



**DUE PROCESS CHALLENGES FACED BY UNDOCUMENTED
IMMIGRANTS: AN IMMIGRATION ATTORNEY'S
PERSPECTIVE**

Submitted to
U.S. Senate Judiciary Committee

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March 20, 2013

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Chairman Leahy, Ranking Member Grassley, presiding Senator Coons and Committee members, it is a privilege to share with you today, some concerns regarding the due process challenges faced by many undocumented immigrants who try to navigate their way through our complex immigration system. I currently manage the immigration law area of practice at The Castro Firm, Inc., in Delaware and, because of our firm's commitment to and close involvement with the community, I have had the opportunity of assisting many undocumented immigrants both directly and through the conducting of seminars and workshops throughout the state. We also collaborate with and conduct training sessions for the staff of dedicated non-profit community service providers such as the Latin American Community Center and the Delaware Alliance for Community Advancement, to assist this sector of our population.

As an immigrant myself, while I did not have to contend with the issues arising from being undocumented, I fully recognized the necessity of having expert legal advice to guide me through the process. The need for representation by Counsel is even more important in the case of an individual placed in removal proceedings.

NEED FOR COUNSEL:

According to one recent study,¹ approximately 60 percent of immigrants placed in removal proceedings are unrepresented by immigration counsel. Despite the sterling efforts of organizations such as The American Immigration Lawyers Association (AILA) to provide pro bono assistance to many, there is a clear need for a framework to provide greater access to counsel for persons in proceedings. We are already confronted with an immigration court system unable to keep up with the ever increasing case load. By the summer of 2012, the backlog had increased to 322,681 cases pending, an increase of 23 percent over the preceding 2 year period.²

Court administrative time and, consequently, cost increases, when immigration judges are required to spend additional time guiding pro se respondents' through proceedings or grant multiple continuances to afford them every opportunity to obtain representation by counsel. But even with the additional time taken by the immigration judge, it should never be forgotten that his/her role is not to represent the respondent, which can only be effectively accomplished through access to counsel. It is the role of counsel to ensure that all forms of available relief have been adequately explored, that all issues for proper consideration have been brought to the attention of the court and that the law

¹ National Immigration Justice Center, "Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court (Sept. 2010), 4, 8 available at: <http://www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html>

² TRAC Immigration, "Latest Immigration Court Numbers, as of August 2012." (Sept. 13, 2012), available at http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog

has been correctly applied to the facts and circumstances of the particular respondent. The greater the access to counsel, the less the likelihood of exploitation of undocumented immigrants by “notarios” and “immigration consultants”.

When the person facing removal proceedings is from one of the more vulnerable groups, such as juveniles, VAWA, U visa or asylum candidates, or persons with mental disabilities, the need for court-appointed counsel to ensure the interests of justice are served, is even more pressing.

A framework needs to be established to ensure that these vulnerable groups are identified at the earliest opportunity and provided with representation by counsel in their immigration matter. As an example, an undocumented immigrant was in an abusive relationship for a number of years during which she suffered from repeated acts of domestic violence. Having acquired only an elementary level education and been repeatedly warned by her abuser that if she told anyone, she would be deported, her situation only came to light when an act of physical violence against her in a public parking lot was observed by a patrolling police officer. The offender was charged and a Protection from Abuse (PFA) order was issued by the court, but with the absconding of the offender, the issue has not yet reached to trial. Had a friend not recommended that she contact our firm for assistance, she likely would never have learned of the possibility of a U visa application being filed on her behalf. Especially for persons in such vulnerable situations, counsel is necessary to ensure that the legal help needed will be provided.

CUSTODY DETERMINATIONS and MANDATORY DETENTION:

The fact that any removable non-citizen can be detained and that many removable non-citizens do not have access to prompt bond hearings defies the fundamental tenets of due process. Indeed, if the basis for removal falls within certain categories, these persons may be subject to mandatory custody or detention, although some of the offenses which trigger such mandatory custody or detention may be relatively minor or may have occurred many years before.

Everyone placed in removal proceedings should have prompt access to a bond hearing, with the immigration judge having full discretionary authority to make a determination based on all factors relevant to the grant of release on bond, such as flight risk, the respondents’ ties to the community and the likelihood that he will pose a threat to the community, or the interests of national security. The mere existence of a past criminal record, especially where the individual has served his sentence, taken concrete steps towards rehabilitation and has demonstrated a proper civic attitude for many years since his prior criminal encounter, should not by itself subject such individual to mandatory detention. Immigration and Customs Enforcement (ICE) data for

2009 reflects that 66 percent of detained immigrants were subject to mandatory detention whereas only 11 percent had committed violent crimes for which they had previously completed their sentence.

With the increasing costs to taxpayers for immigration detentions, the bond redetermination process should be clarified to give immigration officers and judges the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued custodial detention is necessary and lawful.

I am reminded of the case of one immigrant, who arrived in the US in 1999 on a temporary visa, to seek care for his ailing wife, but later fell out of status. In 2001, he started a business in order to support himself and his family. He made sure that this business was duly licensed and insured and paid taxes for every year it was operating. By 2011, he had acquired two residential properties, was able to provide employment for two additional persons, was the sole financial supporter for his 7 year old US citizen son and had taxable earnings of over \$100,000.00 for the tax year 2010. He was also acknowledged as providing significant support for certain community programs. In 2011, he was detained and placed in removal proceedings.

When he was detained, no bond application was entertained, until a bond redetermination hearing was requested in immigration court. Bond was granted by the immigration judge, but only after he had spent 10 days incarcerated. For the sole operator of a small business, this is detrimental. Not to be overlooked also, is the fact that this cost to the taxpayer of approximately \$112.00 to \$164.00 per day (using the average per bed day cost of immigrant incarceration)³, could have been avoided if a clearly defined standard was established which would require DHS and immigration courts to place immigrants in the least restrictive setting and only impose institutional detention when concerns as to public safety and flight risk clearly mandate.

Unnecessary incarceration also creates hardship for the US citizen relatives of the detained immigrant. For example, those residing in southern Delaware (Sussex County), who wish to visit a detained family member at the closest facility in York P.A., must travel approximately four hours each way. Added to the strain is the fact that a detained immigrant may be relocated to any other detention facility at will, based on what might be described as "operational expediencies". Both the family and counsel representing the detained immigrant must now face the additional challenge of locating and maintaining communication with the immigrant. In practical terms, it would in many instances be virtually impossible for counsel to provide effective representation for a client who has been transferred, perhaps as far as Texas.

³ *The Math of Immigration Detention* (Aug. 2012), 2, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

JUDICIAL DISCRETION:

In conjunction with the need for adjustments to the bond redetermination and mandatory custody and detention policies, immigration judges should be afforded broader discretionary powers to review the facts and arguments presented by both sides and to grant relief based on the merits. In 2011 ICE issued guidance on the exercise of prosecutorial discretion. This policy, while promising on paper, has not been implemented effectively by ICE or Customs and Border Protection (CBP), as evidenced by the small percentage of cases which have been reviewed for prosecutorial discretion that have been administratively closed thus far, and the continued denial of many apparently sympathetic cases.

The prosecutorial discretion policy vests power solely in the hands of DHS who are in reality the adverse party in immigration proceedings. Does this not amount to giving them the power as final arbiter? The ability of an immigration judge to exercise judicial discretion in such circumstances and arrive at a decision on the merits would go a long way towards ensuring the interests of justice are served.

I revert to my example from the prior section regarding the business owner detained in 2011, who, having secured bond, must now establish a form of relief which would allow him to remain in the US. Regrettably, the assistance available to him was either Prosecutorial Discretion or Voluntary Departure. In the face of refusal by DHS to consider Prosecutorial Discretion and in the absence of any authority on the part of the immigration judge to exercise judicial review of such determination, he was given limited time to put his business affairs in order and depart.

How has our community benefitted from his departure? He sold his business assets and homes at a loss to ensure he could settle all outstanding obligations, while two persons were left without employment. The state has also been deprived of the taxes/ revenue previously generated by this business. Added to this, is the fact that his US citizen son has now been left without a source of financial support.

FOIA / DISCOVERY PROCESS:

Many immigration clients are unable to provide a clear, comprehensive and accurate record of their immigration history, despite the assistance of counsel. This may be as a result of the fact that they were young when they entered the country, or were simply not sure of the nature of their encounter with CBP / ICE, such as whether or not they were ordered removed. In order for me to better advise my clients as to their options, such as whether or not they may have an available form of relief, I must carefully consider their immigration as well as criminal history.

The current mechanism for determining past immigration history, is a FOIA request. This process has become time consuming because of the lengthy delays in receiving the requested information. Even where the more expedited format is adopted because the immigrant is in removal proceedings, this process can still take months.

This would be alleviated if there was an established procedure for ensuring that counsel representing an immigrant has access to the immigration and criminal records in the possession of DHS, in the fashion of the normal adverse party discovery process. This would have the advantage of providing counsel for the immigrant with adequate details of all issues which are likely to be raised and allow for timely preparation to address these and potentially reduce the judicial administrative time in the disposition of that case.

CONCLUSION:

There are numerous policy determinations which must be made in the course of structuring comprehensive immigration reform. However, if we truly desire to build an immigration system worthy of American values, the due process issues outlined herein, represent some of the ways in which the system could be improved, while ensuring the interests of justice are served, the costs to the taxpayer are reduced and, the efficiency of the administration of justice are enhanced.