would help prevent fraud by keeping clients informed, and because violations could easily be proven, would help the government punish fraud.

To help prevent and punish immigration consultant fraud, the accredited representatives must be accountable to the government and to their clients. Currently, BIA-accredited representatives are subject to sanctions for violating federal professional responsibility requirements.<sup>183</sup> This accountability should be preserved since it serves as a deterrent and a means of punishment. However, the government should add more safeguards to keep accredited representatives accountable to their clients. The BIA should post each applicant’s name, license number, accreditation status, sanction history, and photo on its website.<sup>184</sup> The government could also require accredited representatives to conspicuously display their names, license numbers, and the BIA web

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179. See, e.g., CAL. BUS. & PROF. CODE §§ 22440–48 (West 2008) (requiring both).

180. See, e.g., *id.*; MINN. STAT. ANN. § 325E.031 (West 1996). Both statutes require immigration consultants to post a disclaimer.

181. See *supra* Part I.A.

182. See, e.g., NEB. REV. ST. § 64–105.03 (2004). As a Spanish substitute for “notario,” immigration consultants could instead call themselves “consultor/a migratorio/a” or “consultor/a de inmigración,” which would more literally translate into “immigration consultant” and therefore avoid being misleading. See SAINT DAHL, *supra* note 46, at 45, 380.

183. See *supra* note 124 and accompanying text.

184. See e.g., CAL. BUS. & PROF. CODE §§ 22440–48 (requiring posting of each registered immigration consultant’s name, photo, and background check status on the state’s website).

address in their office, and/or include this information on all contracts and receipts. This would allow consumers to check the status of a representative, prevent consultants from falsely claiming representation, and give consumers an easier mechanism to report abuses. An accompanying advertising campaign targeted at immigrant communities would ensure that the meaning of accreditation and how to verify it become common knowledge and practice.

*B. Feasibility of Expanded Accreditation*

Although allowing immigration consultants to become accredited and work for profit is a dramatic departure from the current regulations, it is not impractical. While enlarging the class of accredited representatives and increasing the BIA's regulation of them would require more resources,<sup>185</sup> it would also save the government resources over the long term. The accreditation exam is much more efficient from a financial perspective than the current individualized application procedure. The preparation for accreditation could be provided by educational institutions instead of the government, or the government could provide the training for a profit. More importantly, the availability of competent and affordable representatives should decrease the amount of government resources currently wasted on reviewing meritless visa applications, struggling to make correct determinations at confusing hearings, and prolonged appeals from deportation orders.<sup>186</sup>

Although this Article does not contemplate allowing immigration consultants to perform the same spectrum of services that an attorney could, any non-attorney representation is an objectionable proposal for many. Proponents of UPL laws would criticize the expansion of accredited representations as compromising the legal profession's integrity and putting the public at risk.<sup>187</sup> However, non-attorney representation is already an accepted practice among other federal agencies, with no apparent detriment to the profession or the public.<sup>188</sup> The U.S. Department of the Treasury allows different categories of non-lawyers to prepare tax forms, advise clients regarding Internal Revenue Service matters, and appear in agency proceedings.<sup>189</sup> The U.S. Patent and Trademark Office also allows non-attorneys to prosecute

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185. Moore, *supra* note 35, at 32.

186. *See id.* at 6 (describing how fraud burdens the immigration administrative system).

187. *See* Ashbrook, *supra* note 142, at 265.

188. *See* Moore, *supra* note 35, at 31.

189. *Id.*



patent applications as registered agents.<sup>190</sup> Of course, the BIA also already allows non-attorneys, including accredited representatives, law students, and “reputable individuals,” to appear before it.<sup>191</sup> Expanding the current accreditation system would not be unprecedented in the federal government.

## Conclusion

The problem of immigration consultant fraud continues to plague immigrant communities. Unscrupulous immigration consultants or “notarios” hold themselves out as qualified to provide legal advice and services, defrauding their clients and cheating them out of money and a chance to live in the United States legally. Immigrants are particularly vulnerable to fraud because a large percentage of them are relatively poor, isolated (many do not speak English or understand the U.S. government system), and often reluctant or unable to report the problem. Federal and state laws have attempted to combat this fraud by restricting the lawful conduct of immigration consultants and creating civil and criminal sanctions for those who venture into the practice of law. Yet the fraud persists, not only because the laws are under-enforced, but also because they do not address the source of the problem—a lack of affordable and accessible legal services in immigrant communities. This Article proposes to amend the federal regulations in order to expand and legitimize the immigration consultant profession by allowing more non-lawyers to offer limited immigration law services for reasonable fees. Making immigration assistance a viable, regulated profession would dramatically increase the availability of competent legal services to immigrants, meeting the need that fraudulent practitioners have exploited.

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190. *Id.*

191. 8 C.F.R. § 291.2(a) (2010).

