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6 June 2018

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Haiti and United States: Whether legal representation is required for persons who apply for asylum in the US; availability of legal aid for asylum applicants, particularly for Haitians, in the states of California, Florida, New Jersey and New York (2016-June 2018)

Research Directorate, Immigration and Refugee Board of Canada, Ottawa

1. Legal Representation

The US *Immigration Court Practice Manual* [1] explains the following:

Asylum applications are categorized as either "defensive" or "affirmative." A defensive asylum application is filed with the Immigration Court by an alien already in [removal] proceedings. An affirmative asylum application is filed with the Department of Homeland Security (DHS) Asylum Office by an alien not in removal proceedings. If the DHS Asylum Office declines to grant an affirmative asylum application, removal

proceedings may be initiated. In that case, the asylum application is referred to an Immigration Judge, who may grant or deny the application. (US 2 Nov. 2017, Sec. 3.1 (b) (iii))

Title 8 [2] of the *US Code of Federal Regulations (CFR)* provides that applicants "may have counsel or a representative present" during interviews before asylum officers (US 24 May 2018, Sec. 208.9). The US Citizenship and Immigration Services (USCIS) indicates that for the affirmative asylum process, applicants "may bring an attorney or accredited representative to the interview" (US 26 Jan. 2018).

The *Immigration Court Practice Manual* provides the following about appearances before the Immigration Court:

2.1 Representation Generally

(a) Types of representatives. — The regulations specify who may represent parties in immigration proceedings. ... As a practical matter, there are four categories of people who may present cases in Immigration Court: unrepresented aliens (Chapter 2.2), attorneys (Chapter 2.3), accredited representatives (Chapter 2.4), and certain categories of persons who are expressly recognized by the Immigration Court (Chapters 2.5 [Law Students and Law Graduates], 2.8 [Family Members], and 2.9 [Others]).

...

No one else is recognized to practice before the Immigration Court. Non-lawyer immigration specialists, visa consultants, and "notarios," are *not* authorized to represent parties before an Immigration Court.

...

2.2 Unrepresented Aliens ("Pro se" Appearances)

(a) Generally. — An individual in proceedings may represent himself or herself before the Immigration Court.

Many individuals choose to be represented by an attorney or accredited representative. Due to the complexity of the immigration and nationality laws, the Office of the Chief Immigration Judge recommends that those who can obtain qualified professional representation do so. ...

...

(US 2 Nov. 2017, Sec. 2.1-2.2, emphasis in original)

The US Department of Justice explains the following about the Board of Immigration Appeals (BIA):

The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the [DHS] in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm.

BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court. (US 16 Mar. 2018)

The *Board of Immigration Appeals Practice Manual* [3] provides that the BIA "generally has the authority to review appeals from," among others, "decisions of Immigration Judges pertaining to asylum" (US 23 Mar. 2018, Sec. 1.4(a)).

The *Board of Immigration Appeals Practice Manual* provides the following on appearances before the Board:

2.1 Representation Generally

(a) Types of representatives. – The regulations specify who may represent parties before the Board. ... As a practical matter, there are four categories of people who may present cases to the Board: unrepresented aliens (Chapter 2.2), attorneys (Chapter 2.3), accredited representatives (Chapter 2.4), and certain kinds of individuals who are expressly recognized by the Board (Chapter 2.5 [Law Students and Law Graduates] and 2.9 [Others]).

No one else is recognized to practice before the Board. Non-lawyer "immigration specialists," "visa-consultants," and "notarios" are not authorized to represent parties before the Board. ...

...

2.2 Unrepresented Aliens ("Pro se" Appearances)

(a) Generally. – An individual in proceedings may represent himself or herself before the Board.

Many individuals choose to be represented by an attorney or accredited representative. Due to the complexity of the immigration and nationality laws, the Board recommends that those who can obtain professional representation do so.

... (US 23 Mar. 2018, Sec. 2.1-2.2)

In correspondence with the Research Directorate, an assistant professor of law at the University of Detroit Mercy, whose areas of expertise include immigration law and asylum in the US [4], indicated that asylum applicants do not need an attorney, whether they are trying to obtain asylum through the affirmative or defensive process, or for an appeal to a decision (Assistant Professor 30 May 2018).

2. Fees for Asylum Applications

According to the USCIS, there is no "[f]iling fee" associated with the filing of the form I-589, called "Application for Asylum and for Withholding of Removal" (US 20 Mar. 2018). The same source adds that "[b]iometrics services may be required at no cost" (US 20 Mar. 2018). According to a manual prepared by the National Immigrant Justice Center (NIJC) [5], there is no "filing fee" associated with applications for asylum, filed affirmatively or defensively (NIJC Oct. 2017, 28). Similarly, the Assistant Professor indicated that there is no fee when applying for asylum status in the US (Assistant Professor 30 May 2018).

Title 8 of the US *CFR* provides the following regarding the fees for filing an appeal with the BIA:

§ 1103.7 Fees.

...

Form EOIR-26. For filing an appeal from a decision of an immigration judge - \$110.

Form EOIR-29. For filing an appeal from a decision of an officer of the Department of Homeland Security - \$110.

... (US 24 May 2018, Sec. 1103.7)

3. Legal Aid

Citing US court decisions, Sabrineh Ardalan, of Harvard Law School [6], explains that the Supreme Court and federal courts have "declined to recognize a universal right to appointed counsel for indigent asylum seekers, and instead maintain that immigration proceedings are civil in nature" (Ardalan 2015, 1009). Similarly, the Huffington Post (HuffPost), an American news website, explains that participants to immigration proceedings do not have "a right to a lawyer" because the proceedings "are civil rather than criminal" (HuffPost 9 Nov. 2017).

The information in the following paragraph was provided by the Assistant Professor:

"In general, traditional legal [aid] services are not available to asylum applicants in the US." Legal aid organizations often receive funding from the Legal Services Corporation (LSC) that places limitations, for example in terms of immigration status and on eligibility for assistance. "Even if LSC-funded entities have other funding, the commingling of those funds usually prevents legal aid organizations from providing legal services to non-LSC eligible clients." Asylum seekers are not eligible for such assistance. "Of course, in several states around the country, there are immigration legal service providers and law school clinics [funded by other entities] that do provide free or low-cost assistance to non-citizens with immigration issues" (Assistant Professor 30 May 2018). Corroborating information could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

3.1 Authorised Pro Bono Legal Service Providers

For the interview related to the affirmative asylum process, the USCIS indicates that applicants "may obtain a list of pro bono (free or reduced cost) attorneys and community-based, non-profit organizations that may be available to assist [them]" (US 12 May 2017). Title 8 of the *CFR* provides the following in the "List of Pro Bono Legal Service Providers":

§1003.61 General provisions.

(a) *Definitions*—

1. *Director*. Director means the Director of the Executive Office for Immigration Review (EOIR) ... and shall also include any office or

official within EOIR to whom the Director delegates authority with respect to subpart E of this part.

2. *Pro bono legal services.* Pro bono legal services are those uncompensated legal services performed for indigent individuals or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.
3. *Organization.* A non-profit religious, charitable, social service, or similar group established in the United States.
4. *Pro bono referral service.* A referral service, offered by a non-profit group, association, or similar organization established in the United States that assists persons in locating pro bono representation by making case referrals to attorneys or organizations that are available to provide pro bono representation.
5. *Provider.* Any organization, pro bono referral service, or attorney whose name is included on the List of Pro Bono Legal Service Providers.

(b) *Authority.* The Director shall maintain a list, known as the List of Pro Bono Legal Service Providers (List), of organizations, pro bono referral services, and attorneys qualified under this subpart to provide pro bono legal services in immigration proceedings. The List, which shall be updated not less than quarterly, shall be provided to individuals in removal and other proceedings before an immigration court.

...

(US 24 May 2018, Sec. 1003.61, italics in original)

The *Immigration Court Practice Manual* provides the following:

2.2 Unrepresented Aliens ("Pro se" Appearances)

...

(b) Legal service providers. — The Immigration Courts cannot give advice regarding the selection of a representative. However, aliens in proceedings before an Immigration Court are provided with a list of free or low cost legal service providers within the region in which the Immigration Court is located. ... The list is maintained by the Office of the Chief Immigration Judge and contains information on attorneys, bar associations, and certain non-profit organizations willing to provide legal services

to indigent individuals in Immigration Court proceedings at little or no cost. The free or low cost legal service providers may not be able to represent every individual who requests assistance.

In addition, all of the lists of free legal service providers nationwide are available on the EOIR website at www.justice.gov/eoir. (US 2 Nov. 2017, Sec. 2.2)

The EOIR website provides the following information about the "List of Pro Bono Legal Service Providers" (formerly known as the "List of Free Legal Services Providers"):

The List contains information on non-profit organizations and attorneys who have committed to providing at least 50 hours per year of pro bono legal services before the immigration court location where they appear on the List. The List also contains information on pro bono referral services that refer individuals in immigration court proceedings to pro bono counsel. (US 16 May 2018)

The EOIR website, according to a list dated 16 May 2018, indicates that the following states and territories do not have any providers: Alabama, Alaska, American Samoa, Arkansas, Delaware, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Northern Mariana Islands, Oklahoma, Puerto Rico, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, Washington D.C., West Virginia, Wisconsin and Wyoming (US 16 May 2018). An April 2018 document combining the lists of pro bono legal service providers for the states of California, Florida, New Jersey and New York, as provided on the EOIR website, is attached to this Response (Attachment 1).

The Assistant Professor explained that the capacity and specialization of free or low-cost legal service providers, available to non-citizens with immigration issues, "vary widely. Some only assist with a narrow segment of legal matters, such as naturalization. Other have robust removal defence programs that rely heavily on pro bono attorney involvement" (Assistant Professor 30 May 2018). Similarly, according to the lists of pro bono legal services providers in California, Florida, New Jersey and New York, some providers have restrictions in terms of clients they represent, including the following examples:

- The Legal Aid Society of San Diego does not represent asylum cases (US Apr. 2018a);

- The Asian Law Caucus in San Francisco "[r]arely take[s] asylum cases" (US Apr. 2018a);
- The Catholic Charities Legal Services Archdiocese of Palm Beach does not represent detained clients (US Apr. 2018b);
- Kids in Need of Defense (KIND) only represents minors and unaccompanied children in:
 - Los Angeles and San Francisco (US Apr. 2018a);
 - New Jersey (US Apr. 2018c);
 - New York (US Apr. 2018d).
- The Immigrant Defenders Law Center in Los Angeles only takes cases of unaccompanied minors (US Apr. 2018a);
- The Northern Manhattan Coalition for Immigrant Rights in New York does not take asylum cases (US Apr. 2018d);
- HIAS, located in New York and which represents clients in the Newark Immigration Court in New Jersey and at the New York Immigration Court, provides assistance to asylum applicants who are scientists, scholars, students, artists or professionals (US Apr. 2018c; US Apr. 2018d).

According to the same lists, in California, there are six providers (located in Los Angeles, San Diego and San Francisco), that specifically mention that they offer assistance to asylum seekers, or that they accept all types of cases (US Apr. 2018a); in Florida, there are four (located in Doral, Hollywood, Jacksonville, Miami and Port Richey) (US Apr. 2018b); for New Jersey courts, there are three (located in Newark and New York) (US Apr. 2018c); and in New York, there are six (located in Brooklyn, New York and Rochester) (US Apr. 2018d).

In correspondence with the Research Directorate, a representative at the Orlando Center for Justice (OCJ), an organization that is included on the list of pro bono legal service providers for the state of Florida, explained that the OCJ provides the following pro bono legal services to asylum seekers:

We provide consultations. We have represented clients before USCIS asylum officers in affirmative cases and in Immigration Court in defensive cases. We advise on what is asylum and what it is not. We prepare application packages and prepare clients through mock interviews and/or hearings. We attend interviews and hearings with clients. Our service area is mainly Central Florida, but we do take cases throughout Florida. ... [We attend] BIA appeals, if warranted. (OCJ 29 May 2018)

In correspondence with the Research Directorate, a representative at Americans for Immigrant Justice (AI Justice), an organization that is included on the list of pro bono legal service providers for the state of Florida, indicated that their pro bono legal

services include "legal screening and assessment, Freedom of Information Act requests (as needed), and, as feasible, affirmative and defensive representation" (AI Justice 31 May 2018).

3.2 BIA Pro Bono Project

The *Board of Immigration Appeals Practice Manual* provides the following:

2.2 Unrepresented Aliens ("Pro se" Appearances)

...

(b) Pro Bono Program. – The Board cannot give advice on when to obtain professional representation or whom to select. However, EOIR provides general information for persons seeking free legal services on its website through the Office of Legal Access Programs. The website also includes information on the BIA Pro Bono Project, which matches attorney brief writers with indigent aliens who have cases on appeal

... (US 23 Mar. 2018, Sec. 2.2)

The Department of Justice describes the BIA Pro Bono Project as follows:

In January of 2001, [the Project was] implemented ... to increase pro bono representation initially for individuals detained by the U.S. Immigration and Customs Enforcement (ICE) with immigration cases under appeal. The Project was developed between EOIR and several non-governmental organizations ... Since its start, the Project has succeeded in securing pro bono counsel for well over 1,000 individuals around the country - individuals who would not have otherwise been represented by counsel.

As a general matter, immigrants in removal proceedings are not entitled to publicly-funded legal assistance and, thus, many appear before the Immigration Courts and BIA without legal counsel. Agencies that provide legal services to immigrants normally face great obstacles in identifying, locating, and communicating with unrepresented individuals in time to write and file an appeal brief.

Under the Project, EOIR assists in identifying potentially meritorious cases based upon criteria determined by the partnering volunteer groups. Once cases are identified and reviewed, their summaries are then distributed via e-mail to pro bono

representatives across the United States. Volunteers who accept a case under the Project receive a copy of the file, as well as additional time to file the appeal brief. (US 16 Nov. 2016a)

3.3 National Qualified Representative Program

The Department of Justice indicates that the National Qualified Representative Program (NQRP), launched in 2013, is "a nationwide program to provide [q]ualified [r]epresentatives ... to certain unrepresented and detained respondents who are found by an [i]mmigration [j]udge or the BIA to be mentally incompetent to represent themselves in immigration proceedings" (US 16 Nov. 2016b). The Vera Institute of Justice (Vera) [7], contracted by the EOIR to set up the NQRP (Vera n.d.a), stated that, as of July 2016, the NQRP operated in six states (Washington, California, Arizona, Colorado, Texas and Florida), and that it would "eventually operate nationwide" (Vera n.d.b). Further information on the NQRP could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

3.4 Availability

The Transactional Records Access Clearinghouse (TRAC)'s Immigration Project [8] indicates that in the 2017 fiscal year, in the US, 6,228 asylum decisions (out of a total of 30,179) made by the Immigration Court involved unrepresented applicants (20.6 percent); and that in the 2016 fiscal year, 4,843 asylum decisions (out of a total of 22,312) involved unrepresented applicants (21.7 percent) (TRAC 28 Nov. 2017). According to the same source, out of 2,602 asylum decisions before the Immigration Court involving Haitians between the 2012 and 2017 fiscal years, 1,156 applicants were not represented (approximately 44.43 percent out of a total of 2,602 cases), and 1,446 were represented (approximately 55.57 percent) (TRAC 20 Nov. 2017). According to the same source, 86.1 percent of the asylum applications filed by Haitians were denied, with a rate of denial at 95.5 percent for unrepresented applicants, compared to 78.6 percent for represented applicants (TRAC 20 Nov. 2017). A table with the number of asylum applicants represented and not represented by nationality, from 2012 to 2017, provided by TRAC's Immigration Project, is attached to this Response (Attachment 2).

The Assistant Professor provided the following information:

For asylum applicants to be eligible for free legal services, they must live in an area where there is a provider able to perform these legal services. ... Availability of immigration legal services varies greatly [around the country].

Some asylum applicants are successful in obtaining legal aid with the lists of pro bono legal service providers, but certainly not enough. There is a dearth of immigration legal service organizations that really have the capacity to meet the needs of persons seeking asylum ... especially when those persons are detained. ... Several detention facilities [are] in remote parts of the country where there are also immigration courts on site. Stewart, in Georgia is an example of one such site. Stewart Detention Center is over two hours from Atlanta. The facility has a capacity of 1,700+. It is an impossible task to provide free or low-cost immigration legal services at a site like Stewart (or Eloy, AZ). ...

Asylum applicants face obstacles in obtaining legal aid services, [including the following]: ... language access (more attorneys and staff speak Spanish than French or Haitian Creole), short timelines, ineligibility for bond for many detainees, limited pro bono specialization/training on the complexities of immigration law generally and asylum law specifically, unwillingness of large and small firms to commit the time and money for prolonged representation, and limited mentoring capacity. (Assistant Professor 30 May 2018)

According to the lists of pro bono legal service providers, in California, there are no providers that specifically mention that they offer services in French or Haitian Creole (US Apr. 2018a); in Florida, there are two that indicate both French and Haitian Creole among their languages (US Apr. 2018b); in New Jersey, there are two that indicate the use of French (US Apr. 2018c); and in New York, there are three that mention French and one that mentions Creole (US Apr. 2018d).

The OCJ representative explained the following regarding the requests they receive from Haitians:

We do see a significant number of Haitians seeking [asylum] services. We are not able to provide legal services to all of them. 20 percent of all we serve are pro bono. The remaining services are on an income based sliding scale. We have two full time staff attorneys, so our ability to take cases is limited. Neither of our attorneys speak

Creole, further limiting the total number of Haitian Creole cases we can take at one time because an outside translator is often needed. Unfortunately, without additional funding, our reach is limited. (OCJ 29 May 2018)

The AI Justice representative explained that they "have seen a sharp increase of Haitian clients seeking assistance," with the termination of Temporary Protected Status (TPS) [9] (AI Justice 31 May 2018). According to the same source, AI Justice is not able to provide legal aid services to all Haitians seeking assistance because the organization has limitations in terms of funding and capacity (AI Justice 31 May 2018).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

Notes

[1] The *Immigration Court Practice Manual* is "a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice before the Immigration Courts. The requirements set forth in this manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case. The Practice Manual does not limit the discretion of Immigration Judges to act in accordance with law and regulation" (US 2 Nov. 2017).

[2] Title 8 of the *CFR* pertains to "Aliens and Nationality"; the regulatory entity for sections 1 to 499 is the DHS, and the regulatory entity for sections 1000 to 1399 is the Executive Office for Immigration Review (EOIR) (US 24 May 2018).

[3] The *Board of Immigration Appeals Practice Manual* "describes procedures, requirements, and recommendations for practice before the Board of Immigration Appeals[;] [it] is provided for the information and convenience of the general public and for parties that appear before the Board ... [and] [it] does not carry the weight of law or regulation. [It] is not intended, nor should it be construed in any way, as legal advice, nor does it extend or limit the jurisdiction of the Board as established by law and regulation" (US 23 Mar. 2018, Sec. 1.1).

[4] The Assistant Professor indicated that the information he provided is also based on resources and background shared by an attorney managing a legal resource centre for immigrants in Michigan (Assistant Professor 30 May 2018).

[5] NIJC provides legal services to immigrants, refugees and asylum seekers in the US (NIJC n.d.).

[6] Sabrineh Ardanan is an assistant director at the Harvard Immigration and Refugee Clinical Program where she "supervises and trains law students working on applications for asylum and other humanitarian protections, as well as appellate litigation and policy advocacy" (Harvard Law School n.d.). She also teaches courses on immigration and refugee law (Harvard Law School n.d.).

[7] Vera, "in partnership with leaders in the public sector," works on "projects [that] drive change by advancing new knowledge about justice reform and implementing solutions on the ground," including projects related to immigration (Vera n.d.c).

[8] TRAC "is a data gathering, data research and data distribution organization at Syracuse University" (TRAC n.d.a). TRAC's Immigration Project includes, among other elements, "[d]etailed reports on the handling of asylum matters by over 200 immigration judges [in the US]" (TRAC n.d.b).

[9] The USCIS indicates that "[t]he Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. USCIS may grant TPS to eligible nationals of certain countries (or parts of countries), who are already in the United States. Eligible individuals without nationality who last resided in the designated country may also be granted TPS" (US 22 May 2018).

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Additional Sources Consulted

Oral sources: American Bar Association – Immigration Justice Project; Camden Center for Law and Social Justice; Casa Cornelia Law Center; Catholic Legal Services, Archdiocese of Miami; Central American Legal Assistance; Centro Legal de la Raza; El Rescate; Equal Access Legal Services; Human Rights First; La Raza Centro Legal; professor of law whose areas of expertise include immigration and refugee law in the United States; professor of law whose research focuses on immigration and refugee law in the United States; San Francisco Lawyers' Committee for Civil Rights – Asylum Program; Social Justice Collaborative.

Internet sites, including: American Immigration Council; Factiva; Human Rights First; Humanity in Action; UN – Refworld; US – Department of State; Washington Office on Latin America.

Attachments

1. United States (US). April 2018. Department of Justice, Executive Office for Immigration Review (EOIR). "[List of Pro Bono Legal Service Providers](#)." [Accessed 17 May 2018]
2. Transactional Records Access Clearinghouse (TRAC). 20 November 2017. Immigration Project. "Table 2. Immigration Court Asylum Denial Rates by Nationality and Representation Status, FY 2012 - FY 2017." "[Asylum Representation Rates Have Fallen Amid Rising Denial Rates](#)." [Accessed 29 May 2018]

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