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Assignment of Counsel and the Immigrant Defendant/Respondent

The advocate community widely believes that there should be consistent standards governing the assigned counsel application process throughout the State of New York. There are many concerns to address such as how to determine the poverty threshold, whether income and asset documentation should be required and how to provide screening early in the process. IDP would like to take this opportunity to emphasize how the lack of uniformity and fairness regarding documentation requirements effectively excludes parties from receiving due process, with a disproportionate impact on immigrants.

Scenario

Mamadou is an undocumented immigrant who has lived in the U.S. since the age of 2. He is now 30 and lives with his wife and two children in Queens. Mamadou works for a security company off the books because he does not have work authorization, and is paid less than minimum wage in cash. His wife also works at a subsistence wage job and 80% of their income is spent on rent since they are not eligible for housing assistance due to their immigration status. They have no savings because the balance of their income is stretched between utilities, transportation, food and cell phones necessitating them to supplement at a church-run food pantry and clothing bank. While visiting a high school friend who moved to upstate New York to attend a celebration, Mamadou and his friend were arrested after allegedly getting into an altercation in a bar. At the arraignment, Mamadou told the judge that he could not afford counsel and the judge sent him to meet with one of the county's two assigned counsel. The assigned counsel asked Mamadou what his income is and demanded to see pay stubs, bank statements, proof of receiving means-tested benefits such as Medicaid or food stamps and a list of assets. Mamadou cannot able to produce pay stubs because he is paid in cash and does not have a bank account because he does not have a social security number or current identification. Though financially eligible, Mamadou does not receive means-tested benefits on account of his lack of requisite immigration status. The assigned counsel told him that she could not approve Mamadou's application since Mamadou could not comply with the documentation requirements. If convicted, Mamadou's pending Deferred Action for Childhood Arrivals (DACA) application will most likely be denied and he will face deportation to a country that is not his home and permanent separation from his family.

Lack of Income and Asset Documentation Should Not Foreclose an Immigrant from Being Appointed Counsel

1. *Though most immigrants work hard, many do not have conventional proofs of income.* For immigrants who have not adjusted status and are awaiting work authorization, they often work “off the books” and are paid in cash by their employers. As a result, they do not have the ability to produce pay stubs or W2 forms. Their employers are not usually willing to produce written confirmation of their employment due to federal laws prohibiting the hiring of undocumented workers. Recognizing this reality, New York City’s courts and uninsured care programs allow immigrants to provide income and asset affidavits in lieu of proof of income. Given the growing immigrant populations throughout the state, it is imperative that their needs and realities be included in the assigned counsel application eligibility criteria in each jurisdiction.

2. *For immigrants living on subsistence wages, many are not eligible for safety net assistance due to their immigration status and do not have evidence of means-tested benefits.* While requiring proof of eligibility for means-tested benefits such as TANF, food stamps or subsidized housing is good evidence of low-income status, it should not be a requirement before assigned counsel is appointed. With respect to immigrants, they may not be eligible for unemployment benefits if they have lost their jobs or for subsidized housing or food stamps or Medicaid on the basis of their lack of requisite immigration status, even though they are income- eligible.

With respect to citizens and non-citizens alike, lack of means-tested benefits should not automatically result in a conclusion that the applicant is not eligible for assigned counsel. It has been widely documented that about 75% of the U.S. population, which includes a high number of home owners living above the federal poverty guidelines, are living paycheck to paycheck without emergency savings accounts.¹ Given the high cost of living and stagnation of the real wage, a significant portion of defendants and respondents who do not receive means-tested benefits do not have the ability to retain counsel directly unless they can do so through credit or wealthy loved ones. Rather than imposing a rigid documentation requirement that working people show enrollment in a means tested benefit program, a meaningful and fair review would include an eligibility assessment that factors in income relative to expenses, family size, ability to quickly liquidate a non-essential asset and so forth. Our eligibility criteria must keep pace with the reality of the various forms of hardship that preclude people from accessing counsel.

Conclusion

In Mamadou’s example, which is true and representative of a common scenario, Mamadou would have received counsel had he been arrested in a different jurisdiction, such as NYC. Instead, anxious to get out of jail, return to his wife and keep his job, he was strong-armed into accepting a plea agreement that carried harmful immigration consequences and that could have been avoided had he been represented by counsel who could have negotiated an “immigration-safe” plea that still served the ends of justice. Disposing of rigid income and means-tested benefits documentation requirements in a consistent and sensible

¹ <http://money.cnn.com/2013/06/24/pf/emergency-savings/>

manner throughout the state will go a long way toward providing constitutional protections to citizens and non-citizens alike.