

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**  
**AUGUST 8-9, 2011**

**RESOLUTION**

RESOLVED, That the American Bar Association supports measures to improve access to counsel for individuals in immigration removal proceedings and urges the Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR) to:

- (a) Develop regulations to strengthen the eligibility requirements for attorneys and agencies that wish to be included on the EOIR pro bono service provider lists, and encourage participation in pro bono services by qualified agencies and individuals;
- (b) Conduct outreach to agencies in underserved locations to encourage them to seek recognition and their qualified staff to seek accreditation from the Board of Immigration Appeals (BIA), in order to provide competent legal services to meet the needs of the immigrant populations.

FURTHER RESOLVED, That the American Bar Association urges the BIA to require that BIA-recognized agencies:

- (a) Provide free or low cost services based on the financial need of the individual receiving services;
- (b) Obtain IRS tax-exempt and "non-profit" corporate status;
- (c) Employ an attorney and/or establish a mentoring/technical support relationship with a legal support agency or a qualified attorney to provide adequate supervision and/or support;
- (d) Demonstrate that a meaningful portion of the agency's budget comes from non-fee sources of support;
- (e) Require each of the agency's accredited representatives to participate in a minimum of two trainings on immigration law each year; and
- (f) Ensure that individual accredited representatives are assigned only to those cases appropriate to their level of skill and experience.

FURTHER RESOLVED, That the American Bar Association supports measures to combat the unauthorized practice of immigration law (UPIL) and immigration practitioner fraud.

FURTHER RESOLVED, That the American Bar Association encourages federal, state, and local governments to adopt laws that:

- (a) Create a private right of action for victims of UPIL or immigration practitioner fraud.
- (b) Provide criminal penalties for engaging in UPIL or immigration practitioner fraud that would give federal and state authorities the right to investigate and prosecute those engaging in UPIL or immigration practitioner fraud.

FURTHER RESOLVED, That the American Bar Association urges the Department of Homeland Security (DHS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) to make accommodations for victims of immigration practitioner fraud, including:

- (a) Allowing the withdrawal without prejudice of submissions in cases in which a noncitizen can establish that his or her immigration filings were created or submitted by an individual engaged in UPIL or immigration fraud or alternatively, developing a means for submitting corrected filings which will supersede the documents previously filed.
- (b) Allowing the U non-immigrant visa to be available for victims of immigration fraud who cooperate with federal, state, or local law enforcement, as well as state bars or EOIR, in the prosecution of those engaging in UPIL or immigration fraud.
- (c) Developing a waiver of inadmissibility for individuals who face a bar to reentry after leaving the U.S. based on the erroneous advice of an individual engaged in UPIL or immigration fraud.

## REPORT

The American Bar Association is deeply committed to ensuring fair treatment and access to justice under the nation’s immigration laws in accordance with the Constitution. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and cultural barriers are present. This policy resolution seeks to enhance representation and fairness by increasing the number of pro bono lawyers available, and the capacity and competency of Board of Immigration Appeals (“BIA”)–recognized agencies and accredited non-attorneys; deterring the incidents of the Unauthorized Practice of Law (UPIL); and providing remedies for victims of *notario* fraud and other immigration fraud by practitioners.

Increased representation of noncitizens has the potential to make the removal adjudication system not only fairer, but also more efficient. The Department of Justice’s (DOJ’s) Executive Office for Immigration Review (“EOIR”) has put in place some measures to provide noncitizens with assistance in obtaining representation which include procedures for recognizing or accrediting organizations that can represent individuals in immigration matters, and providing a list of pro bono service providers. Despite EOIR’s efforts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2010, almost 60% of noncitizens were unrepresented.<sup>1</sup> The figure is substantially higher for those who are detained with around 84% unrepresented.<sup>2</sup> Rates of representation for proceedings before the BIA are somewhat better than for those before the immigration courts, but a substantial number of noncitizens are unrepresented there as well.<sup>3</sup>

There is strong evidence that representation affects the *outcome* of immigration proceedings. In fact, the newly released preliminary findings from The New York Immigrant Representation Study, a two-year project of the Judge Robert A. Katzmann Immigrant Representation Study Group, show that “[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.”<sup>4</sup> The

<sup>1</sup> Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *FY 2010 Statistical Year Book* (January 2011), at G1, *available at* <http://www.justice.gov/eoir/statpub/fy10syb.pdf>.

<sup>2</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007) (citing Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Inst.), April 2005, at 1). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see Jaya Ramji-Nogales et al., *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (NYU Press 2009).

<sup>3</sup> *Id.* The CLINIC BIA Pro Bono Project was developed in 2001 to alleviate some of this need at the appellate level, using a network of committed volunteers, trainers, and mentors to safeguard the rights of vulnerable asylum-seekers and long time lawful permanent residents. Since the Project’s inception in 2001, it has secured representation for more than 550 individuals. *See* <http://cliniclegal.org/programs/center-immigrant-rights/bia-pro-bono-project/0811/bia-pro-bono-project>.

<sup>4</sup> The New York Immigrant Representation Study, *Preliminary Findings*, at 1, *available at* <http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf>.

study analyzed representation in the New York immigration courts, and found that 74% of individuals who were represented and released or never detained had a successful outcome; 18% of individuals who were represented but detained were successful; but only 3% of individuals who were unrepresented and detained were successful.<sup>5</sup> Another study has shown that whether a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.”<sup>6</sup> For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when the asylee proceeded *pro se*. Between 1995 and 2007, in affirmative asylum cases, which are processed administratively by asylum officers, the grant rate for applicants was 39% for those with representation and only 12% for those without it.<sup>7</sup> In defensive asylum cases, which are heard in immigration court, 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful. Between 2000 and 2004, in expedited removal cases, 25% of represented asylum seekers were granted relief, compared to only 2% of those who were unrepresented.<sup>8</sup>

Meanwhile, the stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries. In this context, representation is arguably at least as critical as in the criminal context.

Representation also has the potential to increase the efficiency, and thereby reduce the costs, of at least some adversarial immigration proceedings. Pro se litigants can cause delays in immigration court proceedings and, as a result, impose a substantial financial cost on the government. As a number of immigration educators, judges, practitioners, and government officials have observed, the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better informed decisions. In addition, representation can speed the process of adjudication, reducing detention costs. Increased representation for noncitizens thus would lessen the burden on immigration courts and facilitate the smoother processing of claims.

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<sup>5</sup> *Id.*

<sup>6</sup> GOV'T ACCOUNTABILITY OFFICE, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008) (“GOV'T ACCOUNTABILITY OFFICE”). An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.

<sup>7</sup> *Id.* A defensive case is where an individual requests asylum before an immigration judge in response to an expedited removal or other removal action by DHS.

<sup>8</sup> See Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in 2 U.S. COMMISSION ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 239, 244-50 (2005), available at <http://www.uscirf.gov/government-relations/other-advocacy-materials/3395-uscirfs-expedited-removal-study.html>.

In short, enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with *pro se* litigants, and more just outcomes for noncitizens.<sup>9</sup>

### **Developing regulations to strengthen the eligibility requirements for the pro bono service provider list**

EOIR's Office of the Chief Immigration Judge maintains a current list of free legal service providers who meet the qualifications specified in the regulations (8 C.F.R. §1003.61). These entities include recognized organizations; organizations not recognized by the BIA but which demonstrate that they provide free legal services to indigent aliens and have an attorney on staff; bar associations; and attorneys.<sup>10</sup> Local lists are made available across the country.

The EOIR roster of pro bono service providers is updated quarterly, and under statute and regulation lists are provided to all individuals in removal proceedings. Updated and properly maintained, the EOIR list provides an invaluable source of assistance for noncitizens facing removal. EOIR announced plans to develop regulations to strengthen the requirements for attorneys and organizations who wish to be included on the list in 2007.<sup>11</sup> Appropriate regulations should be adopted promptly that facilitate the process of connecting noncitizens to competent counsel. At a minimum, immigration judges should be required to consult with local bar associations and other local stakeholders in determining the criteria for inclusion on the pro bono service providers list to help ensure the quality of the listed service providers.

### **Outreach to organizations in remote, underserved locations to encourage them to seek recognition and accreditation from the BIA**

Detention of immigrants in general makes it difficult to secure representation and pursue relief to which they may be entitled. This problem is exacerbated by detention at remote locations, far from metropolitan areas where most immigration practitioners and pro bono programs are

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<sup>9</sup> See Catholic Legal Immigration Network, Inc., *et al.*, Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel for Immigrants in Removal Proceedings, at 12-13 (June 29, 2009), available at <http://www.immigrantjustice.org/download-document/491-petition-for-rulemaking-appointed-counsel-june-2009.html>.

<sup>10</sup> Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud, Careen Shannon, *Fordham Law Review*, Vol. 78, pg 577, Nov 2009, pg 604, available at [http://www.fordhamlawreview.org/assets/pdfs/Vol\\_78/Shannon\\_November\\_2009.pdf](http://www.fordhamlawreview.org/assets/pdfs/Vol_78/Shannon_November_2009.pdf).

<sup>11</sup> See U.S. Department of Justice News Release, *EOIR to Expand and Improve Pro Bono Programs* (November 15, 2007), available at <http://www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf>. No regulations have been reflected in EOIR's Progress Review of 2008 or 2009. See U.S. Department of Justice Fact Sheet, *EOIR's Improvement Measures — Progress Overview* (September 8, 2008); U.S. Department of Justice Fact Sheet, *EOIR's Improvement Measures — Progress Overview* (June 5, 2009).

located. “The practical effect of detention in remote locations ... is to restrict asylum seekers’ legally authorized right to counsel.”<sup>12</sup>

A report published by the Heartland Alliance’s National Immigration Justice Center explains:

Geographic isolation of detention facilities is a substantial barrier to access to counsel. Non-Governmental Organizations (“NGOs”) and law firms that can provide *pro bono* counsel to immigrant detainees are most commonly located in metropolitan areas, but a significant number of detention facilities are located more than 100 miles from these cities. Almost all of the legal aid organizations surveyed reported that the proximity of detention facilities affected their ability to provide legal counsel. More than a quarter (28 percent) of the detention facilities surveyed, holding about 3,000 people, are not served by any legal aid organization. Eight facilities with more than 100 detainees did not have any access to legal aid organizations, including any type of legal orientation program. Many of these facilities are county jails with intergovernmental service agreements, but the largest facility without access to attorneys is owned by ICE—California’s El Centro Service Processing Center, which detains more than 450 people per day.<sup>13</sup>

The only manner in which high quality legal services will be made available to meet the needs of this particularly vulnerable population in remote areas is if organizations which are located near these detention centers are encouraged to seek recognition and their qualified staff to seek accreditation from the BIA. As is discussed in more detail below, immigration law provides for representation by accredited representatives working for BIA recognized agencies. The ABA supports programs to provide whatever assistance is needed to increase their participation in BIA accreditation.

**The important role played by BIA-recognized agencies in expanding legal services available to individuals, particularly vulnerable populations within the immigration court system**

Regulations governing BIA recognition of nonprofit religious, charitable, social service or similar organizations require only that the organization have a recognized nonprofit status; that they charge only nominal amounts; that they assess no excessive membership dues for persons given assistance; and that the organization has at its disposal adequate knowledge, information and experience.<sup>14</sup> There is currently no requirement that a recognized agency offer attorney supervision, or even that it be “tax-exempt.” Accredited representatives work for organizations that qualify under these regulations and have been recognized by the BIA.

<sup>12</sup> U.S. Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal*, Vol. II, at 240.

<sup>13</sup> Heartland Alliance National Immigrant Justice Center, *Isolated in Detention* (Sept 2010), at 8; available at <http://www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html>.

<sup>14</sup> See 8 C.F.R. §1292.2. This is comparable to what is authorized in other areas of administrative adjudication such as social security and veterans’ proceedings.

Regulation of providers of immigration assistance services occurs at the state level and some states exempt nonprofit organizations that are not BIA-accredited from its regulatory purview, inadvertently creating a dangerous loophole allowing many such entities to persist in performing bad, even fraudulent, work on behalf of immigrants. Moreover, many so-called nonprofit organizations that are not BIA-recognized, but are providing immigration services, are in fact profitable enterprises that abuse their non-profit and tax-exempt statuses.<sup>15</sup>

This policy resolution would ensure a high quality of legal representation by requiring either employment of a lawyer by the agency, or that a mentoring relationship exist between a qualified lawyer and the agency. In addition, accredited representatives would be required to maintain their competence by participating in two immigration law trainings per year and their participation in cases would be limited to legal issues appropriate to their level of skill and experience.

### **Measures to combat the unauthorized practice of immigration law (UPIL)**

The ABA supports vigilant enforcement against the unauthorized practice of law (UPIL) 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.<sup>16</sup> The existing lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by unscrupulous “immigration consultants” and “*notarios*.”

UPIL occurs when those who are not attorneys or accredited representatives, such as unscrupulous “immigration consultants” and “*notarios*,” provide legal assistance to applicants or petitioners in immigration matters or hold themselves out to be qualified in legal matters. The unauthorized practice of immigration law endangers the integrity of our immigration system and victimizes members of the immigrant community. U.S. Citizenship and Immigration Services (USCIS) has launched an initiative to combat this exploitative practice by promoting public understanding of the best ways to find bona fide legal advice and avoid scams; building capacity for legitimate assistance and services; supporting enforcement action against those who engage in the unauthorized practice of immigration law.”<sup>17</sup> The ABA Commission on Immigration’s Fight Notario Fraud project has also made strides in this effort.

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<sup>15</sup> Careen Shannon, “Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud,” *FORDHAM LAW REVIEW*, Vol. 78 577 (Nov 2009) at 616 *available at* [http://www.fordhamlawreview.org/assets/pdfs/Vol\\_78/Shannon\\_November\\_2009.pdf](http://www.fordhamlawreview.org/assets/pdfs/Vol_78/Shannon_November_2009.pdf).

<sup>16</sup> ABA Recommendation 107D(c), adopted February 2006, *available at* [http://www2.americanbar.org/sdl/Documents/2006\\_MY\\_107D.pdf](http://www2.americanbar.org/sdl/Documents/2006_MY_107D.pdf).

<sup>17</sup> U.S. Citizenship and Immigration Services, “USCIS Initiative to Combat the Unauthorized Practice of Immigration Law Fact Sheet,” *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=8>

## **Deterring UPIL by encouraging the adoption of laws that would create a private right of action for victims of immigration fraud and UPIL, as well as providing criminal penalties**

State law currently provides the most effective provisions for a private right of action against UPIL; the most common legal mechanisms are laws against the unauthorized practice of law more generally.<sup>18</sup> Several states have enacted notario-specific legislation, and courts have recently ruled against notarios in several cases.<sup>19</sup> California was the first state to pass legislation in 1986 recognizing and regulating a group of immigration consultants.<sup>20</sup> Other key states (i.e., states with high levels of immigration) subsequently enacted laws directed at non-lawyers who seek to assist foreign nationals in applying for immigration benefits. Among these states are Arizona,<sup>21</sup> Georgia,<sup>22</sup> Colorado,<sup>23</sup> Illinois,<sup>24</sup> Michigan,<sup>25</sup> Minnesota,<sup>26</sup> New Jersey,<sup>27</sup> New York,<sup>28</sup> and Pennsylvania.<sup>29</sup> There is no federal law regulating “immigration specialists” or “assistants” outside the regulations establishing BIA recognizes organizations and accredited representatives.

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<sup>18</sup> Alabama, Ala.Code 1975 § 34-3-1; Alaska, AS 08.08.230; Arkansas, A.C.A. § 16-22-501; Connecticut, Conn. Gen. Stat. § 51-88 (2004); Florida, Fla. Stat. § 454.23; Hawaii, HRS § 605-14; Idaho, Idaho Code § 3-420; Indiana, Burns Ind. Code Ann. § 33-43-2-1; Kansas, K.S.A. § 21-3824; Kentucky, KRS § 524.130; Louisiana, La. R.S. 37:213; Maine, 4 M.R.S.A. § 807; Maryland, Md. Business Occupations and Professions Code Ann. § 10-601; Massachusetts, ALM GL Ch. 221, § 46A Executive Order 455 (03-13); Minnesota, M.S.A. § 481.02; Mississippi, Miss. Code Ann. § 73-3-55; Missouri, V.A.M.S. 486.390; Montana, Mont. Code Ann. § 37-61-210; Nevada, Nev. Rev. Stat. Ann. § 7.285; New Hampshire, N.H. Rev. Stat. § 311:7-a; New Jersey, N.J.S.A. 2C:21-31 (Supp. 2003); North Dakota, N.D. Cent. Code, § 27-11-01; Ohio, ORC Ann. 4705.07; Pennsylvania, 42 Pa.C.S. § 2524, 18 Pa.C.S. § 4913; Puerto Rico, 4 P.R.L.A. § 740; Rhode Island, R.I. Gen. Laws § 11-27-12; South Dakota, S.D. Codified Laws § 16-16-1, S.D. Codified Laws § 16-18-1; Virginia, Va. Code Ann. § 54.1-3904; Washington, DC, D.C. App. R. 49; West Virginia, W. Va. Code § 29C-7-201; Wisconsin, Wis. Stat. § 757.30; Wyoming, Wyo. Stat. § 33-5-117.

<sup>19</sup> Oregon, ORS § 194.166 (2003); Alabama, A.C.A. § 16-22-501, A.C.A. § 4-109-103; Georgia, Ga. Code Ann. § 45-17-8.2 (1984); Nebraska, Neb. Rev. St. § 64-105.03 (2004); New Mexico, N. M. Stat. Ann. § 14-12A-15 (2003); Tennessee, Tenn. Code Ann. § 8-16-402 (2002); Utah, Utah Code Ann. § 46-1-11 (1998).

<sup>20</sup> CALIF. BUS. & PROF. CODE § 22440-22448 (1986).

<sup>21</sup> A.R.S. § 12-2701 et seq. (2009).

<sup>22</sup> GA. CODE ANN. § 43-20A-1 et seq. (2008).

<sup>23</sup> COLO. REV. STAT. 12-55-110.3 (2008).

<sup>24</sup> 5 ILL. COMP. STAT. 312/3-103 (2005).

<sup>25</sup> MICH. COMP. LAWS § 338.3459 (2004);

<sup>26</sup> MINN. STAT. § 325E.031 (1998).

<sup>27</sup> N.J.S.A. 2C:21-31 (West 2005).

<sup>28</sup> N.Y. GEN. BUS. LAW § 460-a to -j (McKinney Supp. 2009).

<sup>29</sup> 42 PA. CONST. STAT. ANN. § 2524 (West 2005).

This resolution seeks to deter UPIL and immigration practitioner fraud by encouraging the adoption of laws that would create a private right of action for victims of UPIL and immigration fraud in state and federal law. A private right of action for victims deters UPIL and immigration fraud by elevating the risk of being held accountable for their fraudulent and deleterious activities. This right would provide incentive for victims to seek monetary damages against persons who are preying upon a particularly vulnerable population, a population who may culturally be accustomed to accepting being taken advantage of and may never have the means to seek redress.

In addition to civil litigation, the possibility of criminal prosecution would both serve as a deterrent through criminal prosecution, while also satisfying one of the requirements for changes in U visa eligibility which this policy proposes. Making UPIL and immigration fraud crimes would extend their statutes of limitation while increasing the perceived seriousness of the crime, thereby increasing the deterrent value and encouraging the exercise of prosecutorial discretion.<sup>30</sup>

**Accommodations for victims of immigration fraud which would allow them to pursue immigration relief which has been denied them due to erroneous or inappropriate advice or filing**

The ABA supports 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.<sup>31</sup>

The serious problem of unauthorized practice of law and other fraud in immigration matters is so pervasive that the term “*notario* fraud” is often specifically recognized in state consumer fraud laws. Throughout the country, unscrupulous “*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.<sup>32</sup> A related problem arises when attorneys knowingly (or even inadvertently) make 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

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<sup>30</sup> Shannon, “Regulating Immigration Legal Service Providers,” 577-616.

<sup>31</sup> ABA Recommendation 107D, adopted February 2006, *available at* [http://www2.americanbar.org/sdl/Documents/2006\\_MY\\_107D.pdf](http://www2.americanbar.org/sdl/Documents/2006_MY_107D.pdf).

<sup>32</sup> ABA Recommendation 107D, adopted February 2006, at 4, *available at* [http://www2.americanbar.org/sdl/Documents/2006\\_MY\\_107D.pdf](http://www2.americanbar.org/sdl/Documents/2006_MY_107D.pdf).

unauthorized practice of law and fraud in immigration matters, and appropriate measures should be taken against those attorneys who knowingly 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, immigration fraud, or ineffective assistance of counsel.<sup>33</sup>

While measures to deter immigration fraud such as providing a private right of action or criminal prosecution are important, they do not address the major preoccupation of a noncitizen who has been denied the opportunity to remedy the wrong perpetuated against them and the government through inappropriate advice or fraudulent filing by a *notario* or other person engaged in fraudulent practice or UPIL. Monetary recompense does not come close to recovering what has been lost — their opportunity to pursue the immigration relief to which they may be entitled.

**Allowing the withdrawal, without prejudice, of submissions, or for submitting corrected filing which will supersede the documents previously filed**

Ineffective assistance of counsel in civil cases is generally remedied in state law by malpractice suits against the attorney involved. Such a remedy is irrelevant in UPIL and *notario* situations because there is no attorney, no threat of ethical proceedings, nor malpractice insurance upon which to draw.

A central principle Congress codified in Immigration and Nationality Act (INA) Section 240, which governs removal policy, is that noncitizens in removal proceeding should have a fair opportunity to be heard.<sup>34</sup> By establishing procedures which would allow for withdrawal of submissions which were fraudulently filed, and by authorizing filing of documents to correct those filed by a *notario* or other persons engaged in UPIL or fraud, the court will not be granting any new or additional rights but rather will be returning to the *status quo ante*. Certainly a person should not be deprived of their opportunity to pursue immigration remedies through the fraudulent actions of another person.

The American Immigration Council (formerly the American Immigration Law Foundation) and the American Immigration Lawyers Association sent a letter to EOIR in November 2009 recommending steps the agency can take to better protect victims of ineffective assistance of counsel and help ensure that all immigrants in removal proceedings are afforded a fair hearing. The letter recommends that EOIR's new framework strive to achieve the following: ensure that all noncitizens in removal proceeding have a fair opportunity to be heard; promote quality representation and ensure that the immigration bar meets ethical and professional standards; and reduce the need for litigation and promote judicial efficiency.<sup>35</sup> The rationale for this improved

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<sup>33</sup> *Id.*

<sup>34</sup> American Immigration Council, Letter to Thomas G. Snow, U.S. DOJ, EOIR (November 12, 2009), at 2, available at <http://www.aila.org/content/fileviewer.aspx?docid=30540&linkid=211538>.

<sup>35</sup> *Id.*

framework is clear: “Language and cultural barriers and lack of knowledge about the immigration system mean that immigrants must have access to competent counsel. However, these realities also mean that immigrants are susceptible to fraudulent practices. Victims of ineffective assistance of counsel may not immediately realize that their lawyer did something wrong, and they may not be equipped to bring appropriate claims to the immigration agencies. EOIR’s new framework must reflect these realities and the challenges that immigrants in removal proceedings face.”<sup>36</sup>

The need for a procedure which would allow for curative filing of properly drafted documents is exemplified by BIA decisions which have noted the presence of *notarios* who are corrupting the immigration system, while also refusing to allow their activities to be grounds for a motion to reopen because they are not attorneys.<sup>37</sup> To allow a case to be reopened based on a lawyer’s deficient performance, while denying any relief for a case in which a fraud has been perpetrated on the client and the court by a *notario* is both cruel and nonsensical.

While not addressing the issue of UPIL directly, courts have asserted that while the right to reopen a case based on ineffective assistance of counsel when a non-lawyer is involved, the court held that such a claim could raise other due process claims, thereby inferring the importance of finding a way to right the injustice perpetrated in these cases.<sup>38</sup>

### **Allowing the U non-immigrant visa to be available for victims of immigration fraud**

U visas are available to a victim of certain crimes who has suffered substantial mental or physical abuse, when that person is in possession of information concerning the criminal activities, and that person has been, or is likely to be, helpful in the investigation or persecution of the criminal activity. The policy justification for the U visa is to encourage law enforcement to work with and protect immigrant crime victims, and to encourage immigrant crime victims to report crimes and cooperate with law enforcement.<sup>39</sup> U visas are available to victims of designated crimes ranging from rape and torture to obstruction of justice and perjury.<sup>40</sup> Changing the regulations to include victims of fraud would encourage victims to report criminal activity to the proper authorities, and would enable them to obtain permanent residence for themselves and their immediate family members in the process.<sup>41</sup> This change produces the dual benefit of deterring immigration fraud through criminal prosecution while restoring to the victim a tangible benefit.

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<sup>36</sup> Beth Werlin, American Immigration Council, “The Right to a Remedy for Inefficient Assistance of Counsel,” available at <http://immigrationimpact.com/2009/11/23/the-right-to-a-remedy-for-ineffective-assistance-of-counsel/>.

<sup>37</sup> *Matter of Compean*, 24 I & N Dec. 710, 729, n.7.

<sup>38</sup> *Hernandez v. Mukasey* 524 F.3d 1014 C.A.9,2008 at 1018-19.

<sup>39</sup> Shannon, “Regulating Immigration Legal Service Providers,” at 621. See also Adjustment of Status to Lawful permanent Resident for Aliens in T or U Nonimmigration Status, 73 Fed. Reg. 75,540 (Dec 23, 2008).

<sup>40</sup> 8 C.F.R. § 214.14(a)(9)(2009).

<sup>41</sup> *Id.*, 8 CFR §214.14(a)(10)(2009).

At the present time the U visa is not available to these victims of because immigration fraud is not one of the specified crimes. This could be cured by specifically including it in the federal regulation. In addition, U visa eligibility would require changes to state and federal statutes making immigration fraud a crime, which would allow prosecutors to investigate and prosecute the underlying actions. State laws prohibiting the unauthorized practice of law should specifically define what constitutes the practice of immigration law. “What is really needed is a statute that not only includes a general definition of what constitutes the practice of law, but that includes a specific provision clarifying that the completion of immigration forms constitutes the practice of law. Consideration should also be given to enacting a state law that specifically prohibits the provision of immigration related services for compensation unless authorized (i.e., by attorneys or authorized representatives), clearly defines what constitutes immigration related services . . . and establishes a regime for both civil enforcement and criminal liability.”<sup>42</sup>

Enacting federal law is also an important goal.

Making the unauthorized practice of law in any jurisdiction a federal crime would also help combat the problem of *notarios* and immigration consultants, as well as people who purport to “practice” other types of law, and could be crafted in such a way so as not to usurp the authority of state bars that actually license attorneys in individual states. A specific law should also be enacted at the federal level to prosecute fraudulent immigration consultants (both attorneys and non-attorneys); federal jurisdiction is needed because the problem is nationwide, and bad actors are often able to operate out of the reach of the state bars precisely because they are exploiting federal immigration laws. One reason why incompetent attorneys practicing immigration law often evade discipline is that, because immigration law is federal law, most states (including New York) do not require admission to the state bar for attorneys who limit their practice to immigration law.

Consideration should therefore also be given to pressuring state bar authorities to enact a rule providing that an attorney who maintains an office for the practice of immigration law within the state must be admitted to practice in the state, so that state bar disciplinary committees would then have the authority to discipline these attorneys.<sup>43</sup>

### **Developing a waiver of inadmissibility for individuals face a bar to reentering after leaving the U.S. based on the erroneous advice of an individual engaged in UPIL or immigration fraud**

One manner in which a noncitizen may suffer a devastating blow to their immigration case and serious disruption to their life is when they inadvisedly depart the U.S. on advice of an individual engaging in UPIL or immigration fraud. Regulations provide that a motion to reopen an immigration case shall not be made by or on behalf of a person who is the subject of removal

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<sup>42</sup> Shannon, “Regulating Immigration Legal Service Providers,” at 614.

<sup>43</sup> *Id.* at 614-15.

proceedings subsequent to his or her departure from the United States.<sup>44</sup> Therefore any person who has left the country on the bad advice of someone perpetrating a fraud on the victim and the immigration court is left without a remedy. Developing a waiver of inadmissibility for individuals who leave the country based on bad advice would ensure that noncitizens in removal proceeding may reenter the U.S. and have a fair opportunity to be heard. Noncitizens who have a clear means of gaining lawful immigrant status, should not be punished because they left the U.S. based on fraudulent counsel.

Furthermore, some noncitizens may face a bar to reentry upon departing the U.S., whereas by remaining they could have resolved their case. If a noncitizen is the beneficiary of an approved Petition for Alien Relative (I-130), he or she has a clear basis for legal status in the United States and may be eligible to adjust to permanent residency here. However, if the noncitizen had more than 180 days of presence in the U.S. without status upon leaving, he or she would be barred from re-entering for three years. If the noncitizen had over one year of unlawful presence, he or she will be barred from reentry to the U.S. for ten years. The current requirements for a waiver of these re-entry bars is very high. To face this hurdle after being victimized not only punishes the noncitizen, but their U.S. citizen or Lawful Permanent Resident (LPR) spouse or family member. This proposed waiver is a direct way in which the government can impact the lives of victims, and provide much needed relief for individuals who have a legitimate claim to a life in the United States.

Respectfully submitted,

Karen T. Grisez, Chair  
Commission on Immigration

August 2011

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<sup>44</sup> 8 C.F.R. §1003.2(d) (2006).

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Karen T. Grisez, Chair

1. Summary of Resolutions(s).

The resolution, sponsored by the Commission on Immigration, addresses the issue of expanding and assuring the quality of representation for indigent noncitizens in immigration proceedings. It seeks to ensure the legitimacy and competence of service providers, while deterring fraud committed on this vulnerable population through the establishment of a private right of action and enhanced criminal penalties against those perpetrating immigration practitioner fraud. In addition, it would ameliorate the harm caused by fraud by allowing for withdrawal of improperly filed forms, pursuit of U visas for injured fraud victims, and allowing those people who have left the country due to incompetent advice to pursue immigration relief.

2. Approval by Submitting Entity.

On May 9, 2011, the Commission on Immigration approved this resolution.

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

No.

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

The Association is deeply committed to ensuring fair treatment and access to justice under the nation's immigration laws. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system. Promoting the goals of fairness and efficiency through improvements to our overburdened immigration adjudication system will serve to advance the rule of law (Goal IV) by providing for a fair legal process. As part of promoting this goal, the ABA 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 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 (06M107D).

In 2006, the House of Delegates adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters. This policy also supported the establishment of a system to screen and to refer indigent persons with potential relief from removal — as identified in the expanded “legal orientation program” — to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs, and government-funded counsel; and the

establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them. (06M107A) This resolution would enhance the competency of all referrals by ensuring that all lawyers or groups which provide pro bono assistance meet appropriate criteria of the BIA before they are placed on the list of pro bono providers. In addition, the resolution would ensure that accredited representatives retain their competency through continuing immigration education.

The ABA has consistently supported 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. (06M107D) 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 provide fraudulent legal assistance to the detriment of their clients. This resolution would increase deterrence of such unauthorized practice and fraud by authorizing civil suits and increased criminal penalties.

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 (06M107D). This resolution provides for remedies for actions which were committed by fraud or incompetence of a practitioner which have deprived the victim of access to immigration relief to which they might have been entitled. By allowing for the withdrawal of erroneously filed documents and the submission of corrected documents this proposal would allow for the correction of fraud committed against both the victim and the court.

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

Study findings released in May 2011 found that the two most important factors to determining successful outcomes in immigration cases are representation and detention. However, in 2010 almost 60% of noncitizens did not have representation in their cases, and the figure is substantially higher, 84%, for noncitizens in detention. This striking lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, and exposes noncitizens to the risk of abuse and exploitation by unscrupulous immigration consultants or “*notarios*.” The resolution will help build advocacy efforts to increase qualified representation in immigration matters.

6. Status of Legislation. (If applicable.)

Senators Dianne Feinstein and Edward Kennedy introduced the Immigration Fraud Prevention Act in the 111<sup>th</sup> Congress to help combat *notario* fraud and related abuse by individuals who willfully, knowingly and falsely represent that an individual is an attorney or accredited representative in any matter arising under federal immigration law. The bill has not been introduced in this session.

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

None.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest with this resolution.

9. Referrals.

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

Section of Administrative Law and Regulatory Practice

Criminal Justice Section

Commission on Domestic Violence

Section of Family Law

Government and Public Sector Lawyers Division

Commission on Hispanic Legal Rights & Responsibilities

Section of Individual Rights & Responsibilities

Section of International Law

Judicial Division

Legal Services Division/Standing Committee on Pro Bono and Public Service

Commission on Racial and Ethnic Diversity in the Profession

Section of Litigation

Standing Committee on Legal Aid and Indigent Defendants (SCLAID)

Young Lawyers Division

American Immigration Lawyers Association (AILA)

National Legal Aid and Defender Association (NLADA)

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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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution, sponsored by the Commission on Immigration, addresses the issue of expanding and assuring the quality of representation for indigent noncitizens in immigration proceedings. It seeks to ensure the legitimacy and competence of service providers, while deterring fraud committed on this vulnerable population through the establishment of a private right of action and enhanced criminal penalties against those perpetrating immigration practitioner fraud. In addition, it would ameliorate the harm caused by fraud by allowing for withdrawal of improperly filed forms, pursuit of U visas for injured fraud victims, and allowing those people who have left the country due to incompetent advice to pursue immigration relief.

### 2. Summary of the Issue that the Resolution Addresses

The American Bar Association is deeply committed to ensuring fair treatment and access to justice under the nation's immigration laws. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and cultural barriers are present. Representation in immigration cases is often hindered by improperly trained advocates, and fraudulent representation. Actions can not only defraud this vulnerable population of their money, but fraudulent and incompetent filing can also cost individuals the right to pursue immigration relief to which they would have been entitled.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

This resolution expands on the prior policy of enhanced representation and fairness by increasing the number of pro bono lawyers available, enhancing the competency of Board of Immigration Appeals ("BIA")-recognized agencies; deterring the incidents of the Unauthorized Practice of Law (UPIL); and providing remedies for victims of immigration practitioner fraud including *notario* fraud. These changes will improve access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.

### 4. Summary of Minority Views

None to date.