



AILA RECOMMENDATIONS ON THE EXPANSION AND IMPLEMENTATION OF IMMIGRATION LEGAL REPRESENTATION PROGRAMS

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U.S. immigration proceedings carry severe consequences that often include long periods of detention and the risk of permanent banishment from the country. As a result, federal law recognizes the right to counsel in removal proceedings. However, unlike the criminal justice system, where any defendant facing even a single day in jail is provided counsel, in immigration proceedings the federal government does not guarantee an attorney to every person who is unable to afford one.

Being represented by counsel is essential to a fair hearing. To begin with, in every immigration case, the government is represented by a trained attorney who can argue for continued detention or deportation, regardless of whether the immigrant is represented. Having counsel is among the most decisive factors in determining whether someone will obtain legal relief in removal proceedings. According to a 2016 study by the American Immigration Council, people were five times more likely to obtain legal relief if they were represented by counsel. People who were detained were ten-and-

a-half times more likely to succeed. In the absence of a universal right to counsel, a significant portion of people in removal proceedings—at least 40 percent—are unrepresented by counsel. The representation rate is even lower for people held in detention.

In addition to making proceedings fairer, providing legal representation advances the government's interest in ensuring due process and efficiency in the legal system by facilitating court operations, reducing the court backlog (which currently exceeds 1.7 million cases), and even reducing the detention of immigrants. More than a decade of [government data](#) shows that people represented by counsel appear for their hearings over 96 percent of the time. As a result, legal representation also dramatically reduces the government's detention and court costs.

AILA has long supported the nationwide expansion and rapid scale-up of government-funded legal representation programs with the goal of ensuring representation for all

indigent persons.¹ The federal government has a clear imperative to provide legal representation to people facing removal and should recognize their right to counsel paid for by the government when necessary. AILA urges Congress and the executive branch to fund and implement a federal immigration legal representation system.

AILA BUILDING CONSENSUS AND SUPPORT

Ultimately, the success of these advocacy efforts and the programs themselves depend on the involvement and commitment of organizations throughout the legal service community. Toward this end, in 2021, AILA convened a legal representation task force that included representatives from non-profits, public defenders, and the private bar.² The task force outlined the following essential elements for creating and funding legal representation:

BUILD UPON AND MAXIMIZE CAPACITY ACROSS THE LEGAL SERVICE PROVIDER COMMUNITY

1. Partner with and maximize the utilization of all available legal service providers, including non-profit organizations, public defender offices, and private counsel, that are committed to and have the experience and expertise in providing legal representation and services to immigrant communities in order to facilitate the rapid implementation and long-term sustainability of legal services initiatives.³
2. Ensure that there is a robust entity, preferably operating at a national or regional level, to provide administration, oversight, support, training, analysis, and advocacy to improve legal representation programs, access to counsel, and related matters that impact clients.
3. Grow and sustain quality legal expertise in the field by building the pipeline of talent, recruiting and training attorneys, and providing professional development and support to them.⁴
4. Design funding structures to facilitate and expand participation by nonprofits, private counsel, public defender offices, and other legal service providers, as well as avoid giving preference to any particular entity. The principal goal driving funding determinations

should be to ensure that the highest quality legal services are delivered to the target population. Funding structures should give service providers flexibility while also ensuring consistency and stability.

5. Provide funding for legal service organizations with multi-year commitments. Legal service providers will need multi-year commitments to take on removal cases that take years to litigate. Multi-year funding helps service providers stabilize funding if federal funding experiences cuts or decreases in appropriations.
6. Structure funding for private counsel to ensure high quality representation on an hourly basis at a fair and reasonable rate.⁵ This should include funding for creating a payment system similar to those in state-assigned counsel and federal CJA court programs to compensate private counsel for representing indigent clients.
7. Fund training, supervision, and professional development as well as funding for experts and representation on relevant collateral matters.
8. Build upon existing state and local legal assistance programs that provide vital services,⁶ and complement existing federal initiatives such as the BIA Recognition and Accreditation program and the EOIR-funded legal orientation program.

PROGRAM ELIGIBILITY

The long-term goal should be for the federal government to create and fund legal representation programs nationwide to ensure the broadest eligibility and coverage to those who, after being adequately screened, are determined to be unable to afford counsel. Specifically, AILA's position is that the federal government should provide representation⁷ to all indigent individuals at current risk of removal⁸ without regard to merit. Priority should be given to people who are or have been detained in immigration detention or border facilities.

SCOPE OF REPRESENTATION

1. Funding should be sufficient to provide representation for the duration of the removal case, regardless of the person's custodial status. For detained individuals, representation should begin when someone is taken into DHS custody. This will help individuals in detention who are not in proceedings as well as those released from custody who need representation before or after they have an immigration case in court.

2. Representation should cover appellate and custodial matters and collateral representation on matters pertinent to the immigration proceedings (such as state court representation for Special Immigrant Juvenile Status or criminal court representation for post-conviction relief, where such representation is not otherwise provided for indigent individuals by the relevant jurisdiction).

AILA POSITIONS AND RESOURCES ON LEGAL REPRESENTATION

- AILA's [Board-passed 2021 Advocacy and Policy Priorities](#) include legal representation funding among the top 5 priorities for our advocacy: "Right to Counsel and Access to Counsel – Recognizing the value of legal counsel as an essential component

of a fair immigration system, AILA will advocate for dramatic expansion of government-funded counsel programs and improved access to counsel for people in detention and other settings."

- [AILA's November 2020 recommendations to President Biden](#) state: "Guarantee Legal Counsel – Within the first 30 days, the president should announce a commitment to provide every person facing immigration removal with legal counsel paid for by the government if they cannot afford it."
- Greg Chen and Jorge Loweree, AILA and American Immigration Council, [Policy Brief: The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal](#), January 2021.
- AILA [resource page](#) on legal representation advocacy

Endnotes

- 1 See [AILA 2021 Advocacy and Policy Priorities](#), adopted by the AILA Board of Governors, January 2021.
- 2 The AILA Legal Representation Task Force was chaired by AILA's President-Elect, Jeremy McKinney and included the following individuals (organizational affiliations included for reference only): Heidi Altman, National Immigrant Justice Center; Breanna Cary, private practitioner; Greg Chen, AILA staff; Cory Forman, private practitioner; Laura Lichter, private practitioner; Jorge Loweree, American Immigration Council staff; Karen Lucas, American Immigration Council staff; Andrew Nietor, AILA Board member and member of the EOIR/ICE Joint National Committee; Allyson Page, Immigration Services and Legal Advocacy; John Pratt, private practitioner; Reid Trautz, AILA staff; Marc Van Der Hout, private practitioner; Wendy Wayne, public defender.
- 3 A [nationwide survey](#) conducted by American Immigration Council and Women's Refugee Commission in late 2020 concluded that there is a strong footprint of service capacity across the country to serve immigrants navigating detention and removal. The survey identified 45 different organizations providing legal and related services who indicated that funding is their only consideration in expanding their services, and that they would be interested in increasing capacity if they were to receive additional funding.
- 4 For example, through two-year fellowships for recent law graduates, recent retirees or those contemplating a new legal career focus (using the Immigrant Justice Corps model).
- 5 The CJA Guidelines provide one model for appointed attorney compensation. Under [18 U.S.C. § 3006A \(d\)\(1\)](#), the Judicial Conference is authorized to increase all hourly rate maximums by an amount no more than the federal pay raises given to federal employees. See also [Chapter 2, § 230: Compensation and Expenses of Appointed Counsel | United States Courts](#)

- [\(uscourts.gov\)](#). AILA discourages the use of per-case fee methods which are more likely to under-pay for necessary work and undermine quality representation. See Benjamin Schwall, *More Bang for Your Buck: How to Improve the Incentive Structure for Indigent Defense Counsel*, 14 Ohio St. J. Crim. L. 553 (2017), available at <https://kb.osu.edu/handle/1811/80795> and Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 Clearinghouse Rev. 271, 275 (2006), available at: http://civilrighttocounsel.org/uploaded_files/17/Lessons_from_Gideon_Abel_.pdf.
- 6 Over the past few years, more than 40 states and localities have created programs to provide legal representation to individuals facing removal proceedings. For instance, California currently allocates over \$50 million in funding per year to immigration legal services (including representation in immigration court). See AILA and American Immigration Council, "[Policy Brief: The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal](#)," January 2021.
- 7 [AILA's November 2020 recommendations to President Biden](#) states: "Guarantee Legal Counsel – Within the first 30 days, the president should announce a commitment to provide every person facing immigration removal with legal counsel paid for by the government if they cannot afford it." See also "The Case for Universal Representation," [Vera Institute](#). See also ABA, https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_american_immigration_promise.pdf, and Public Defender Coalition for Immigrant Justice, <https://www.pds4immjustice.com/ten-point-plan>.
- 8 The phrase "current risk of removal" includes people with a specific and identifiable risk of being placed in proceedings, such as those under arrest by a DHS component, or who are currently in proceedings pursuant to INA Sections 235, 238, 240, 241 and 246 and those who have been ordered removed but whose deportation is delayed.