



NEW YORK  
CITY BAR

COMMITTEE ON  
IMMIGRATION & NATIONALITY LAW

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Mayor Bill de Blasio  
City Hall  
New York NY 10007

**Re: The Need to Allow Immigration Legal Services Providers to, at a Minimum, Receive Funding for Brief Services for Cases Subject to the Carve-out Based on Certain Convictions**

Dear Mayor de Blasio:

The New York City Bar Association (“City Bar”) has long advocated for increased representation in civil legal proceedings for people who cannot afford counsel, and has recognized the particular need for counsel in immigration court proceedings. The City Bar’s over 24,000 members include attorneys in private practice, government service, non-profit practice, and academia. The Immigration and Nationality Law Committee is comprised of immigration attorneys, current and former judges, immigration law scholars, and attorneys specializing in human and civil rights; this letter is based upon committee members’ expertise and experience counseling clients.

**The “Criminal Carve-Out” Makes No Sense in the Context of Immigration Legal Services**

Since early 2017, New York City contracts with legal service providers (LSPs) have prohibited New York Immigrant Family Unity Project (NYIFUP) providers from receiving funding for representing noncitizens subject to a Criminal Carve-Out discussed below. Subsequently, beginning in late 2017, the City extended this Criminal Carve-Out to exclude funding for any LSP contract, including for the ActionNYC, Immigrant Children’s Relief Advocates Effort (ICARE), and Immigrant Opportunities Initiative (IOI) contracts. We write now to renew our request that the Criminal Carve-Out be eliminated and that New York City support universal representation for indigent people in immigration proceedings. In the alternative, we ask that you to amend the City’s current policy, at a minimum, with regard to brief services where LSPs provide screenings to noncitizens.

The City Bar has previously advocated for full funding for NYIFUP legal services. On June 1, 2017, we wrote you a letter urging full funding for the New York Immigrant Family Unity Project (NYIFUP)<sup>1</sup>, and on January 31, 2018 we again wrote to you urging that other legal services contracts not be subjected to a carve-out based on certain criminal convictions.<sup>2</sup> The criminal carve-out adopts wholesale the list of crimes that governs the New York City Detainer Law (NYC Admin. Code §§ 9-131 and 14-154), which requires the City to honor U.S. Immigration and Customs Enforcement (ICE) detainer requests if the noncitizen has been convicted of certain serious crimes. If an individual has a prior conviction for one of 170 enumerated violent or serious crimes during the five years immediately preceding a “current arrest” (§ 9-131(2)(ii)) or an “instant arrest” (§ 14-154(2)(ii)), City prison officials must honor an ICE detainer request and transfer that individual to ICE (the “Criminal Carve-Out”).<sup>3</sup>

While there may be some logic in considering the underlying criminal conviction to determine when the City should cooperate with ICE detainers, there is no logic in importing this standard in considering whether noncitizens with those convictions should have legal counsel to challenge that detention, seek relief from removal, or seek an affirmative immigration benefit. Yet this is happening because the City is inserting a provision into various immigration legal services contracts allowing LSPs to represent clients under the contracts “only if ... [t]he individual is not convicted of any serious or violent felony offense as defined by and under the circumstances described in §§ 14-154 or 9-131 of the New York City Administrative Code.” The Detainer Law should not be used to block access to counsel for indigent New Yorkers who otherwise qualify for legal representation and who may qualify for an immigration benefit.

Most of the clients the LSPs seek to serve under the affected contracts do not have a “current” or “instant” arrest that would bring them to the attention of law enforcement. So even if a potential client has had a conviction for one of the 170 offenses in the last five years, the Detainer Law was not a factor in their current need for legal representation. Therefore, whatever validity the Criminal Carve-Out may have under the Detainer Law, it should have no relevance to these individuals’ eligibility for LSPs to represent them in applications for immigration benefits for which they qualify. The LSPs should be able to represent all indigent New Yorkers who need immigration legal services in New York City under the relevant contract.

The NYIFUP providers have obtained private funding, at least in the current fiscal year, to represent detainees subject to the Criminal Carve-Out, allowing them to uphold the promise of universal representation in immigration detention that was the spirit and purpose of NYIFUP. We are hopeful that the City will, in the meantime, reconsider the Criminal Carve-Out so that there is no interruption in access to counsel for the vulnerable population that NYIFIUP serves. ICARE and IOI providers, however, have not obtained private funding to represent potential clients subject to the Carve-Out, and would simply have to turn all such clients away. Moreover,

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<sup>1</sup>“Letter to Mayor de Blasio Regarding Due Process, Universal Representation, and the New York Immigrant Family Unity Project,” June 1, 2017, *available at* [http://s3.amazonaws.com/documents.nycbar.org/files/2017154-NYIFUPsupport\\_FINAL\\_6.1.17.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/2017154-NYIFUPsupport_FINAL_6.1.17.pdf).

<sup>2</sup> “Letter to Mayor De Blasio Regarding The Need to Fund Immigration Legal Services without a Carve-out Based on Certain Convictions,” January 31, 2018, *available at* <http://bit.ly/2nv3mwC>.

<sup>3</sup> An ICE detainer asks that the City hand the individual over to ICE custody from City custody, at the completion of their City criminal matter. If the individual does not have a “current” or “instant” arrest, the Detainer Law is not implicated.

ICARE and IOI providers who invest time in screening and brief services would not receive any compensation for the time they put into those cases under the current contract.

### **LSPs Must be Compensated for Intake Activities Regarding Clients Who Are Later Discovered to be Subject to the Carve-Out**

As explained above, the Carve-Out should be removed from all immigration legal services contracts with the City. If, however, the Carve-Out is to remain, then at a minimum there must be a mechanism for LSPs to receive compensation for the time spent in determining whether the Carve-Out applies to a given client. LSPs often are unable to determine whether a potential client is subject to the Carve-Out until they have already invested hours of legal work in the case. Under the IOI contract, this would count as a “Brief Service,” which encompasses screening, obtaining documents, performing legal research, and related efforts to determine whether a given client is subject to the Carve-Out.

Under each of the LSP contracts, potential clients are screened for eligibility for immigration relief, whether in the removal defense or affirmative immigration benefit context. There is no other way for the lawyers to determine whether a prospective client has a potential claim for relief and whether he or she is subject to the Carve-Out. Individuals who disclose prior involvement with the criminal justice system typically do not come to screening appointments with their RAP sheets readily in hand; and detainees rarely have their papers with them. Instead, LSPs must investigate each potential client’s criminal history in the course of considering whether that person can seek an immigration benefit or relief from removal. This analysis involves, *inter alia*, conducting a search in the NYS Office of Court Administration’s CRIMS database to check for NYS criminal court records; submitting a fingerprint card to the Federal Bureau of Investigations (FBI) to obtain the FBI records, which are particularly helpful in terms of identifying out-of-state convictions; and occasionally obtaining a certificate of good conduct from the New York Police Department.

The moment an LSP determines that a potential client was convicted of one of the enumerated offenses within the last five years, the LSP is unable to proceed any further with the representation; furthermore, the LSP is unable to report to the City—and receive compensation for—the work leading up to that discovery, no matter how substantial the investigatory work had been. If the City remains committed to imposing the Criminal Carve-Out, fairness dictates that, at the very least, LSPs should be compensated for time and resources spent screening prospective clients and obtaining their records.

Take as a typical example a potential client referred through an ActionNYC site to a LSP for screening for immigration remedies based on having survived domestic violence. She appears to have a meritorious claim for a U nonimmigrant visa, through which she can obtain not only the visa, but eventually permanent residence and U.S. citizenship. She believes that she may have been convicted three years ago of felony assault in a North Carolina criminal court. This could be a sister state criminal conviction analog to one of the 170 offenses. Yet through the U visa process, that conviction likely would not affect the client’s ability to obtain a visa, and ultimately to obtain permanent resident status. In order to obtain the criminal court records, the LSP would fingerprint the individual and seek her FBI records, a process that can take several months. Those records would likely provide enough basic information to write to the criminal

court in North Carolina, from which the LSP would then seek a certificate of disposition and copy of the court file, a process that might take another few weeks. Upon receipt of the criminal court records, the LSP would undergo the requisite statutory analysis to determine whether the conviction is analogous to one of the offenses listed in the Detainer Law. If it is analogous, then the representation would come to an abrupt end despite the fact that the individual could have a pathway to citizenship. Moreover, the LSP which will have invested several hours of work in the case would be unable to seek payment under its IOI contract with the City.

We urge you to reconsider the criminal Carve-Out altogether and fully fund desperately needed immigration legal services, whether the potential clients are facing removal or seeking affirmative immigration benefits. We particularly urge you to reconsider this funding limitation outside the context of immigration detention, where New York City's detainer laws are completely inapplicable and where high quality representation is so important because even a routine application could trigger detention and deportation. At the very least, if the Carve-Out is to remain, the LSPs should be compensated, at the Brief Service rate, for the substantial time and effort spent arriving at the lamentable determination that a potential client's meritorious case must be rejected due to this unnecessary limitation on provision of services.

Thank you for your consideration.

Respectfully submitted,



Victoria Neilson, Chair  
Immigration and Nationality Law Committee

Cc : Hon. Steven Banks, Commissioner, NYC Human Resources Administration  
Hon. Bitta Mostofi, Commissioner, Mayor's Office of Immigrant Affairs  
Hon. Jordan Dressler, Civil Justice Coordinator, Office of Civil Justice, NYC Human Resources Administration  
Hon. Daniel Dromm, Chair, Finance Committee, New York City Council  
Hon. Vanessa Gibson, Chair, Capital Budget Subcommittee, New York City Council  
Hon. Liz Glazer, Director, Mayor's Office of Criminal Justice  
Hon. Corey Johnson, Speaker, New York City Council  
Hon. Rory Lancman, Chair, Justice System Committee, New York City Council  
Hon. Carlos Menchaca, Chair, Immigration Committee, New York City Council