

STATE OF NEW YORK

81--A

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sens. HOYLMAN, BRISPORT, GIANARIS, KAVANAGH, PERSAUD, RAMOS, RIVERA, SALAZAR, SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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-d to read
4 as follows:

5 § 94-d. 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.

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

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(c) "Covered proceeding" means any proceeding in a covered venue in which a covered individual is seeking an avenue of relief from removal from the United States, or is challenging his or her arrest or detention under the Immigration and Nationality Act ("INA"), as amended, and its implementing regulations. A covered proceeding includes, if applicable, a proceeding or hearing in immigration court; a proceeding in New York state family court for purposes of obtaining a special findings order; a habeas corpus petition to a federal district court located in New York challenging detention under the INA; motions to reopen or reconsider under 8 U.S.C. § 1229(a); a petition for review under 8 U.S.C. § 1252; a remand to a federal district court from the United States Circuit Courts of Appeals for fact-finding purposes; and any appeal related to any of the foregoing to the Board of Immigration Appeals, the United States Circuit Courts of Appeals, and/or the United States Supreme Court.

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

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

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

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

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

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

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

2. Right to counsel in immigration proceedings. (a) All covered individuals shall have the right to legal services as provided in this paragraph.

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

(ii) Covered individuals facing a covered proceeding in a covered venue other than an immigration court in New York or New Jersey shall

1 have the right to a consultation provided by a legal services provider,
2 and if found by the legal services provider to have a viable application
3 for appeal, challenge to a court order, or other form of relief from
4 removal from the United States, shall have the right to ongoing legal
5 representation.

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

8 (i) In the case of proceedings for removal pursuant to 8 U.S.C. §
9 1229a, upon receipt of a Notice to Appear, as defined in 8 U.S.C. §
10 1229. The obligations of this section shall be satisfied if counsel is
11 provided to a covered individual no later than their first appearance in
12 a covered proceeding, or as soon thereafter as is practicable.

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

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

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

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

23 (c) Subject to the provisions of paragraph (d) of this subdivision,
24 the right to counsel established in paragraph (a) of this subdivision
25 shall terminate:

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

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

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

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

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

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

(d) Notwithstanding the requirements of paragraph (c) of this subdivision, the rights established in paragraph (a) of this subdivision shall not terminate if:

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

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

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

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

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

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

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

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

(ii) the salaries and other compensation paid to individual administrators, attorneys, and staff in connection with the provision of such services;

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

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

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

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

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

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

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

(h) establish the criteria and procedures used to determine whether a person is eligible to receive legal services, including requirements

1 related to income and domicile, and to track the number of persons
2 considered for and applicants denied such services, the reasons for the
3 denials, and the results of any review of such denials;

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

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

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

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

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

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

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

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

39 (q) beginning in two thousand twenty-three, and by September fifteenth
40 of each year thereafter, submit a report to the governor, the speaker of
41 the assembly, and the temporary president of the senate, describing
42 compliance with the requirements of this section, including but not
43 limited to:

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

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

48 (iii) the number of individuals deemed eligible and ineligible for
49 legal services;

50 (iv) the number of cases started and completed and the outcomes of
51 those cases; and

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

53 4. Funding. (a) The state shall establish a dedicated fund and shall
54 appropriate sufficient sums into such fund to fully carry out the
55 requirements of this section. Funds necessary to fully carry out the
56 requirements of this section shall be determined annually by December

1 first of each year by the secretary of state, in consultation with the
2 administrator and the director of the division of the budget.

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

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

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

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

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

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

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

1 (e) The advisory committee's initial meeting shall take place within
2 thirty days of the appointment of all required committee members under
3 paragraph (b) of this subdivision, or within sixty days of the effective
4 date of a chapter of the laws of two thousand twenty-one that added this
5 section, whichever is sooner. The advisory committee shall meet no less
6 than four times per year. The advisory committee may establish its own
7 procedures with respect to the conduct of its meetings and its other
8 affairs; provided, however, that the quorum and majority provisions of
9 section forty-one of the general construction law shall govern all
10 actions taken by the advisory committee.

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

19 (g) Beginning in two thousand twenty-three, the advisory committee
20 shall produce a report concerning its duties pursuant to this section
21 and any related recommendations, and such report shall be included in
22 the report submitted by the administrator to the governor, the speaker
23 of the assembly, and the temporary president of the senate under para-
24 graph (p) of subdivision three of this section.

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

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

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

39 (c) If any provision of this section or any application thereof to any
40 person or circumstance is held invalid, such invalidity shall not affect
41 any provision or application of this section that can be given effect
42 without the invalid provision or application. To this end, the
43 provisions of this section are severable.

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