

**CITY BAR
JUSTICE
CENTER**

NYC Know Your Rights Project

**An Innovative Pro Bono Response
to the Lack of Counsel for Indigent
Immigrant Detainees**



**City Bar Justice Center
42 West 44th Street
New York, N.Y. 10036
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CREDITS

The NYC Know Your Rights Project is operated by the City Bar Justice Center in collaboration with The Legal Aid Society and the American Immigration Lawyers' Association, NYC Chapter Pro Bono Committee. The Project recruits, trains and coordinates pro bono attorneys to provide free legal advice and counseling to detainees at a weekly clinic at the Varick Federal Detention Center. This report was written by Kiera LoBreglio, Fragomen Fellow, and Lynn M. Kelly, Executive Director at the City Bar Justice Center. We gratefully acknowledge the contributions of City Bar Justice Center Deferred Associate Marissa Geannette, Seton Hall Law 3L student Michael Patterson, former Fragomen Fellow, Elizabeth T. Reichard, Esq., and Helen Poitra-Chalmers, NYC Know Your Rights Project Coordinator at the City Bar Justice Center.

We would like to thank our partners on the NYC Know Your Rights Project: The Legal Aid Society team lead by Maria Navarro and the American Immigration Lawyers Association – NY Chapter and their representatives Cyrus Mehta and Lauren De Bellis, and the six inaugural pro bono firms who helped to launch this project – Fragomen, del Rey, Bernsen & Loewy, LLP; Orrick, Herrington & Sutcliffe LLP; Paul, Weiss, Rifkind, Wharton & Garrison LLP; Seward & Kissel LLP; McKee Nelson LLP; and Skadden, Arps, Slate, Meagher & Flom LLP. We also want to thank Professor Nancy Morawetz at NYU Law School and Linda Kenapaske, Esq. for helping to train the pro bono attorneys and consulting with the project on complicated cases. This project is a remarkable collaboration of the New York legal community.

EXECUTIVE SUMMARY

The NYC Know Your Rights Project is a collaboration of the City Bar Justice Center, The Legal Aid Society and the American Immigration Lawyers Association, NYC Chapter. The purpose of the collaboration is to increase access to legal advice and information for the detainees held at the Varick Facility by recruiting, training, and mentoring private law firm volunteers to staff a regular weekly clinic at the Immigration and Customs Enforcement detention facility in Lower Manhattan. The report is based on data on 158 detainees counseled at Varick by pro bono volunteers between December 11, 2008 through July 9, 2009. We found 39.2% of the detainees had possible meritorious claims for relief from removal. The most common forms of relief were cancellation of removal; asylum; withholding of removal, and/or relief under the Convention Against Torture; nonimmigrant visas including U and S visas; 212(c) relief; and adjustment of status under 245(i) of the Immigration and Nationality Act.

39.2% of the detainees interviewed have possible meritorious claims for relief from removal

In addition we found 10% of detainees we interviewed had been granted bond, but the amount was set so high that they could not raise the funds and thus remained housed in the facility. We also experienced detainees we met with being shipped to other parts of the country where access to counsel is even less likely than in the New York metropolitan area, sometimes before the volunteer could finish researching the case.

Of those with bond set, 90% cannot afford to pay and remain in detention

This report recommends that there be government-funded appointed counsel for all detained immigrants who cannot afford private counsel. Despite our best efforts and the diligence of our volunteers, we were only able to help 10 detainees a week at the NYC Know Your Rights Clinic. While only a handful of cases have been matched for full pro bono representation from the clinic, we have had some notable successes including the release of several clients from detention.

Bearing witness to the detention of people without access to counsel, particularly those who have lived, studied and worked in our community, in some cases for their whole lives but for their birth outside the country, is difficult. Twenty seven of the detainees were lawful permanent residents

and a few others had possible derivative citizenship claims based on being the child of a citizen parent. Some detainees asked their pro bono attorney to notify loved ones who did not know they were being held. While some of the immigrants at Varick arrive at the termination of a state criminal sentence, others are picked up on a routine traffic stop or a minor car accident. The wrenching costs of detention to spouses, life partners, children, parents, employers and communities is beyond the scope of this report, but the toll we witnessed on these cases is high and must be studied further.

HISTORY OF THE NYC KNOW YOUR RIGHTS PROJECT

In October 2008, a petition signed by nearly 100 detainees at the Varick Federal Detention Facility in lower Manhattan arrived at the City Bar Justice Center. The detainees were presenting a “petition to investigate grave human rights abuses.” The cover letter implored: “We hereby ask you to take a minute to read the attached petition and use all the means possible at your[sic] disposal to help us inform the public and government agencies about what’s going on in here in the middle of Manhattan.” In closing their plea, the detainees wrote: “Hoping for a swift and positive answer we look forward to see some immediate changes in this corrupt system designed to profit the owners of this facilities” [sic]. The petition raised a lengthy list of serious complaints about conditions of detention in the facility, as well as the cost of outsourcing the detention to a nongovernment for-profit contractor.

Just six weeks later, in December 2008, the City Bar Justice Center organized a pilot project to bring pro bono attorneys into the Varick Facility in the hopes that access to counsel would provide detainees with basic information about their legal defenses to removal and help relieve some of the complaints alleged by the detainees. Resources to assist the detainees were extremely scarce. Although the detention and the removal proceedings have a criminal nature, they are considered civil. Therefore, no right to counsel attaches and there were few detainees with sufficient funds to pay private attorneys. The City Bar Justice Center surveyed the organizations serving the detained immigrant population in New York City, aiming to start a pro bono legal services project as quickly as possible without reinventing the wheel. The Immigration Unit of The Legal Aid Society and the Pro Bono Committee of the New York Chapter of the American Immigration Lawyers Association were extremely responsive. Fortuitously, The Legal Aid Society had recently gained access to provide legal resources to immigrants detained at Varick as part of their detention outreach efforts. In addition, six large law firms stepped up to the plate to help launch this new pro bono project.

NYC Know Your Rights Project Collaborating Groups:

The City Bar Justice Center's mission is to increase access to justice by leveraging the resources of the New York City legal community. The City Bar Justice Center is part of the City Bar Fund, the 501(c)(3) public service of affiliate of the 23,000-member New York City Bar Association. The City Bar Justice Center operates ten or more pro bono projects annually and assists 25,000 New Yorkers with unmet civil legal needs.

The Legal Aid Society is the nation's oldest and largest provider of legal services to the indigent. Founded in 1876, the Society provides a full range of civil legal services as well as criminal defense work, and juvenile rights representation in Family Court. The Legal Aid Society aims to provide free legal assistance to New Yorkers who live at or below the poverty level and cannot afford to hire a lawyer when confronted with a legal problem.

The American Immigration Lawyers' Association (AILA) is the national association of more than 12,000 immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA's New York Chapter is the nation's largest with over 1,300 members. AILA-NY chapter members work in various practice areas (immigration litigation, family, employment, etc.) in a range of settings (solo practices, large firms, law schools, non-profits/community based organizations, legal services providers, etc.).

THE NYC KNOW YOUR RIGHTS PROJECT – LOGISTICS AND OPERATIONS

The NYC Know Your Rights Project is a collaborative effort between the City Bar Justice Center (CBJC), The Legal Aid Society, the American Immigration Lawyers Association (AILA), New York City Chapter, participating pro bono law firms and several law school clinics to provide immigration advice and legal assistance to those detained at the Varick Federal Detention Facility.

The Project conducts a weekly Thursday morning legal clinic on site at the facility. Each week participating firms and organizations send an aggregate team of ten attorneys to the facility where they meet with detainees and conduct screening interviews. Attorneys, supervised by volunteer immigration expert AILA mentors, determine whether immigration relief is available to the detainees they interview and make appropriate referrals to pro bono (or “low bono”) counsel. The clinic is a brief services model so that volunteers are not expected to take cases on for full representation in the removal proceedings although they may. The pro bono attorney interviews the detainee following a detailed interview form created for the clinic, checks with the AILA mentor on the correct advice and then counsels the detainee on their options and answers any questions. The Legal Aid Society, which also rotates through the AILA mentor pool, has managed the relationship with the facility, including coordinating meetings with Varick administrators, exchanging information, and reporting serious medical issues, as well as running criminal background checks to help determine the relief eligibility of the detainees seen at each clinic.

The City Bar Justice Center provides administration, scheduling and data collection for the weekly clinics. The Fragomen Fellow, a rotating one-year fellow placed at the CBJC from the immigration law firm of Fragomen, Del Rey, Bernsen & Loewy LLP, oversees the project, from training and recruiting new volunteers to overseeing the follow-up on all of the cases opened at each clinic. The Fragomen Fellow is responsible for logistics of the weekly clinics, including detainee sign-up, collection of detainee data, analysis of the cases and follow-up. The Fragomen Fellow also coordinates with volunteer lawyers in the weeks following their participation at the clinic in order to ensure that all cases are resolved and closed in a timely fashion. The Fragomen law firm has assisted with issuing the CLE for the two pro bono trainings held to date.

Law firms and Organizations Currently Participating in the NYC Know Your Rights Project:

American Immigration Lawyers Association – New York Chapter

Fragomen, Del Rey, Bernsen & Loewy LLP

Hogan & Hartson LLP

Kelley Drye & Warren LLP

Linklaters

Milbank, Tweed, Hadley & McCloy LLP

New York City Law Department

Orrick, Herrington & Sutcliffe LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Seward & Kissel LLP

Sidley Austin LLP

Simpson Thacher & Bartlett LLP

Skadden, Arps, Slate, Meagher & Flom LLP

Sullivan & Cromwell LLP

ANALYSIS OF INTERVIEW DATA

The data gathered by volunteer attorneys during intake interviews is recorded into our database, and includes: alien registration number, demographic information, current immigration status, status at time of entry, criminal history, immigration status of immediate family members, prior applications and/or proceedings, and information/advice given. Varick is a men's detention facility (though one transgendered female client was interviewed) and we have encountered no detainees who reported being under the age of 18. The average age of the detainees interviewed is 37. Some individuals are detained after serving time for a criminal conviction at Riker's Island or a state or federal prison. Several were transferred from penal to immigration custody before their criminal case had concluded. Others ran afoul of a local law enforcement officer during routine traffic stops or minor incidents that in the past would have resulted in nothing more than a fine. Many have employment ties to the New York metropolitan area and live here with their families; the vast majority have been in the US for over ten years. Only 25% of the detainees counseled came from outside the New York metropolitan area.

The sample analyzed for this report consists of 158 detainees interviewed at the weekly clinics between December 11, 2008 and July 9, 2009. The sample is not completely random, as detainees choose whether to sign up for a consultation and there are time and space constraints at the clinics.

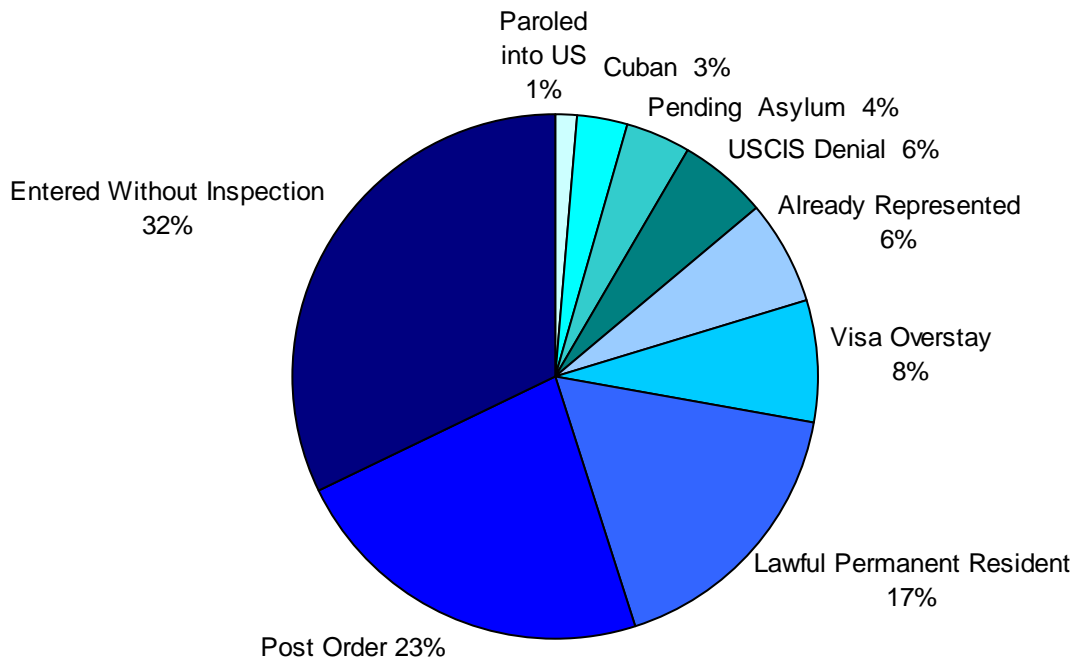
The 158 detainees screened came from 44 different countries. Twenty-four individuals were from El Salvador and 23 from the Dominican Republic, representing 17 and 16 percent, respectively, of the overall sample. Detainees from Mexico (14, or 10%) and Jamaica (13, or 9%) made up the third and fourth largest nationality groups. Other Latin American and Caribbean countries represented 19%, the Middle East and Central Asia 16%, and African countries 11% of those counseled. [Appendix A] The overwhelming majority of the detainees interviewed (85%) had been living in the United States for more than five years. Sixty-five percent had been living in the country for over ten years, and 28% had been here for more than 20 years. [Appendix B] Over three quarters of the detainees surveyed had been living in New York City, with the majority living in Queens. [Appendix C] Nearly half of the detainees (49%) had been held in detention for four to six months at the time of the interview. Twenty-seven percent had been detained for less than four months. Nine detainees (6%) had spent between 13 and 24 months in detention, and two detainees (1%) had been in detention for over two years at the time of interview. [Appendix D]

We selected the following legal parameters for examination in this report: detainees’ current immigration status; eligibility for bond or custody review; and indication of possible meritorious claims for immigration relief. We also explored which forms of relief were most commonly available within the population seemingly eligible for relief.

Status of Detainees

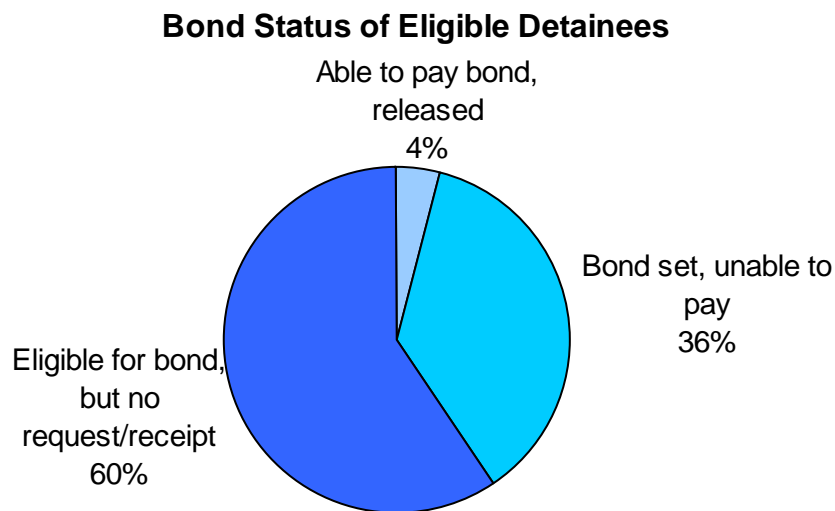
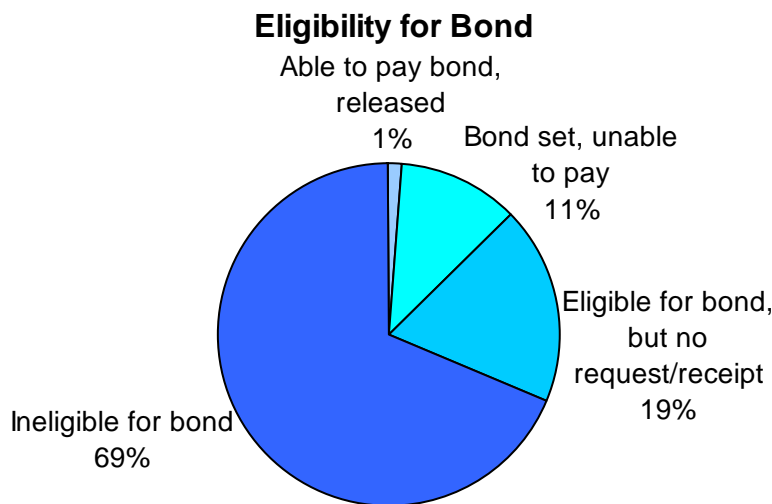
Of the 158 detainees interviewed over the seven month period, ten reported that they were currently being represented by immigration counsel and one terminated the interview, and thus no further status information was collected on these individuals. Of the remaining 147 detainees, 27 were lawful permanent residents (LPRs). Fifty-one had entered the United States without inspection and did not have any immigration status. Twelve detainees had overstayed the time limit on their non-immigrant visas, and six detainees had pending asylum applications. Two detainees were paroled into the US (one for humanitarian reasons and one as a result of extradition). Five detainees were present in the U.S. pursuant to Cuba-specific provisions of the Immigration and Nationality Act. Finally, nine detainees had applications recently denied by USCIS, and the remaining 36 were being held in detention after the issuance of a final order by an Immigration Judge and were either awaiting departure or pursuing appeals.

Legal Status of Detainees in US



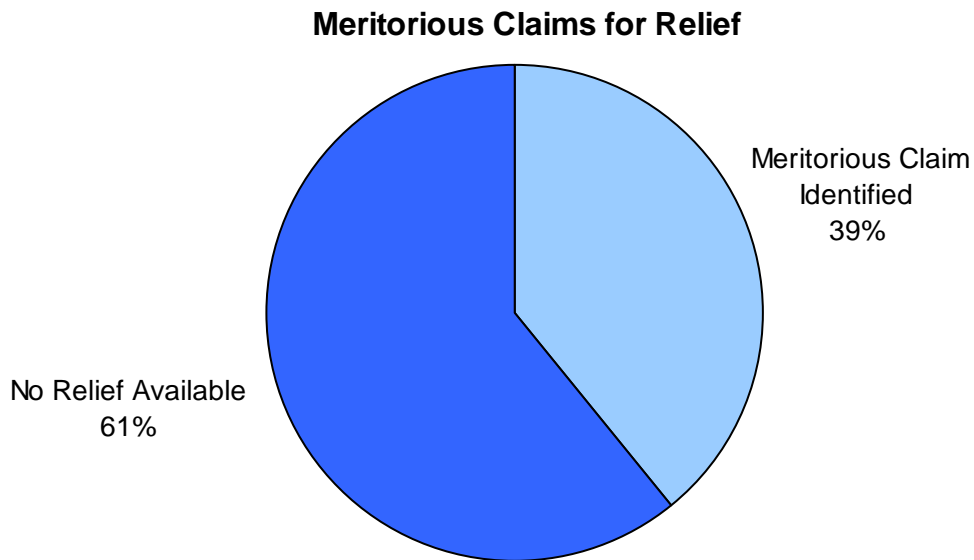
Bond Eligible/Bond Set/Custody Review

Bond is available to those individuals not subject to mandatory detention, not a threat to national security, and not a bail risk. Of the 158 detainees interviewed, 17 detainees had a bond set, but were unable to pay the entire amount. Twenty-one detainees were bond eligible, but had either not requested a bond hearing, or had not yet received a bond determination. Two detainees were able to pay their bond and were released from detention. Eight detainees were eligible to request a custody review, as they had been in detention for over 180 days after being ordered removed. Of these eight, three were being held because they could not obtain travel documents, and were eligible for supervised release. Another three of the eight were potentially eligible for humanitarian parole due to severe medical conditions.



Possible Meritorious Claims

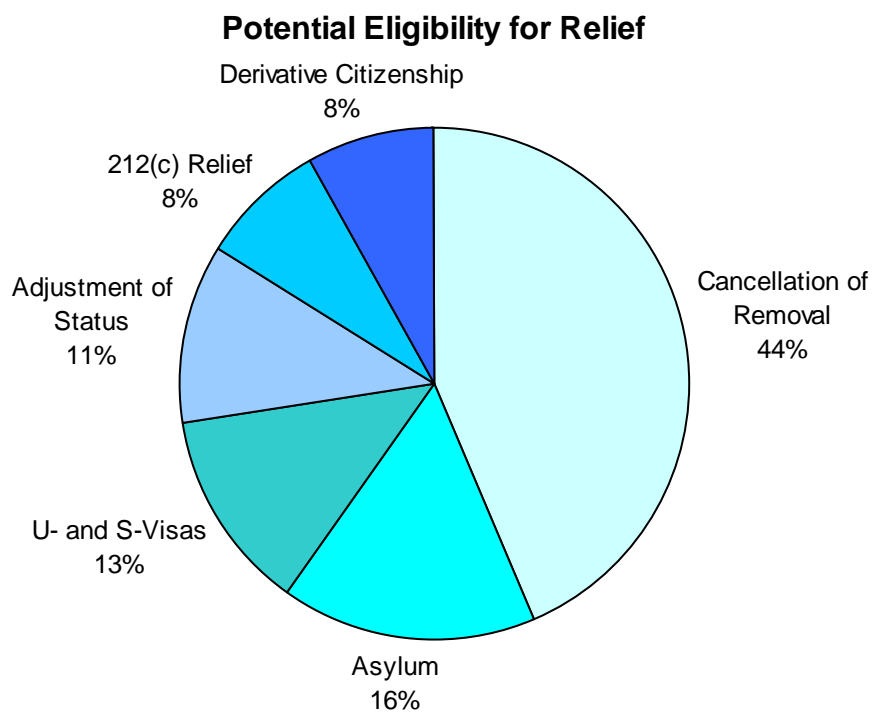
Of the 158 detainees interviewed, 62, or 39%, appeared to have meritorious claims for relief from removal. The most common forms of available relief were cancellation of removal; asylum, withholding of removal, and/or relief under the Convention Against Torture, nonimmigrant visas including U and S visas; 212(c) relief; and adjustment of status under section 245(i) of the Immigration and Nationality Act. Other possible forms of available relief (stand-alone or as alternatives to the relief discussed above) included derivative citizenship, Temporary Protected Status, Special Immigrant Juvenile Status (for individuals under 21 years old), various waivers of inadmissibility under section 212 of the Immigration and Nationality Act (INA), and adjustment of status under several country-specific INA provisions. These forms of relief are explained below.



Breakdown and explanation of common forms of relief

- *27 detainees appeared eligible for cancellation of removal*

Cancellation for LPRs is available to any LPR who has resided in the US for seven years since admission (issuance of Notice to Appear or commission of an inadmissible or deportable offense stops the seven year clock), has been in LPR status for five years, has not been convicted of an aggravated felony, has not received cancellation or 212(c) relief previously, and who is not a terrorist, crewman, or exchange visitor. The positive equities established in the US (e.g. family, employment, community involvement) must outweigh the negative factors (e.g. criminal convictions). Cancellation for non-LPRs is available to individuals who have been continuously present in the US for 10 years (10-year clock stops with 90-day single absence, 180 days of aggregate absences, commission of statutorily listed offense, or issuance of NTA). The person must prove good moral character, and that his/her departure would cause exceptional and extreme hardship to the individual's USC or LPR spouse, child, or parent.



- ***10 detainees appeared eligible for Asylum, Withholding of Removal, and/or Withholding under the Convention Against Torture***

Asylum is available to immigrants who have been persecuted or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The individual must apply within one year of arrival in the US, and cannot have been convicted of a particularly serious crime or an aggravated felony. Withholding of Removal is available where an applicant is more likely than not to face persecution on account of 1 of 5 protected grounds. Withholding is barred by conviction of a particularly serious crime or aggregate sentence of 5 years. Finally, CAT relief is available to an applicant more likely than not to face torture by, at the instigation of, or with the acquiescence of a public official.

- ***8 detainees might be qualified for “special” nonimmigrant visas including U- and S- visas.***

The U-visa is available to victims of qualifying crimes who have suffered substantial harm as a result of the crime and who have been or are likely to be helpful to law enforcement in investigating or prosecuting the crime.

Similarly, the S-visa is available to aliens who provide critical, reliable information necessary to the investigation or prosecution of a criminal or terrorist organization.

- ***5 detainees appeared eligible for 212(c) relief.***

This form of relief is available to LPRs who have held that status for 7 years, pleaded guilty to a crime before April 1996 (except a firearm offense), did not serve 5 years or more for an aggravated felony conviction, and can establish sufficient equities.

- ***4 detainees were eligible for relief under INA 245(i).***

This provision permits aliens who were beneficiaries of certain family- or employment-based petitions filed before April 2001, and paid a \$1000 fine, to adjust status despite having entered the U.S. without inspection. The provision allows adjustment based on a

category different from the basis of the petition originally filed, provided initial petition was approvable when filed.

Significantly, almost none of the immigrants we interviewed had any knowledge of the specific provisions of the law under which they might have a defense to removal. While there is a law library at the Varick facility, very few of the detainees mentioned having used it or being able to do legal research on these complex remedies on their own. In many cases, we were the only lawyers they had spoken to about their immigration case.

CITY BAR JUSTICE CENTER'S CONCLUSIONS AND RECOMMENDATIONS

Based on the data collected and analyzed, the City Bar Justice Center concludes that a significant portion of the detainees housed at Varick. had colorable claims for relief from removal. Working closely with the AILA mentor attorneys, the volunteers were able to give detainees a concise roadmap of their options as well as information regarding referrals to immigration attorneys available for further consultation and possible representation. Of the 158 detainees interviewed by these volunteers at Varick St. between December 2008 and July 2009, a full 39.2%, or 62 individuals, had colorable claims for relief.

Given this substantial number of detainees apparently eligible for relief from removal, the City Bar Justice Center recommends that all detainees be assigned counsel so that they can navigate the complex laws and regulations applicable in removal proceedings.¹ Additionally, bond amounts for detained immigrants with family and ties in the NYC region should be set substantially lower, and alternatives to detention should be employed whenever possible.² Ninety percent of those who were granted a bond were not able to post it. Granting manageable bonds to individuals deemed not to pose a security or flight risk would reduce the cost to the government of housing the individual, and, more importantly, put the individual in a position of greatly increased access to legal counsel and resources, which would in turn render the individual better able to progress more efficiently and successfully through his immigration proceedings. In connection with granting reasonable bonds, we recommend that the Varick Facility be used to house detainees with family and other ties to the New York City community on a longer term basis. Family and community support is often a determinative factor in a detainee's level of access to documents and information in support of his case. Additionally, detainees already consulting with attorneys based in the New York area should be kept at Varick for the duration of their proceedings. If a detainee must be transferred, the attorney of record should be notified immediately, and all mail should be forwarded to the detainee.

¹ See New York City Bar, Committee on Immigration and Naturalization, *Report on the Right to Counsel of Detained Immigrants in Removal Proceedings* (Aug. 2009).

² See Donald Kerwin & Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?*, MIGRATION POL'Y INST. (Sept. 2009).

Summary of CBJC Recommendations

1. All indigent detainees should be assigned counsel.
2. Bond amounts for detained immigrants with family and ties in the NYC region should be set substantially lower, and alternatives to detention used whenever possible.
3. The Varick Facility should be used to house detainees with family and other ties to the New York City community on a longer-term basis.
4. Detainees already consulting with attorneys based in the New York area should be kept at Varick.
5. If a detainee must be transferred, the attorney of record should be notified immediately, and all mail should be forwarded to the detainee.
6. Legal orientation presentations should be made available to the immigrants upon being detained at the Varick Facility.
7. Scheduling for the NYC Know Your Rights Project should be done by language group.
8. The Varick law library should be staffed with a law clerk to assist with research and writing.

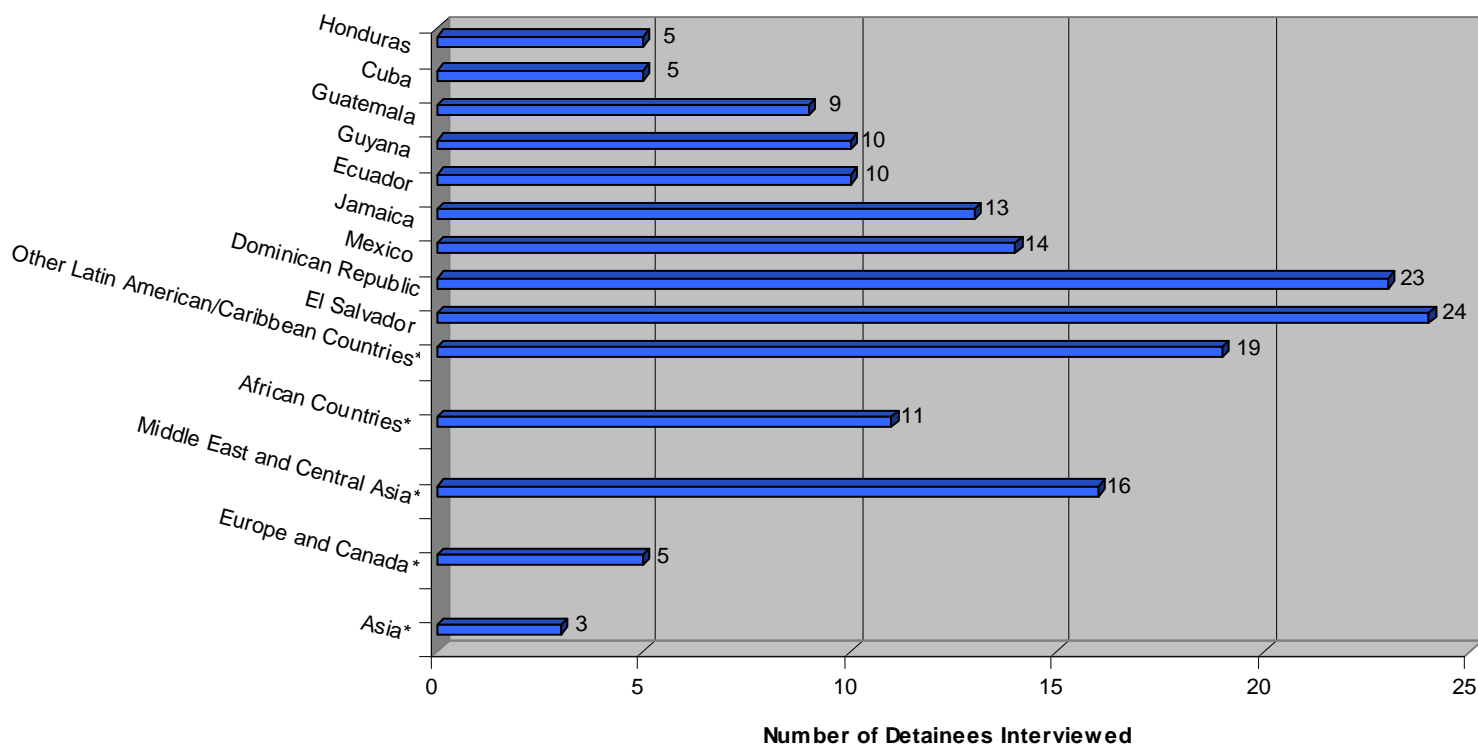
In order to facilitate the identification of legal claims and access to counsel, it is crucial that group legal orientation presentations be made available to the immigrants upon being detained at the Varick Facility. In addition, the NYC Know Your Rights Project clinics should be allowed to be scheduled by language group in order to most effectively screen the largest number of detainees that wish to be seen. Finally, the law library should be staffed with a law clerk to assist with research and writing. Only with access to information can detainees advocate for themselves and begin the process of obtaining legal counsel.

APPENDICES

Appendix A - Country of Origin for Detainees Held

Detainees from El Salvador and the Dominican Republic represent the highest percentage of detainees, making up 17% and 16% of the population, respectively. Detainees from Mexico (10%) and Jamaica (9%) make up the third and fourth largest groups. The majority of the rest of the detainees are originally from countries in Latin America and the Caribbean.

Detainee Country of Origin



* Other Latin American/Caribbean countries include:
Trinidad, Haiti, Panama, Brazil, Columbia Grenada, Aruba/Trinidad, Nicaragua, & Peru

African countries include:
Nigeria, Ghana, Guinea, Ivory Coast, Kenya, Sierra Leone & Sudan

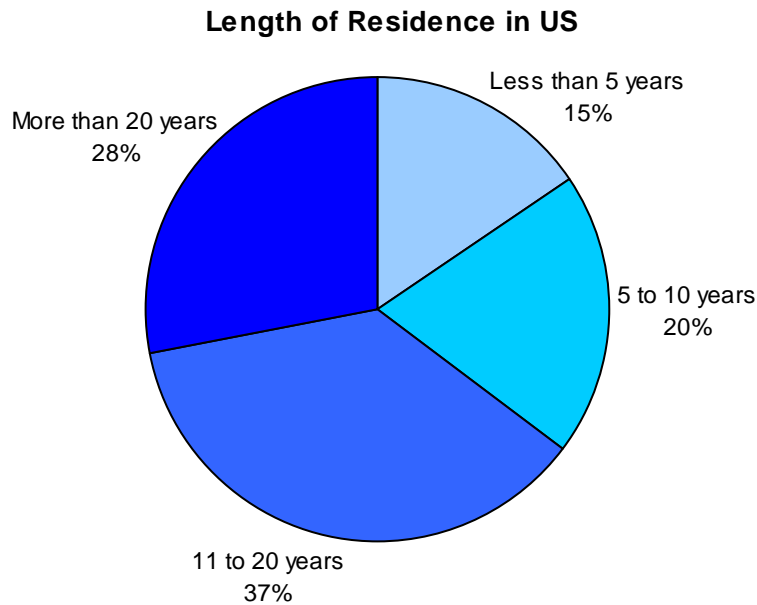
Middle Eastern and Central Asian countries include:
Egypt, India, Israel, Kazakhstan, Kyrgyzstan, Tajikistan, Lebanon, Turkey & Yemen

European countries and Canada include:
Albania, Canada, Czech Republic, Greece, Italy, Poland & the United Kingdom

Asian countries include:
China & Vietnam

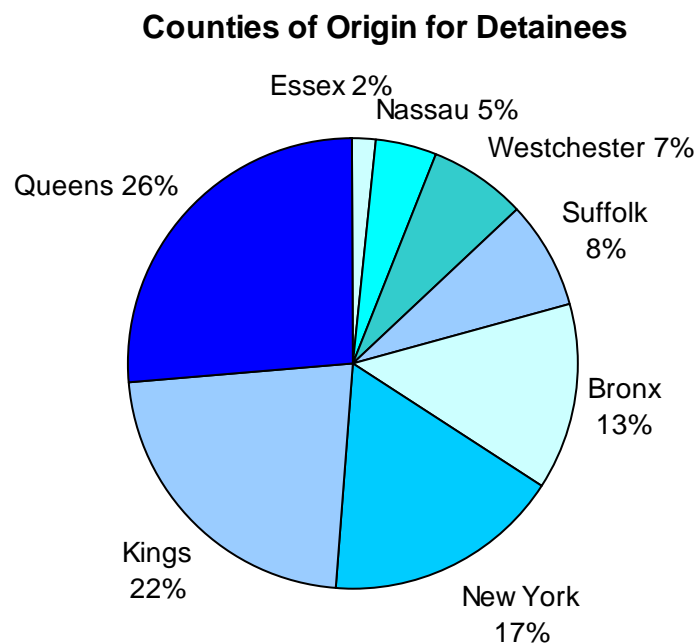
Appendix B – Length of Residence in US

The overwhelming majority (85%) of the detainees held at the detention center have lived in the U.S. for five years or more. Furthermore, a significant percentage (65%) of the total population of detainees had been in the U.S. for more than ten years before being detained. Some detainees even come to the clinic after having lived in the U.S. for over 45 years.



Appendix C – Counties of Origin

Over three-quarters of the detainees (78%) live in Queens, Kings, New York, and Bronx counties, with the majority residing in Queens (26%).



Appendix D – Length of Time Detained

Almost half (48%) of the detainees are held at the detention center between 4 and 6 months. A large percentage (27%) are held from zero to four months. Some, however, are held much longer—up to 28 months in one case.

Duration Detained

