

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES**

February 13, 2006

RECOMMENDATION

RESOLVED, that the American Bar Association supports:

- (a) a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner;
- (b) the development of efficient interagency procedures to ensure that those involved in immigration matters have a clearly identified means for addressing and resolving issues that require action by more than one of the federal agencies that have jurisdiction;
- (c) vigilant enforcement against the unauthorized practice of law and ineffective assistance of counsel in immigration matters, and the development of mechanisms to ensure that substantive and procedural rights are not prejudiced for applicants for immigration relief or benefits who have been victimized by the unauthorized practice of law or ineffective assistance of counsel;
- (d) free availability of user-friendly legal resources for participants in immigration matters, and the development of self-help assistance centers in all facilities where immigration matters are processed or adjudicated;
- (e) the adoption of reasonable discovery procedures for immigration proceedings that are consistent with best practices in other administrative agencies; and
- (f) the development of a standardized, efficient process for the timely handling of Freedom of Information Act requests for immigration matters that ensures compliance with statutory deadlines.

REPORT

*This is the fourth report in the Commission's series of seven resolutions and reports that addresses "Administration of U.S. Immigration Laws," as explained at the beginning of the first report (107A).

The protections of our immigration laws, and justice itself, are illusory if the federal agencies charged with administering these laws are unable to carry out their duties in a timely and fair manner. Unfortunately, timely and fair administration of our immigration laws is much more the exception than the rule in today's system. Consistent with the ABA's mission of promoting justice and respect for the law, the ABA should support a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient.

Regardless of where one stands on the political spectrum, there is wide agreement that our country's immigration laws are extremely complex and have potentially grave consequences for immigrants, refugees, and asylum seekers who make mistakes in attempting to comply with these laws. The complexity of these laws and their corresponding requirements are especially challenging given that immigrants, refugees, and asylum seekers often are unfamiliar with our language, culture, and legal system. As a result, it is critically important that there be a transparent, user-friendly, accessible, fair, and efficient system for processing applications for immigration relief or benefits; and that this system contain appropriate mechanisms for correcting mistaken decisions.

It also is widely known that the governmental entity presently charged with processing the majority of immigration applications, U.S. Citizenship and Immigration Services (CIS) within the U.S. Department of Homeland Security (DHS), is plagued by severe and persistent backlogs that lead to lengthy delays (often several years) in the adjudication of well-founded and properly filed applications for immigration benefits. These backlogs, due in large part to insufficient appropriations for CIS to carry out its duties, plagued CIS' predecessor agency, the Immigration and Naturalization Service (INS), throughout its existence. The ABA has long had policy in place calling upon the federal government to eliminate its persistent backlogs in adjudicating applications by providing the responsible agencies with adequate appropriations so that these agencies can carry out their responsibilities in a timely and efficient manner, by more effectively using agency personnel, and by improving agency procedures.

This resolution presents a series of proposed ABA policies designed to address other pressing issues relating to administration of our immigration laws. These policies, combined with the existing ones, would enable our nation to realize the goal of establishing a system that is transparent, user-friendly, accessible, fair, and efficient. These proposed resolutions fit squarely within the overall ABA mission of promoting justice and respect for the law.

Interagency Coordination

One of the fundamental challenges that applicants for immigration relief or benefits face today is that their applications often require action by more than one federal agency. Before

2002, the agencies with principal responsibility for administration of our immigration laws were INS and the Executive Office of Immigration Review (EOIR), both of which were housed within the United States Department of Justice. The Department of State also had a role for certain types of matters.

With the passage of the Homeland Security Act of 2002, INS was abolished and the number of agencies with some responsibility for administering our immigration laws multiplied. The functions formerly housed within INS were assumed by three new agencies within DHS: CIS, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protections (CBP). In addition, matters involving the care and custody of unaccompanied immigrant minors were transferred to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services. EOIR continues to have jurisdiction over most adjudicatory functions involving immigration matters and remains within the Department of Justice, and the Department of State also continues to have a role for certain immigration matters.

Given the multiple federal agencies that potentially have jurisdiction over a particular immigration matter (and the three separate agencies within DHS that may be involved), there is a critical need for effective coordination among these agencies to ensure that immigration matters are resolved in a timely and fair manner. In particular, it is imperative that there be clearly identified procedures to address and resolve issues that require action by more than one agency. Without such mechanisms in place, immigration matters are delayed unnecessarily and decided incorrectly, effectively cutting off relief that lawfully should have been available to the applicants.

Recognizing that different types of immigration matters require differing levels of involvement for the multiple agencies that potentially have jurisdiction, it may not be possible for there to be a “one size fits all” solution to the interagency coordination issue. For example, for adult asylum matters there might be one central point of contact, while for matters regarding unaccompanied immigrant minors there might be another. But for each general area of immigration matters that potentially involves more than one agency, there should be one clearly identified means for those pursuing immigration relief or benefits to address any issues that may arise among any of the involved agencies.

Protection from Unauthorized Practice of Law and Ineffective Assistance of Counsel

As is true throughout our American system of justice today, persons pursuing claims for immigration relief or benefits—particularly lower-income applicants unable to afford counsel—are often unable to obtain competent counsel to assist them. This problem, however, is particularly acute in immigration matters. Immigrants, refugees and asylum seekers often are unfamiliar with our language, culture, and legal system, and as a result are especially vulnerable to being deceived by persons who are not authorized to practice law, or harmed as a result of mistakes by attorneys who lack sufficient familiarity with our nation’s complex and often unforgiving immigration laws. These problems are compounded in the immigration context by the grave consequences that can result when applicants make errors in the process, and by the very limited means that currently exist to correct mistaken decisions.

The serious problem of unauthorized practice of law in immigration matters is so pervasive that the term “*notario* fraud” is often specifically recognized in state consumer fraud laws. Throughout the country, “*notarios*” and other unauthorized “document preparers” prey on unsuspecting immigrants by charging them seemingly reasonable fees to prepare applications for immigration relief or benefits. These *notarios*, however, often either fraudulently or negligently assist applicants in filing improper immigration claims that can have severe consequences for the applicants. For example, under current law, filing the wrong claim for immigration relief or benefits can lead to a ten-year ban, and even a permanent ban, from legally staying in this country.

A related problem arises when attorneys who may be skilled in other areas of the law but who lack familiarity with immigration law inadvertently make similar errors in the process, which again can have long-lasting or even permanent negative consequences for the applicants.

The common thread in these circumstances is that innocent victims of fraud or negligence should not be subject to the often severe penalties that otherwise would attach under our current immigration laws. There must be vigilant enforcement against those who engage in the unauthorized practice of law in immigration matters, and appropriate measures should be taken against those attorneys who negligently provide ineffective legal assistance to the detriment of their clients. More importantly, just as ineffective assistance of counsel can be grounds for overturning improper convictions in criminal matters, the substantive and procedural rights of applicants for immigration relief or benefits should be protected when they are victimized by the unauthorized practice of law or ineffective assistance of counsel.

Improved Legal Resources and Legal Information Centers for Immigrants

In addition to increased enforcement against those who engage in the unauthorized or negligent practice of immigration law, there need to be improved legal information and resources for immigrants, refugees, and asylum seekers. The combination of the complexity of our nation’s immigration laws and the sizable gap in access to competent counsel for immigration matters makes it critically important that there be user-friendly and accessible legal information and resources for applicants for immigration relief and benefits.

As is already happening for other areas of the law throughout the country, there should be widely available, user-friendly legal resources (including web-based resources) that give immigrants reliable information on the basic substantive and procedural requirements governing common immigration matters. In addition, the ABA and the American Immigration Lawyers Association (AILA), along with local bars and AILA chapters, should partner with EOIR and the federal courts to establish legal information centers in all facilities where immigration matters are processed or adjudicated.

At a minimum, such centers should include general information on substantive and procedural immigration matters translated into relevant languages as well as referrals for available legal help. In addition, to the maximum extent possible, the centers should include “advice desks” where immigration applicants can obtain brief advice from competent counsel in

immigration matters, and, where appropriate, limited legal assistance or referrals for extended representation. These information centers and advice desks should be operated by bar-approved attorneys or agencies to ensure that appropriate advice and assistance is being given.

Reasonable Discovery and FOIA Procedures

Two other related issues under current immigration law and practice are the lack of discovery procedures in immigration proceedings and the uneven application of the Freedom of Information Act (FOIA) for these matters.

Unlike court proceedings and most other administrative matters, there is no provision for discovery in immigration proceedings. This lack of access to discovery for immigration applicants raises a fundamental question of fairness and due process, because immigration proceedings often involve matters of basic liberty and even may involve issues of life and death. There should be reasonable discovery developed for these proceedings, using the Federal Rules of Civil Procedure and the rules in use in other administrative proceedings as a model, with due consideration of the unique issues that can arise in immigration proceedings.

There are multiple problems with FOIA as it relates to immigration matters. Some of those problems arise from the lack of available discovery in immigration matters, which effectively requires applicants for immigration relief or benefits to use FOIA as a means of discovery. As the federal government adopts reasonable discovery procedures for immigration matters, it also should clarify that discovery is the proper means for obtaining information in contested immigration proceedings, while FOIA is the appropriate means for other cases.

In addition to delineating the discovery/FOIA threshold, the federal government also needs to establish a standardized and efficient process for the timely handling of FOIA requests that ensures compliance with statutory deadlines. In part, this is a coordination matter between agencies and DHS bureaus, and that aspect would be addressed by establishing a clear means for handling these requests.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Richard Peña, Chair

1. Summary of Recommendation(s).

This recommendation supports a transparent, user-friendly, accessible, fair, and efficient system for administering immigration laws that has sufficient resources to carry out its functions in a timely manner. The recommendation supports the development of efficient interagency procedures to ensure that individuals have clear means for addressing and resolving issues that require action by more than one of the federal agencies with jurisdiction over immigration matters. The recommendation also supports vigilant enforcement against the unauthorized practice of law and ineffective assistance of counsel in immigration matters, and the development of mechanisms to ensure that the substantive and procedural rights of victims of such practices are not prejudiced. The recommendation also supports free availability of user-friendly legal resources for participants in immigration matters, including the development of self-help assistance centers in facilities where immigration matters are processed. Finally, the recommendation supports the development of a standardized process for the Department of Homeland Security when handling Freedom of Information Act (FOIA) requests.

2. Approval by Submitting Entity.

On October 7, 2005, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

This recommendation recognizes the need for increased efficiency in the administration of U.S. immigration laws, in order to afford due process to non-citizens. It is consistent with, and does not restate, the following relevant existing Association policies:

- Labor Certification Program: supports legislative and administrative proposals to improve administration of this program (8/76).
- Unauthorized Practice of Law: urges jurisdictions to establish and implement effective procedures for the discovery and investigation of any apparent violation of its laws prohibiting the unauthorized practice of law, and to pursue active enforcement of those laws (00M8A).
- Increased Appropriations for Enforcement: Supports provision by Congress of sufficient resources to federal agencies charged with administering immigration, refugee, and fair labor

standards laws (2/83).

This recommendation expands upon existing Association policy by supporting more effective, efficient, and user-friendly immigration processes, and by supporting interagency procedures that would enable component agencies within the Department of Homeland Security and other agencies charged with various responsibilities under immigration law to address and resolve issues effectively. Existing Association policy does not address these issues. The recommendation also extends Association policy opposing the unauthorized practice of law to the immigration context, specifically addressing unique barriers that immigrants face, as well as substantive and procedural rights at stake. Finally, the recommendation calls for the adoption of reasonable discovery procedures in the immigration context, and the development of a standardized, efficient process for the timely handling of Freedom of Information Act (FOIA) requests.

5. What urgency exists which requires action at this meeting of the House?

The protections of our immigration laws, and justice itself, are illusory if the federal agencies charged with administering these laws are unable to carry out their duties in a timely and fair manner. Unfortunately, timely and fair administration of our immigration laws is much more the exception than the rule in today's system. The Department of Homeland Security (DHS) is plagued by severe and persistent backlogs that lead to lengthy delays (often several years) in the adjudication of well-founded and properly filed applications for immigration benefits. Immigration processing is also plagued by unauthorized practice of law, which deprives victims of their substantive and procedural rights. Finally, due process is impeded by the lack of a standardized process for the Department of Homeland Security when handling Freedom of Information Act (FOIA) requests.

6. Status of Legislation. (If applicable.)

On May 12, 2005 Senators McCain and Kennedy introduced the Secure America and Orderly Immigration Act of 2005 (S. 1033), which was introduced in the House by Representatives Kolbe, Flake, and Gutierrez (H.R. 2330). The bill requires a complete evaluation of current border enforcement and coordination capabilities and development of a national plan; allows DHS to alleviate problems due to visa processing delays; and provides for resources that would assist immigrants in fulfilling requirements for citizenship.

7. Cost to the Association. (Both direct and indirect costs.)

Existing Commission and Governmental Affairs staff will undertake the Association's promotion of this recommendation, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This recommendation is currently being circulated to Association entities and Affiliated Organizations including:

Criminal Justice
Family Law
Litigation
SCLAID
Domestic Violence
Administrative Law
Government and Public Sector lawyers
Individual Rights and Responsibilities
International Law
Young Lawyers Division
Labor and Employment
Judicial Division
Law and National Security
Commission on Law and Aging
Center for Children and the Law
CEELI
ABA Africa
LALIC
American Immigration Lawyers Association (AILA)
NLADA
San Diego Bar Association
Chicago Bar Association
Los Angeles County Bar Association
State Bar of Texas
The Association of the Bar of the City of New York
Beverly Hills Bar Association
New Jersey State Bar Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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