

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 13, 2006

RECOMMENDATION

RESOLVED, that the American Bar Association supports 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.

FURTHER RESOLVED, that the American Bar Association supports:

- (a) expansion of the federal “legal orientation program” to all detained and non-detained persons in removal proceedings;
- (b) 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;
- (c) 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; and
- (d) legislation to overturn the “no cost to the government” restriction on representation in removal proceedings.

REPORT

The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees

As the national voice of the legal community, the ABA has long championed the principles that America is built on as a nation of laws and a nation of immigrants—liberty and justice for all. This is underscored by the ABA adopting the theme of “Defending Liberty, Pursuing Justice” as its guiding vision. Unfortunately, for immigrants and refugees in America today, these principles more often represent unfulfilled promise than reality. Our immigration laws bear little relation to our country’s fundamental principles, our economic needs, or our national security interests. In short, our nation’s immigration system today is broken. Comprehensive and real solutions are needed, and the ABA’s leadership in developing those solutions is essential.

Consistent with the ABA’s overarching goals of defending liberty and pursuing justice, the ABA has adopted a number of substantive goals to carry out its mission of promoting justice, professional excellence, and respect for the law that are relevant in this context. These goals include, among others, promoting improvements in our system of justice; promoting meaningful access to legal representation and to the American system of justice for all persons; increasing respect for the law and legal process; advancing the rule of law in the world; and preserving the independence of the legal profession and the judiciary.

These ABA goals are particularly important for immigrants and refugees, who face unique challenges under our laws and justice system. Our immigration laws today are extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture, and legal system. Moreover, despite the fact that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic due process protections and checks and balances that we take for granted in our American system of justice.

For all of these reasons, the ABA’s leadership on issues relating to immigrants and refugees is absolutely essential, and for years the Association consistently has taken that role to heart. While these issues affect all members of the ABA in some way, the ABA has charged its Commission on Immigration to direct the Association’s efforts to ensure fair and unbiased treatment, and full due process rights, for immigrants and refugees within the United States.

Over a period spanning dozens of years, the ABA has adopted policies on a wide range of legal issues affecting immigrants and refugees. Many of these policies represent overarching principles that still hold true today. Other policies were adopted in piecemeal fashion in response to circumstances or events at a particular time. Finally, a number of changes in our country’s laws and policies governing immigrants and refugees in recent years are not adequately addressed by current ABA policies.

With the ABA’s overall goals as a guide, the ABA Commission on Immigration has

embarked on a comprehensive project to develop additional, up-to-date immigration policies that supplement and expand upon our existing policies. The Commission is therefore proposing a series of seven resolutions that address the following issues:

- Right to Counsel
- Immigration Reform
- Due Process & Judicial Review
- Administration of U.S. Immigration Laws
- Immigration Detention
- Asylum and Refugee Procedures
- Protections for Immigrant Victims of Crime

The resolutions address issues not already covered within existing Association policies, and are therefore not intended to supersede, restate, or reaffirm existing policies. Rather, the Commission firmly believes that with these proposed additions, ABA policies on issues involving immigrants and refugees will be fully consistent with the ABA's mission and goals and will be a vastly improved resource for ABA members, Congress, relevant government agencies, and other interested parties.

*Below is the report regarding the first resolution in the series, on "Right to Counsel."

I. Introduction

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Immigration law is extremely complex, removal (deportation) proceedings are adversarial, and they can have very severe consequences. Deportation can separate immigrants from their families, can impoverish them, can return them to countries in which they have no functional ties, and can lead to their persecution. In recent years, the grounds for removal have expanded, the available relief from removal has been restricted, and the use of detention (which impedes the ability of immigrants to obtain counsel) has skyrocketed. Justice Brandeis wrote more than 80 years ago that removal can result "in loss of both property and life; or of all that makes life worth living."¹ This is particularly true for persons who may qualify for relief from removal under strict U.S. immigration standards.

By statute, persons in removal proceedings have "the privilege of being represented," but "at no expense to the Government."² As a result, most immigrants must negotiate this process without counsel. Not surprisingly, *pro se* immigrants fare far more poorly in these proceedings than do those with legal representation. Put differently, removal cases too often turn on an immigrant's income, rather than on the merits of his or her claim.

This resolution supports the provision of legal information to all persons in removal

¹*Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S. Ct. 492, 495, 66 L.Ed. 938, 943 (1921).

²Immigration and Nationality Act (INA) § 292.

proceedings, referral to counsel of indigent immigrants who have potential relief from removal, and government-appointed counsel in cases where it is needed. The resolution would advance the interests of the government and protect the rights of non-citizens facing removal.

II. Relevant ABA Policies

The right to legal representation represents a core concern of the American Bar Association (“ABA” or “Association”), as reflected in the Association’s goals. The ABA’s second goal speaks directly to this priority: “to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.” Expanding legal representation to the indigent also improves the U.S. system of justice (Goal I), promotes standards of professionalism (Goal V) and enhances public service (Goal X).

Consistent with its commitment to legal representation, the ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Populations of particular concern include persons in removal proceedings (formerly called “exclusion” and “deportation” proceedings), political asylum seekers, unaccompanied minors, non-citizens whose removal cannot be effected, detainees, and those held in incommunicado detention. A brief summary of its policies follows.

- In 1983, the ABA opposed legislative initiatives to limit the right to retain counsel in removal proceedings and in political asylum proceedings.
- In 1990, the ABA supported “effective” access to legal representation by asylum seekers in removal proceedings. In particular, it supported improved telephonic access between detained asylum seekers and legal representatives; dissemination of accurate lists of legal service providers; and legal orientation programs and materials for detainees.
- In 2001, the ABA supported government-appointed counsel for unaccompanied minors in all immigration processes and proceedings. Likewise in 2001, the ABA opposed the involuntary transfer of detained immigrants and asylum seekers to detention facilities when this would undermine an existing attorney-client relationship. It also opposed the construction and use by the Immigration and Naturalization Service (INS) of detention facilities in areas that do not have sufficient, qualified attorneys to represent detainees.
- In 2002, in response to the post-September 11th arrest and detention of several hundred non-citizens, the ABA opposed the incommunicado detention of foreign nationals in undisclosed facilities. It also supported the promulgation in the form of federal regulations of federal detention standards (originally developed by the ABA) related to access to counsel, provision of legal information and independent monitoring for compliance with these standards.
- In 2004, the ABA adopted its own *Standards for the Custody, Placement and Care; Legal*

Representation; and Adjudication of Unaccompanied Alien Children in the United States. These standards call for timely legal rights presentations for all unaccompanied children, the opportunity to consult with an attorney, the right to have an attorney present in all proceedings affecting a child's immigration status, and (if necessary) the right to government-appointed counsel.

These policies recognize the crucial importance of legal representation in immigration proceedings. However, they do not offer a comprehensive solution to the immense unmet need for legal representation in immigration proceedings.

III. The Issue

Although viewed as “civil” in nature, removal proceedings largely mirror criminal trials.³ Attorneys must identify, corroborate, and argue complex claims before a presiding judge. They must master a complex area of the law. They must develop and argue factually and legally complex claims for relief. They must contest the government's charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their client's banishment and, in some cases, significant peril.

In 2004, the ABA's Commission on Immigration released a ground-breaking report, *American Justice Through Immigrants' Eyes*, that details recent changes in the law that increase the need for legal representation in removal proceedings. These include expanded grounds for removal, diminished relief from removal, severe limitations on administrative and judicial review, the increased use of detention, and video-conference hearings. As the report demonstrates, fewer persons in removal proceedings now have viable claims for relief, and persons who can legally contest removal typically have extremely strong humanitarian or equitable claims to remain.

A. The Right to Counsel in Removal Proceedings

A 2004 report of the ABA's Standing Committee on Legal Aid and Indigent Defendants titled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* harshly criticized the U.S. criminal justice system for spending roughly two-times more on criminal prosecutions than on indigent defense. The report called for “equivalent funding and other resources” for these essential, interdependent elements of the criminal justice system. In contrast, the government devotes no resources to the representation of immigrants in removal proceedings. Yet these proceedings are similarly complex, adversarial, and consequential.

As stated, non-citizens have a right to counsel in removal proceedings, but at “no expense to the government.”⁴ This provision does not necessarily preclude government-funded counsel; it merely affirms that counsel need not be provided. In fact, courts have recognized that due process might necessitate the appointment of counsel in particular cases.⁵ Typically, however, they have

³*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 4 L.Ed.2d 668 (1984).

⁴INA § 292.

⁵*See Aguilera-Enriquez v. INS*, 516 F. 2d 565, 568 (5th Cir. 1975), *cert denied* 423 U.S. 1050, 96 S. Ct. 776, 46 L.Ed.2d 638 (1976).

denied appointed counsel, reasoning that counsel would have produced no different result.⁶ This reasoning neglects to recognize the crucial role that counsel plays in making the record in a case. The case-by-case approach is unworkable because, as a practical matter, there is no way to know if the absence of counsel has been harmless or not.

In addition, the statute refers to the provision of “counsel,” not to activities that supplement or promote legal representation. In 1995, the INS Office of General Counsel drew this distinction in concluding that the “no expense” language did not bar the government from funding activities that “facilitate” representation.⁷

This opinion paved the way for a federally-funded “legal orientation program” that, at present, operates in six detention facilities. In 2002, modest federal funding of \$1 million supported “legal orientation” presentations to 17,041 detainees.⁸ Under the program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings in order to educate them on the law and to explain the removal process. Based on the orientation, a detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the overwhelming majority – typically submit to removal. According to the Executive Office for Immigration Review (EOIR), roughly 10 percent of all individuals who receive “legal orientation” presentations potentially qualify for relief from removal. While the program does not fund legal representation, participating non-profit agencies refer many of these cases to pro bono attorneys. Others with potential relief obtain legal counsel on their own. A very small percentage cannot secure counsel and, under this proposal, would be eligible for appointed counsel.

The ABA played a lead role in the creation of this program, and its ProBAR program in South Texas receives funding under it. U.S. Department of Justice evaluations of the program have found that these presentations improve the administration of justice and save the government money by expediting case completions and leading detainees to spend less time in detention.⁹ Conversely, the lack of representation for asylum-seekers (and others) creates significant systemic costs:

First and foremost, cases are delayed for considerable periods of time as asylum seekers search for counsel. When Immigration Judges realize that a respondent is asserting an asylum claim, they prefer to proceed when the claim can be presented with the assistance of counsel. For this reason, they often grant continuances giving the asylum seeker time to locate representation. Second, when competent representation is involved, the cases are presented more effectively and efficiently from the Immigration Judge’s perspective. Finally, there is some evidence to suggest that the significant number of cases where asylum seekers do not show up for their hearings are closely related to lack of representation, thus

⁶B. Werlin, “Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings,” 20 *B.C. Third World L.J.* 393, 404 (Spring 2000).

⁷INS Office of General Counsel, “Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings” (Dec. 21, 1995).

⁸D. Kerwin, “Revisiting the Need for Appointed Counsel,” *MPI Insight*, No. 4 (Apr. 2005) at 15 [hereinafter “Revisiting the Need for Appointed Counsel”].

⁹U.S. Department of Justice, Board of Immigration Appeals, “The BIA Pro Bono Project is Successful” (Oct. 2004); U.S. Department of Justice, Executive Office for Immigration Review, “Evaluation of the Rights Presentation” (Jan. 2000).

adding to the overall inefficiency of the system (citations omitted).¹⁰

While the federal legal orientation program has not been extended to non-detained persons, a similar program has long been in place in New York Immigration Courts. The Immigration Representation Program (“IRP”) screens non-detainees for financial need and availability of legal relief prior to their initial court hearing. It then refers qualifying cases to charitable legal programs or pro bono attorneys. Like the federal program, the IRP has received broad support from Immigration Judges and other government officials for improving the administration of justice.¹¹

B. The Legal Services Crisis

The “no expense” restriction has led to low rates of legal representation in removal proceedings. More than one-half of non-citizens whose removal cases were completed in 2003 – 130,730 persons in total – lacked counsel.¹² Unrepresented immigrants frequently turn to unauthorized and often predatory non-attorneys for legal advice and representation.¹³ These so-called “notarios” or “visa consultants” often collect high fees for services they do not provide and fraudulently guarantee that legal benefits will be obtained.

Not surprisingly, persons with qualified and competent legal representation secure relief at far higher rates than pro se litigants.¹⁴ Disparities in case outcomes are particularly dramatic in political asylum cases. In 2003, 39 percent of non-detained, represented asylum-seekers received political asylum, in contrast to 14 percent of non-detained, unrepresented asylum-seekers.¹⁵ Eighteen (18) percent of represented, detained asylum-seekers were granted asylum, compared to 3 percent of detained asylum-seekers who did not have counsel.

The U.S. Commission on International Religious Freedom found success rates of 25 percent in cases of asylum seekers with legal representation who were initially caught at a port-of-entry without proper documents, compared to 2 percent approval rates for those without representation.¹⁶ This disparity could not be explained by attorneys selecting the strongest cases.¹⁷ Representation rates, it concluded, turned more on the availability of counsel, than on the strength of the cases. As evidence, the Committee found that approval rates remained comparable between areas with the lowest and the highest rates of representation

¹⁰A. Schoenholtz and J. Jacobs, “The State of Asylum Representation: Ideas for Change,” 16 *G’town. Immig. L.J.* 739, 746 (Summer 2002) [hereinafter “The State of Asylum Representation.”]

¹¹See “Revisiting the Need for Appointed Counsel,” *supra* note 8 at 13-14.

¹²U.S. Department of Justice, Executive Office for Immigration Review, “FY 2003 Statistical Yearbook” (Apr. 2004).

¹³See generally A. Moore, “Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants,” 19 *Geo. Immigr. L.J.* 1 (Fall 2004).

¹⁴See “The State of Asylum Representation: Ideas for Change,” *supra* note 10, at 739-740 (“... represented asylum cases are four to six times more likely to succeed than pro se ones.”)

¹⁵D. Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded,” *Immigration Briefings*, No. 04-06 (June 2004) at 11-12 [hereinafter “Charitable Legal Programs.”]

¹⁶U.S. Commission on International Religious Freedom, “Report on Asylum Seekers in Expedited Removal,” Vol. II (Feb. 2005) at 239 [hereinafter “Report on Asylum Seekers.”].

¹⁷*Id.*

The unrepresented include thousands of indigent persons, many in detention, with viable claims to remain in the United States based on a fear of persecution, likelihood of torture, long-term lawful permanent residence in the United States, and family ties. As the ABA has recognized in developing immigration detention standards and in its past immigration resolutions, detention significantly impedes access to legal representation, making it far difficult for attorneys to offer representation, for immigrants to obtain counsel, and for pro se litigants to prepare their own cases. *American Justice Through Immigrants' Eyes* describes some of the impediments as follows:

The government's detention practices make it exceedingly difficult for detained persons to secure and communicate with counsel and pursue relief. Immigration authorities frequently transfer detainees to distant locations, often without notifying their lawyers and without regard for their need to prepare for a hearing or to be close to their families and support systems. Many of the more than 900 facilities used for immigration detention are in rural locations, far from private and pro bono lawyers and non-profit legal programs, making access to lawyers, families, and legal materials even more difficult. Without representation, detained persons often cannot access the extensive documentation and other information necessary to meet their burden of proof and apply for most forms of relief, including asylum.¹⁸

It should be emphasized that the number of persons who are potentially eligible for relief from removal is limited. Significant categories of persons are excluded. For example, a person (even a lawful permanent resident) who committed an "aggravated felony" – an expansive category of crimes particular to U.S. immigration law that includes relatively minor offenses and misdemeanors – is not eligible for relief.¹⁹ This is true notwithstanding an immigrant's long tenure in the country, U.S. citizen family members, the lack of severity of his or her offense, the time elapsed since its commission, and evidence of rehabilitation.

Undocumented persons qualify for relief from removal only in extremely narrow circumstances. "Cancellation of removal" – an equitable form of relief – can be granted to undocumented persons of good moral character who have been continuously present in the United States for at least 10 years, if their removal would work an "exceptional and extremely unusual" hardship on a U.S. citizen parent or a U.S. citizen or lawful permanent resident spouse or child. The undocumented can also receive political asylum, adjustment of status to permanent residence (if they have a family-based visa immediately available), temporary protected status (if they fall within a group designated as eligible for this relief due to armed conflict, natural disaster or other extraordinary conditions in their home nation), and certain other population-specific forms of relief.

Beyond the obvious interest of affected non-citizens, legal representation also benefits the government and the administration of justice. As stated, it leads to improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings.²⁰ It also deters frivolous claims. Above all, increased representation serves the

¹⁸American Bar Association, Commission on Immigration, "American Justice Through Immigrants' Eyes" (2004) at 68.

¹⁹*Id.* at 23-26.

²⁰See "Report on Asylum Seekers," *supra* note 16 at 243; U.S. Department of Justice, Executive Office for Immigration

government's interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on a litigant's income.

IV. ABA Resolution

In its policy resolutions and its pro bono programs, the ABA has consistently recognized the crucial importance of: (1) legal orientation presentations to non-citizens (particularly detainees) in removal proceedings; and (2) representation of particularly vulnerable populations like political asylum seekers, unaccompanied minors and detainees. The proposed resolution builds on existing ABA policies to offer a comprehensive framework for representation of immigrants in removal proceedings.

First, it supports expansion of the federally-funded legal orientation program to all persons in removal proceedings, both those in detention and those not in custody. Given the severe consequences of removal, due process demands that all immigrants facing removal receive a minimal level of information on immigration law, removal proceedings, and their potential eligibility for relief. For a relatively small investment of \$1 million annually, the federal "legal orientation program" currently serves 20 percent of the non-citizen detainees whose removal proceedings are completed each year.²¹ Expansion of this program to other large detention facilities and to Immigration Courts would be feasible.

The resolution also supports referral of indigent persons with potential relief from removal to legal counsel. A legal rights presentation allows an immigrant to make an educated judgment on the availability of relief from removal in his or her case. In an ideal system, all immigrants would enjoy the benefit of representation in making this judgment. However, because such a system would be extremely expensive, the resolution opts for a more modest approach. It supports referral to counsel of indigent immigrants who have determined, based on a legal orientation, that relief from removal may be available in their cases. As stated, roughly 10 percent of those who receive legal orientation presentations have viable claims for relief. Of this figure, many secure pro bono counsel and others obtain paid counsel (typically upon release). A very small percentage – those eligible for relief from removal who cannot otherwise obtain legal counsel – would be eligible for appointed counsel under the resolution.

In addition, the resolution supports legal representation for mentally ill and disabled persons for the duration of their cases. Due process demands that these vulnerable persons receive legal representation throughout the immigration process. In particular, they should not have to determine (on their own) whether or not they might qualify for relief.

Finally, the resolution recognizes the limited pool of pro bono attorneys, Legal Services Corporation-funded agencies, and charitable legal immigration programs who accept representation in removal cases. These traditional sources cannot meet the demand for representation on their own. For this reason, the resolution supports a system of appointed counsel for indigent persons who

Review, "Evaluation of the Rights Presentation" (Jan. 2000) at 1, 3-9, 11-12.

²¹See "Revisiting the Need for Appointed Counsel," *supra* note 8 at 15.

cannot otherwise secure representation. While the “no cost to the government” restriction does not preclude appointed counsel in select cases, the resolution proposes a system that may conflict with this restriction. Thus, it supports legislation to overturn the restriction and to allow appointed counsel in cases where it is necessary.

V. Conclusion

The resolution supports a national system that would: (1) provide legal orientation presentations to all persons in removal proceedings; (2) refer unrepresented persons for whom relief might be available to counsel; (3) provide government-appointed counsel for indigent persons who cannot otherwise secure pro bono representation; and (4) assure that two particularly needy populations – mentally ill and disabled persons – receive legal representation in all immigration processes or procedures, whether or not relief might be available to them.

Such a system would assure a minimal level of legal information and screening for all persons in removal proceedings, and would guarantee representation for those who might be eligible for relief from removal under U.S. law. It would also guarantee representation for mentally ill and disabled persons throughout the immigration process. The resolution would benefit the affected non-citizens, improve the administration of justice, and increase the efficiency of the removal process.

Respectfully Submitted,

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Chair
Commission on Immigration
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