



COUNTY OF SAN DIEGO

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CLERK OF THE BOARD
OF SUPERVISORS

TERRA LAWSON-REMER
SUPERVISOR, THIRD DISTRICT
SAN DIEGO COUNTY BOARD OF SUPERVISORS

DATE: May 4th, 2021

05

TO: Board of Supervisors

SUBJECT

**PROVIDE LEGAL REPRESENTATION TO DETAINED IMMIGRANTS FACING
REMOVAL PROCEEDINGS (DISTRICTS: ALL)**

OVERVIEW

Deportation has immeasurable consequences for the person removed and the family and community that is left behind in the United States.

Immigrants' right to counsel in removal proceedings is a right that arises from multiple sources, including the Fifth Amendment to the U.S. Constitution, the Immigration and Nationality Act (INA), other federal statutes, and federal regulations¹. The constitutional right to due process protects the fundamental rights of every "person" in this country. The Fifth Amendment guarantees that "[n]o person ... shall be deprived of life, liberty, or property" without due process of law. Immigrants in removal proceedings, i.e. those facing deportation and appearing before an immigration judge, have a right "of being represented ... by counsel." I.N.A. § 240(b)(4)(A). While an immigrant's right to counsel of their own choice at their own expense in removal proceedings is protected by the Due Process Clause and INA, it is a right afforded to only the few that can pay the cost of such representation.

Many immigrants facing deportation or seeking asylum do not have access to legal representation. Legal fees can be extremely costly. Furthermore, immigration law is vast and complex, making it is very difficult to navigate without access to experts.

There is also strong evidence that when immigrants have access to counsel, the immigration courts run more efficiently. Immigration law is extremely complicated and changes frequently. Clients without a legal guide are lost. Represented clients are more likely to appear at their hearings and file fewer claims.²

¹ Kate M. Manuel, "Aliens' Right to Counsel in Removal Proceedings: In Brief", Congressional Research Service, 7-5700 www.crs.gov R43613 (March 17, 2016): 1-2.

² Ingrid Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," University of Pennsylvania Law Review 164, no. 1 (December 2015): 1-91.
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

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Exercising their constitutional right to being represented by an immigration attorney gives immigrants dignity, hope, and the ability to return to their affairs and continue contributing to their communities while their cases proceed through the courts. According to the American Immigration Council, immigrants in detention with legal representation who had a custody hearing were four times more likely to be released from detention, allowing them to return to their jobs, family and community while they awaited the results of their legal matter³. Legal representation has also been shown to help immigrants gain or maintain their legal work authorization, thus contributing to federal, state, and local tax revenue.

Communities experience a significant loss in economic activity and reduction of tax revenue when immigrants are detained -- revenue that often is collected through employers, mortgages, lease payments, businesses, education and other financial contributions. Furthermore, there are high costs of keeping individuals in immigration detention at the taxpayer's expense. For instance, in the FY 2016 federal budget, taxpayers spent \$2 billion in detention of immigrants⁴. This amount would significantly decline as people access adequate representation and exit the detention system.

The lack of appointed counsel means that tens of thousands of people each year go unrepresented, including asylum seekers, longtime legal residents, immigrant parents or spouses of U.S. citizens, and even children. They are left to defend themselves in an adversarial setting and notoriously complex system against the United States government, which is always represented by counsel. According to the American Immigration Council, only 17 percent of detainees in San Diego have legal representation. Currently, San Diego County has many hard-working immigrant attorneys and organizations working to represent immigrants. ⁵However, many of these organizations lack adequate resources to address the volume of cases.

The Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), held that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for [them]... in particular because “[g]overnments ... quite properly spend vast sums of money to establish machinery to try defendants accused of crime”. However this 6th amendment right to appointed counsel only applies to criminal proceedings, and immigration removal is a civil proceeding – so despite the fact that the consequences of deportation or the denial of asylum are often quite literally life and death, immigrants who are too poor to hire a lawyer are not

³ Ingrid Eagly and Steven Shafer, “Access to Counsel in Immigration Court,” American Immigration Council Special Report (September 2016): 1–28.

www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

⁴ Andrea Black and Joan Friedland, “Blazing a Trial, The Fight for Right to Counsel in Detention and Beyond”, National Immigration Law Center, (March 2016): 8-9.

⁵ Ingrid Eagly and Steven Shafer, “Access to Counsel in Immigration Court,” American Immigration Council Special Report (September 2016): 1–28.

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assured a fair trial and are denied due process.

The Vera Institute of Justice reports that two out of three people in the United States support government-funded representation for immigrants facing deportation, including 67 percent of likely voters.⁶

Los Angeles and Santa Clara County have successfully provided universal legal services to immigrants. Aware of the positive impact of informed legal defense, the County of Los Angeles, the City of Los Angeles, the Weingart Foundation, and the California Community Foundation responded to increased immigration enforcement practices by establishing the Los Angeles Justice Fund. This pilot grantmaking and capacity-building program was designed to strengthen the capacities of legal service providers to provide critical and timely legal representation for more immigrants in Los Angeles County who are detained by immigration officials or in removal proceedings. Santa Clara has a similar model where the County awards grants to immigration legal services who apply and are granted funds.

The San Diego Public Defender's Office currently provides criminal legal defense services to San Diego County. The Office of Assigned Counsel is expertly suited to manage an Immigrant Rights Legal Defense Program, by administering and overseeing contracts awarded by the Department of Purchasing and Contracting to various immigrant defense agencies and non-profits. The Office of Assigned Counsel already provides San Diego County with similar services when directly contracting criminal cases to criminal attorneys when multiple layers of conflict arise pursuant to the Penal Code. Their track record and ability to manage, budget, and assign multiple cases will advance the representation of detained immigrants more readily than any other agency.

With this action today, San Diego will join efforts to realize constitutional rights promised but left unfulfilled, and expand access to justice for our immigrant population. Today's request directs the Chief Administrative Officer to refer to budget \$5 million for a one-year pilot Immigrant Rights Legal Defense Program, and work with the Director of the Office of Assigned Counsel to return to the Board within 90 days with a program plan for a permanent program to provide legal representation to detained immigrants facing removal proceedings in San Diego County.

⁶ Karen Berberich and Nina Siulc, "Why Does Representation Matter? The Impact of Legal Representation in Immigration Court," Vera Institute of Justice (November 2018): 1-3.
www.vera.org/downloads/publications/why-does-representation-matter.pdf.

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**RECOMMENDATION(S)
SUPERVISOR TERRA LAWSON-REMER**

1. Establish a permanent Immigrant Rights Legal Defense Program, to provide legal representation to detained immigrants facing removal proceedings in San Diego County.

a. As a first step in establishing the permanent program, direct the Chief Administrative Officer to refer to budget \$5 million for Fiscal Year 2021-2022 for a pilot Immigrant Rights Legal Defense Program.

i. The program will be a one (1) year pilot with a FY 21-22 budget of \$5 million. This shall include up to \$500,000 for translation services.

ii. The program shall be housed in the Office of Assigned Counsel of the Public Defender's Office.

iii. The Department of Purchasing and Contracting will work with the Office of Assigned Counsel to manage the contracting of cases to various immigrant defense agencies and non-profits within the county.

2. Direct the CAO to work with the Director of the Office of Assigned Counsel of the Public Defender's Office and return to the Board of Supervisors within 90 days with a permanent program plan to provide legal representation for detained immigrants facing removal proceedings in San Diego county under a universal representation model.

a) The program plan shall request a minimum yearly budget of \$5 million, including up to \$500,000 for translation services.

b) The program shall provide detained immigrants facing deportation or removal proceedings in San Diego County access to legal representation at no cost to the individual facing deportation or removal proceedings.

c) The program shall entail an annual report from the Public Defender's Office regarding:

i. Number of immigrants represented

ii. Number of days in custody before release, if released

iii. Dollar amount of the bond if given bond

iv. Substantive outcomes and substantive motions

v. Status of pending cases:

1. Returned to employment

2. Returned to family

3. Returned to community

4. Remained in custody pending outcome

vi. Number of interpreters needed to assist

vii. Which language interpreters utilized

viii. Relief from removal available and utilized

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- d) Require the Office of Assigned Counsel of the Public Defender's Office to use a case management system to capture other data that may be relevant or requested.
- e) The program shall build on lessons learned from the initial pilot project, as well as best practices from other counties with similar programs.

FISCAL IMPACT

Funds for this request are not included in the County of San Diego's Fiscal Year 2020-2021 Operational Plan. Refer to budget for an additional \$5 million to the FY 21-22 budget based on available prior year General Fund fund balance and anticipate a minimum of \$5 million annually in subsequent fiscal years beginning in FY 2022-2023 based on available ongoing funding sources. The impact to net General Fund cost and staff will depend on the final program design.

BUSINESS IMPACT STATEMENT

N/A

ADVISORY BOARD STATEMENT

N/A

BACKGROUND

The promise that all people are created equal, that all people have a right to life, liberty, and the pursuit of happiness, as well as a right to due process, is what makes America unique in the world. This promise has always been aspirational. It has never been fully realized. The gap between the promise and the reality, and the long arc of work to close that gap, is the central thread of American history.

In order to close the gap between aspirations and reality, we must look closer at the inequities that exist in our legal system when immigrants facing removal proceedings are not afforded legal counsel. These immigrants include asylum-seekers; survivors of domestic violence, human trafficking, or torture; and lawful permanent residents and longtime community members with strong ties to the U.S.. Some may even be U.S. citizens who have wrongfully been detained. Although they might have different reasons why they ended in Immigration custody, one key issue they have in common, is that they all face deportation without an appointed immigration lawyer.

The Fifth Amendment of the United States Constitution guarantees that "[n]o person ... shall be deprived of life, liberty, or property" without due process of law. *Reno v. Flores*, 507 U.S. 292, 306 (1993) is the most recent case definitively clarifying that the Fifth Amendment entitles immigrants to due process of law in deportation proceedings. The Immigration and Nationality Act (INA) likewise establishes that immigrants in removal proceedings, i.e. those facing deportation and appearing before an immigration judge, have the right to be represented

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by counsel⁷. Therefore an immigrant's right to counsel of their own choice at their own expense in removal proceedings is protected by both the Due Process Clause of the Constitution and by the INA statute, it is a right afforded to only the few that can pay the cost of such representation.

Legal fees can be extremely costly and often become burdensome on families. Furthermore, immigration law is vast and complex, making it is very difficult to navigate without access to experts. True due process of law and the right to a fair trial, fundamental principles in the American legal system, require that actual quality representation be made available *pro bono* to immigrants facing removal proceedings.

The Vera Institute published a first-hand account of the deportation legal process. Alicia Fullard, a supervisor and 20-year-employee at a nursing home, wrote, "I am an immigrant, and I am a citizen of the United States of America. But if it weren't for my immigration lawyer, I wouldn't be here today." She was born in Jamaica, and the United States has been her home for most of her life. She arrived in the United States 30 years ago with a Green Card. Ms. Fullard came to this country in search of opportunities that weren't available to her in her country of birth. She built the life she had hoped for by starting a career in elder care and raising a family. During all this time, she never had any trouble renewing her status as a lawful permanent resident.

Ms. Fullard returned to Jamaica in 2014 to visit relatives she hadn't seen in decades. On her way home to Albany, immigration officials stopped her at John F. Kennedy International Airport. She was stunned when officials informed her that her Green Card was being taken away, and she was being put in deportation proceedings. She discovered this was all happening because of an arrest from 16 years before, for which she had received three years of probation. No one had ever informed her that this conviction from 1998 could affect her immigration status. She had lived a quiet life ever since and had nothing else on her record.

She didn't know how to present her case in immigration court. Even though she had been steadily employed at a nursing home for 20 years, she didn't have the resources to pay for an immigration attorney. She was afraid she was going to be displaced to a country that, before her trip, she had not been to for almost 25 years. She was worried that she wouldn't get to see her nephew and her grandchildren grow up, that she would be torn away from her job and her community.

Through the New York Immigrant Family Unity Project, she met a *pro bono* immigration attorney. Her attorney connected her with a public defender who assisted her in getting the old conviction vacated—an option she didn't even know existed. With her record cleared, her immigration attorney successfully argued that there was no reason to deport her. To her great relief and her family's joy, the immigration judge terminated the removal case. Like many others out there, she had legal options and claims that she was not even aware of because she did not have a lawyer on her side.

⁷ I.N.A. § 240(b)(4)(A).

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An estimated 70 percent of people in detention are unrepresented and left to fend for themselves while facing government attorneys⁸. In 2018 it was reported that slightly more than half of all pending children's cases were unrepresented.⁹ The New York Immigrant Family Unity Project, demonstrated a significant, causal effect of representation on case outcomes, independent of other factors: a 4 percent unrepresented success rate and a 48 percent represented success rate for detainees. Even if the attorney merely successfully argues for the immigrants' release from custody, release from detention allows people to return to their families, work in their communities while their case is pending, and prepare their affairs should the court ultimately order them to leave the country.

An Immigrant Rights Legal Defense Program in San Diego County would advance values of fairness and due process – principles that we hold deeply as Americans. In 2007-2012 only 17 percent of detainees in San Diego County had legal representation.¹⁰ When detained immigrants lack access to counsel because of inability to pay, we cannot ensure our immigration system is upholding due process. "In order to have due process, you have to have representation of all of the parties before a judge," according to Immigration Judge Sarah Burr. "The fact is that the Constitution guarantees all people due process and equal protection."

Currently, San Diego County has many hard-working immigrant attorneys and organizations working to represent immigrants. However, many of these organizations are faced with difficult triage choices when determining which cases to take due to a lack of resources to meet the need. This leaves many immigrants without representation. This program would fill these gaps in legal representation.

Given the incredible danger in many places to which non-citizens are deported and the toll deportations take on communities and families, it is up to the County of San Diego to step up and provide support to many who have called San Diego home. No one should face the possibility of separation from their family just because they couldn't afford to hire an attorney. With today's action, San Diego will be joining efforts across the nation to provide pro bono attorneys and uphold the immigrant's rights of those facing removal proceedings.

⁸ Transactional Records Access Clearinghouse (TRAC), "Details on Deportation Proceedings in Immigration Court," accessed January 13, 2020.
<https://trac.syr.edu/phptools/immigration/nta/>.

⁹ Karen Berberich and Nina Siulc, "Why Does Representation Matter? The Impact of Legal Representation in Immigration Court," Vera Institute of Justice (November 2018): 1–3.
www.vera.org/downloads/publications/why-does-representation-matter.pdf.

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LINKAGE TO THE COUNTY OF SAN DIEGO STRATEGIC PLAN

Today's proposed request supports the Living Safely Initiative of the County of San Diego's 2021-2026 Strategic Plan. Offering legal representation to immigrants achieves the 2021-2026 Strategic Plan's mission of providing public services that build strong and Live Well San Diego sustainable communities. When immigrants feel supported and have the prospect of returning to their family and their community while awaiting their legal outcome, San Diego can ensure stronger communities. This also demonstrates integrity by putting forth character first and exhibiting the courage to do the right thing for the right reason.

Respectfully submitted,



TERRA LAWSON-REMER
Supervisor, Third District

ATTACHMENT(S)

N/A

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AGENDA ITEM INFORMATION SHEET

REQUIRES FOUR VOTES: Yes No

WRITTEN DISCLOSURE PER COUNTY CHARTER SECTION 1000.1 REQUIRED
 Yes No

PREVIOUS RELEVANT BOARD ACTIONS:
N/A

BOARD POLICIES APPLICABLE:
A-81 (Procurement of Contract Services) – Department Head of the Department requesting the contracting of services is responsible for the overall performance of the contract, including contract monitoring.

BOARD POLICY STATEMENTS:
N/A

MANDATORY COMPLIANCE:
N/A

ORACLE AWARD NUMBER(S) AND CONTRACT AND/OR REQUISITION NUMBER(S):
N/A

ORIGINATING DEPARTMENT: Office of Supervisor Lawson-Remer, District 3

OTHER CONCURRENCE(S): Public Defenders

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