

STATE OF NEW YORK

7261

IN SENATE

January 15, 2020

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the executive law, in relation to establishing the right to legal counsel in immigration court proceedings and providing for the administration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as "the access to
2 representation act".

3 § 2. The executive law is amended by adding a new section 94-c to read
4 as follows:

5 § 94-c. Right to counsel in immigration court proceedings. 1. Defi-
6 nitions. As used in this section:

7 (a) "Administrator" means the director of the New York state office
8 for new Americans.

9 (b) "Covered individual" means any income-eligible individual subject
10 to removal pursuant to 8 U.S.C. § 1229a or 8 U.S.C. § 1225 and their
11 implementing regulations, or a final order of removal under 8 C.F.R. §
12 1241.1, regardless of age, in a covered proceeding who is:

13 (i) a New York state domiciliary who is a non-United States citizen;

14 (ii) a New York state domiciliary who is a United States citizen or
15 whose United States citizenship is in dispute; or

16 (iii) an individual who is not a New York state domiciliary if such
17 non-domiciliary and their proceedings have a significant nexus to New
18 York state such that they should be provided relief under this statute,
19 as determined by the administrator or designee of the administrator on a
20 case-by-case basis.

21 (c) "Covered proceeding" means any proceeding in a covered venue in
22 which a covered individual is seeking an avenue of relief from removal
23 from the United States, or is challenging his or her arrest or detention
24 under the Immigration and Nationality Act ("INA"), as amended, and its
25 implementing regulations. A covered proceeding includes, if applicable,
26 a proceeding or hearing in immigration court; a proceeding in New York
27 state family court for purposes of obtaining a special findings order; a

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 habeas corpus petition to a federal district court located in New York
2 challenging detention under the INA; motions to reopen or reconsider
3 under 8 U.S.C. § 1229(a); a petition for review under 8 U.S.C. § 1252; a
4 remand to a federal district court from the United States Circuit Courts
5 of Appeals for fact-finding purposes; and any appeal related to any of
6 the foregoing to the Board of Immigration Appeals, the United States
7 Circuit Courts of Appeals, and/or the United States Supreme Court.

8 (d) "Covered venue" means: (i) any tribunal located within New York
9 state, including family courts, immigration courts, and federal district
10 courts; (ii) immigration courts located in New Jersey; (iii) with
11 respect to the provision of legal services in the context of expedited
12 removals, any location within the borders of New York state where expe-
13 ditied removals are processed; (iv) the Board of Immigration Appeals; (v)
14 the United States Circuit Courts of Appeals; and (vi) the United States
15 Supreme Court.

16 (e) "Domicile" has the meaning ascribed to it by the administrator
17 pursuant to its rulemaking authority under this section, provided that
18 in any event it shall include a fixed, permanent, and principal home to
19 which a person wherever temporarily located always intends to return.

20 (f) "Domiciliary" means a person that has established domicile with
21 respect to a particular jurisdiction.

22 (g) "Immigration court" means a tribunal of the Executive Office for
23 Immigration Review or a successor entity tasked with deciding the inad-
24 missibility or deportability of a noncitizen of the United States that
25 is presided over by an immigration judge as defined in 8 U.S.C. §
26 1101(b)(4).

27 (h) "Income-eligible individual" means an individual who is deemed
28 eligible for legal services in a covered proceeding based on pre-set
29 income-related criteria promulgated by the administrator, but in any
30 event must at a minimum include any individual whose annual gross house-
31 hold income is not in excess of two hundred percent of the federal
32 poverty guidelines as updated periodically in the Federal Register by
33 the United States Department of Health and Human Services under the
34 authority of 42 U.S.C. § 9902(2).

35 (i) "Legal services" means individualized legal assistance in a single
36 consultation and/or ongoing legal representation, provided by a legal
37 services provider to a covered individual, and all legal advice, advoca-
38 cy, and assistance associated with such service.

39 (j) "Legal services provider" means an individual, organization, or
40 association that has the authority to provide legal services and is
41 designated by the administrator to provide such services.

42 2. Right to counsel in immigration proceedings. (a) All covered indi-
43 viduals shall have the right to legal services as provided in this para-
44 graph.

45 (i) Covered individuals facing a covered proceeding in an immigration
46 court in New York or New Jersey shall have the right to ongoing legal
47 representation.

48 (ii) Covered individuals facing a covered proceeding in a covered
49 venue other than an immigration court in New York or New Jersey shall
50 have the right to a consultation provided by a legal services provider,
51 and if found by the legal services provider to have a viable application
52 for appeal, challenge to a court order, or other form of relief from
53 removal from the United States, shall have the right to ongoing legal
54 representation.

55 (b) The right to counsel established in paragraph (a) of this subdivi-
56 sion shall attach:

1 (i) In the case of proceedings for removal pursuant to 8 U.S.C. §
2 1229a, upon receipt of a Notice to Appear, as defined in 8 U.S.C. §
3 1229. The obligations of this section shall be satisfied if counsel is
4 provided to a covered individual no later than their first appearance in
5 a covered proceeding, or as soon thereafter as is practicable.

6 (ii) In the case of removal proceedings pursuant to 8 U.S.C. § 1225,
7 upon the commencement of such proceedings, or as soon thereafter as is
8 practicable.

9 (iii) In the case of a referral to an immigration judge for a hearing
10 pursuant to 8 U.S.C. § 1231(b)(3) or 8 U.S.C. § 1158, upon receipt of a
11 Notice of Referral to Immigration Judge, or as soon thereafter as is
12 practicable.

13 (iv) In the case of a reinstatement of a final order of removal, upon
14 such reinstatement, or as soon thereafter as is practicable.

15 (v) In all other cases, as soon as is practicable.

16 (c) Subject to the provisions of paragraph (d) of this subdivision,
17 the right to counsel established in paragraph (a) of this subdivision
18 shall terminate:

19 (i) upon the termination or dismissal of removal proceedings or any
20 related appellate matter in respect of a covered individual by the immi-
21 gration court or other competent tribunal or authority;

22 (ii) upon the issuance of a final order or judgment in respect to a
23 covered individual's removal proceedings from which there remains no
24 opportunity for appeal or other avenue for relief including, but not
25 limited to, motions to reopen, motions to reconsider, and petitions for
26 review; provided, however, that legal services providers shall not be
27 required to pursue appeals or other avenues for relief that are specula-
28 tive or frivolous;

29 (iii) if a covered individual ceases to be a New York state domicili-
30 ary and establishes domicile in a jurisdiction outside of New York
31 state;

32 (iv) if it is discovered that the initial determination that an indi-
33 vidual was an income-eligible individual was erroneous at the time that
34 such determination was made, as soon as such discovery occurs; provided,
35 however, that such individual will continue to be provided with legal
36 services pursuant to this subdivision for a reasonable amount of time to
37 enable such person to obtain alternative counsel, so as not to mate-
38 rially prejudice such individual's chance of success in any covered
39 proceeding;

40 (v) if a covered individual knowingly and voluntarily waives the right
41 to counsel on the record in the presence of counsel; or

42 (vi) upon a determination by a legal services provider after the
43 consultation described in subparagraph (ii) of paragraph (a) of this
44 subdivision that a covered individual facing a covered proceeding in a
45 covered venue other than an immigration court in New York or New Jersey
46 has no viable application for appeal, challenge to a court order, nor
47 other form of relief from removal from the United States.

48 (d) Notwithstanding the requirements of paragraph (c) of this subdivi-
49 sion, the rights established in paragraph (a) of this subdivision shall
50 not terminate if:

51 (i) an immigration judge declines to allow a legal services provider
52 to withdraw from representing a covered individual; or

53 (ii) a legal services provider is prohibited from ceasing to provide
54 legal services pursuant to the New York Rules of Professional Conduct or
55 the Executive Office for Immigration Review's Practice Manual.

1 3. Powers and duties of the administrator. The administrator is
2 charged with implementing the requirements of this section no later than
3 January first, two thousand twenty-one, and may promulgate such rules,
4 policies, and procedures as may be necessary and appropriate to accom-
5 plish such implementation. The administrator shall have the power and
6 responsibility to:

7 (a) ensure that all covered individuals be advised of their right to
8 counsel and be offered legal services as provided in paragraph (a) of
9 subdivision two of this section;

10 (b) ensure independent, competent, and zealous representation of
11 covered individuals receiving legal services provided pursuant to this
12 section;

13 (c) examine, evaluate, and monitor legal services provided pursuant to
14 this section;

15 (d) collect and receive information and data regarding the provision
16 of legal services not protected by attorney-client privilege, work prod-
17 uct privilege, or any other applicable privilege, or that can be
18 disclosed by legal services providers without violating the New York
19 Rules of Professional Conduct, including but not limited to:

20 (i) the types and combinations of such services being utilized across
21 the state;

22 (ii) the salaries and other compensation paid to individual adminis-
23 trators, attorneys, and staff in connection with the provision of such
24 services;

25 (iii) the caseloads of legal services providers providing legal
26 services in connection with the provision of such services;

27 (iv) the types, nature, and timing of dispositions of cases handled by
28 legal services providers providing legal services;

29 (v) the actual expenditures currently being made in connection with
30 the provision of legal services; and

31 (vi) the time, funds, and in-kind resources currently being spent on
32 providing such legal services and the amount being spent on ancillary
33 services such as support staff and expert witnesses;

34 (e) analyze and evaluate collected data, and undertake any necessary
35 research and studies, in order to consider and recommend measures to
36 enhance the provision of effective legal services and to ensure that
37 recipients of legal services are provided with quality representation
38 from fiscally responsible providers, which shall include but not be
39 limited to standards, criteria, and a process for qualifying and re-qua-
40 lifying legal services providers to provide legal services;

41 (f) establish measures of performance which programs shall regularly
42 report to the administrator to assist the administrator in monitoring
43 the quality of legal services;

44 (g) establish the standards and criteria used in programs to determine
45 whether individual legal services providers are qualified to provide
46 legal services;

47 (h) establish the criteria and procedures used to determine whether a
48 person is eligible to receive legal services, including requirements
49 related to income and domicile, and to track the number of persons
50 considered for and applicants denied such services, the reasons for the
51 denials, and the results of any review of such denials;

52 (i) establish standards and criteria for the provision of legal
53 services in cases involving a conflict of interest;

54 (j) develop recommendations to improve the delivery of legal services;

1 (k) target grants in support of innovative and cost-effective
2 solutions that enhance the provision of legal services, including colla-
3 borative efforts serving multiple jurisdictions within New York state;

4 (l) investigate and monitor any other matter relevant to the provision
5 of legal services which the administrator deems important;

6 (m) request and receive from any department, division, board, bureau,
7 commission, or other agency of the state or any political subdivision of
8 the state or any public authority such assistance, information, and data
9 as will enable the administrator to properly carry out its functions,
10 powers, and duties, subject to limitations on the disclosure of informa-
11 tion provided on a privileged basis to legal services providers, as well
12 as limitations on the disclosure of information by legal services
13 providers under the New York Rules of Professional Conduct;

14 (n) apply for and accept any grant or other source of funding for
15 purposes of carrying out the requirements of this section. Any sums so
16 received may be expended by the administrator to effectuate the fulfill-
17 ment of any such requirement, subject to any relevant requirements
18 related to the approval of expenditure of funds and audits of such
19 expenditures;

20 (o) develop, publish, and implement a written plan that establishes
21 numerical caseload/workload standards for all legal services providers,
22 with such plan to be completed and published within one hundred eighty
23 days after the enactment of this section, and to monitor and period-
24 ically report on the implementation of and compliance with the plan;

25 (p) develop and implement a written plan, and to monitor and period-
26 ically report on the implementation of and compliance with such plan, to
27 improve the quality of legal services provided to covered individuals,
28 and to ensure that legal services providers providing such represen-
29 tation receive effective supervision and training, have access to and
30 appropriately utilize interpreters and expert witnesses on behalf of
31 clients, communicate effectively with their clients, have the necessary
32 qualifications and experience; and

33 (q) beginning in two thousand twenty-two, and by September fifteenth
34 of each year thereafter, submit a report to the governor, the speaker of
35 the assembly, and the temporary president of the senate, describing
36 compliance with the requirements of this section, including but not
37 limited to:

38 (i) the criteria used to determine whether an individual is eligible
39 for legal services;

40 (ii) the procedures used to determine whether an individual is eligi-
41 ble to receive legal services;

42 (iii) the number of individuals deemed eligible and ineligible for
43 legal services;

44 (iv) the number of cases started and completed and the outcomes of
45 those cases; and

46 (v) qualitative review of the legal services provided.

47 4. Funding. (a) The state shall establish a dedicated fund and shall
48 appropriate sufficient sums into such fund to fully carry out the
49 requirements of this section. Funds necessary to fully carry out the
50 requirements of this section shall be determined annually by December
51 first of each year by the secretary of state, in consultation with the
52 administrator and the director of the division of the budget.

53 (b) The administrator will be charged with ensuring that appropriated
54 funds are timely distributed to legal services providers for the
55 provision of legal services.

(c) Notwithstanding the requirements of paragraphs (a) and (b) of this subdivision, sums appropriated to carry out the requirements of this section shall be used to supplement and not supplant any state, local, or private funding that is, or is anticipated to be, expended for the provision of legal services to covered individuals, and the state shall not be required to appropriate any funds for legal services to the extent that obligations associated with the provision of legal services are otherwise fully satisfied by funds received from state, local, or private sources, or by the United States government in satisfaction of any legal obligation.

5. Advisory committee. (a) There shall be an advisory committee which shall work, as necessary and in collaboration with the administrator, to develop programs, policies, training, and procedures necessary to effectuate the requirements of this section. Matters to be considered by the advisory committee include, but are not limited to:

- (i) the rates of compensation for legal services;
- (ii) community engagement efforts;
- (iii) the sufficiency of access to legal services in covered venues;
- (iv) the sufficiency of space available for designated providers in covered venues;
- (v) ensuring individuals with limited English proficiency have access to appropriate translation services; and
- (vi) other efforts by other states to support individuals facing deportation.

(b) The advisory committee shall be comprised of nine members. The governor shall appoint five members offering services to individuals in covered proceedings, including at least one representative of the private bar and an equal number of representatives of designated legal services providers and representatives of community-based organizations. The speaker of the assembly and temporary president of the senate shall appoint two members each. The administrator shall serve ex officio. The governor shall designate one member to serve as chair of the advisory committee.

(c) Each member, other than the member serving in an ex officio capacity, shall serve for a term of two years, with initial terms for each committee seat commencing on January first, two thousand twenty-one and expiring on December thirty-first, two thousand twenty-two. Initial appointments under this subdivision must be made within twenty days of the effective date of a chapter of the laws of two thousand twenty that added this section. Any vacancies shall be filled promptly and in the same manner as the original appointment, and the appointee filling such vacancy shall serve for the unexpired portion of the term of the succeeded member. Any committee member may be reappointed for additional terms. A member of the advisory committee shall continue in such position upon the expiration of their term and until such time as they are reappointed or their successor is appointed, as the case may be.

(d) Members of the advisory committee shall serve without compensation, but shall be allowed and reimbursed for their reasonable actual and necessary expenses incurred in performance of their functions under this section by the administrator.

(e) The advisory committee's initial meeting shall take place within thirty days of the appointment of all required committee members under paragraph (b) of this subdivision, or within sixty days of the effective date of a chapter of the laws of two thousand twenty that added this section, whichever is sooner. The advisory committee shall meet no less than four times per year. The advisory committee may establish its own

1 procedures with respect to the conduct of its meetings and its other
2 affairs; provided, however, that the quorum and majority provisions of
3 section forty-one of the general construction law shall govern all
4 actions taken by the advisory committee.

5 (f) Membership on the advisory committee shall not constitute the
6 holding of an office. The advisory committee shall not have the power
7 to exercise any portion of the sovereign power of the state. No member
8 of the advisory committee shall be disqualified from holding any public
9 office or employment, nor shall he or she forfeit any such office or
10 employment, by reason of his or her appointment pursuant to this
11 section, notwithstanding the provisions of any other general, special,
12 or local law; ordinance; or city charter.

13 (g) Beginning in two thousand twenty-two, the advisory committee shall
14 produce a report concerning its duties pursuant to this section and any
15 related recommendations, and such report shall be included in the report
16 submitted by the administrator to the governor, the speaker of the
17 assembly, and the temporary president of the senate under paragraph (p)
18 of subdivision three of this section.

19 6. No private right of action. Nothing in this section or the adminis-
20 tration or application thereof shall be construed to create a private
21 right of action on the part of any person or entity against the state or
22 any agency, instrumentality, official, or employee thereof.

23 7. Miscellaneous provisions. (a) Any legal services performed by a
24 legal services provider pursuant to this section shall not supplant,
25 replace, or satisfy any obligations or responsibilities of such legal
26 services provider pursuant to any other program, agreement, or contract.

27 (b) The provisions of this section shall supersede conflicting state
28 or local laws, rules, policies, procedures, and practices, except to the
29 extent that the provisions of any such state or local law, rule, policy,
30 procedure, or practice may provide any additional or greater right or
31 protection. Nothing in this section shall be interpreted or applied so
32 as to create any power, duty, or obligation prohibited by federal law.

33 (c) If any provision of this section or any application thereof to any
34 person or circumstance is held invalid, such invalidity shall not affect
35 any provision or application of this section that can be given effect
36 without the invalid provision or application. To this end, the
37 provisions of this section are severable.

38 § 3. This act shall take effect on the ninetieth day after it shall
39 have become a law. Effective immediately the addition, amendment and/or
40 repeal of any rule or regulation necessary for the implementation of
41 this act on its effective date are authorized to be made and completed
42 on or before such date.