October 20, 2014

Vice President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue N.W.
Washington, DC 20500

Dear Mr. Vice President:

On behalf of the American Bar Association (ABA) and its nearly 400,000 members, I write to express our enthusiasm for collaborating with the Administration and other stakeholders to enhance access to legal representation for unaccompanied children in the immigration court system nationwide. At the White House meeting in August, you recognized that we share a common concern for the welfare of these children and appealed to law firms, bar associations, and nonprofit legal service providers to increase our efforts to provide pro bono representation for children placed in removal proceedings. We are in full agreement that all parties benefit when children, due to their unique vulnerabilities, are competently represented by counsel in adversarial proceedings.

We appreciate your assuming a leadership role in recognizing that these are challenging issues that require a coordinated and dedicated response. The ABA and many other groups throughout the nation are already working to contribute to this effort. The ABA recently established a Working Group on Unaccompanied Minor Immigrants, comprised of a cross-section of lawyers from varying ABA entities, charged with responding to the critical need for additional pro bono lawyers. The Working Group’s primary tasks will be to recruit, train, and mentor additional attorneys to increase capacity and complement the efforts of existing legal services programs.

We want to emphasize, however, that pro bono representation cannot provide a complete solution to this problem. Due to the large number of children lacking counsel, as well as many other competing civil justice pro bono needs, the demand for pro bono services outweighs the available resources. Addressing this situation will require the commitment of additional resources and initiatives from the federal government as well as from the nonprofit and private sectors. We recommend a few steps that can be taken to help facilitate an effective pro bono response and to otherwise enhance access to legal representation for all unaccompanied children.

Prioritize Access to Counsel and Legal Services for Detained and Non-Detained Children

In 2004, the ABA Commission on Immigration developed standards related to the custody, care, representation and adjudication of unaccompanied children and their cases. [ABA Comm’n on
Immigration, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (Aug. 2004.)] These standards recognize the special needs of children and reject an approach that treats children merely as “adults in miniature.” One of the cornerstones of the Standards is that a child should have an attorney in any formal proceeding or other matter in which a decision will be made that will affect the child’s immigration status. This Standard recognizes that legal representation not only protects the child, but also often improves the efficiency of the court process and helps to ensure that the child and his or her sponsor understand the responsibility to appear in court. While pro bono representation should be utilized where possible, government-appointed counsel should be provided if it is not available. We applaud the newly established "justice AmeriCorps" partnership and the recent announcement of $9 million in funding from the Office of Refugee Resettlement to support direct legal representation services; even so, these resources will cover only a small percentage of children with pending cases, and we encourage enhancing these efforts and establishing other similar initiatives.

The ABA also recommends that the government continue to provide resources for the highly successful “Legal Access Project,” funded through the Office of Refugee Resettlement in the Department of Health and Human Services. This program ensures that children in detention centers along the border in Texas and elsewhere receive child-friendly “Know Your Rights” presentations and prompt legal screenings from qualified attorneys and paralegals. These screenings are often critical to identifying children who may be eligible for relief and ensuring that there is an appropriate referral to pro bono counsel upon their release.

Facilitate Pro Bono Efforts by Allowing Adequate Time for Children to Obtain Counsel and for Counsel to Prepare Cases

While the ABA recognizes the need for removal cases to be adjudicated in a timely manner, it is unnecessary and unfair to rush these cases to conclusion. With the vast number of children in need of representation, legal service providers need time to recruit, train, and assign pro bono counsel. Counsel then must have adequate time to establish a relationship with the child, gather evidence, and prepare their cases. We understand that the immigration court is prioritizing the cases of unaccompanied children by scheduling the initial master calendar hearing within 21 days, but that there is no fast-tracking requirement for subsequent hearings. We commend the Executive Office for Immigration Review for issuing the September 10, 2014 memorandum to clarify that the priority scheduling for master calendar hearings for cases involving unaccompanied children does not inhibit the discretion of an immigration judge to grant appropriate continuances to obtain representation or to reset the case for other reasons. However, we encourage an affirmative statement from EOIR that immigration judges should utilize that discretion to provide the appropriate number and length of continuances necessary to ensure that every unaccompanied child is effectively represented by counsel in proceedings.

Ensure Adequate Funding for the Immigration Courts and the Asylum Office

In 2010, the ABA, in collaboration with Arnold & Porter LLP, published a report on reforming the immigration removal adjudication system entitled Reforming the Immigration System—Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the
Adjudication of Removal Cases. One of the report’s key findings was that the significant expansion of immigration enforcement activity in recent years had not been matched by a commensurate increase in resources for the court system. This combination of an ever-increasing caseload and chronically inadequate funding has brought the immigration adjudication system to a crisis point: The number of pending cases before the immigration courts has reached an all-time high of more than 400,000, and the average wait time for these cases has risen to 567 days, according to the most recent data obtained by the Transactional Records Access Clearinghouse. With the decision to prioritize recently arrived unaccompanied children and families with children, other pending cases will be even further delayed. This has a particularly deleterious impact on asylum-seekers who may have already waited years for their individual hearings and whose family members may be at risk in their countries of origin. These lengthy delays also have a detrimental effect on pro bono representation, since attorneys may be unable to commit to taking cases where hearings are scheduled several years into the future. The Administration should work with Congress to increase funding for the immigration court system and the USCIS Asylum Office to help ensure that interviews and hearings are provided in a timely fashion.

The American Bar Association fully agrees with you that the rapid increase in unaccompanied children entering our country presents extremely difficult challenges. However, we cannot be in such a rush to address this crisis that we abandon the principles of fairness and due process that are the hallmark of our justice system. Ensuring legal representation for unaccompanied children must be an important component of our efforts to maintain these principles; we look forward to working with you and the administration toward this goal.

Respectfully,

William C. Hubbard
President

cc: Jeh Johnson, Secretary, Department of Homeland Security (DHS)
Alejandro Mayorkas, Deputy Secretary, DHS
Esther Olavarria, Senior Counselor to the Secretary, DHS
Serena Hoy, Senior Counselor to the Secretary, DHS
Julie McEvoy, Deputy Associate Attorney General, Department of Justice (DOJ)
Juan Osuna, Director, Executive Office for Immigration Review (EOIR), DOJ
Steve Lang, Program Director, Executive Office for Immigration Review EOIR/ DOJ
Megan Mack, Officer for Civil Rights and Civil Liberties, DHS
Cecilia Muñoz, Assistant to the President and Director, White House Domestic Policy Council
Julie Rodriguez, Deputy Director, White House Office of Public Engagement