



# LEGAL ACTION CENTER

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AMERICAN IMMIGRATION COUNCIL

## THE CRIMINAL JUSTICE ACT Appointment of Counsel in Habeas Corpus Proceedings<sup>1</sup>

By the Legal Action Center

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The Criminal Justice Act (CJA) authorizes the U.S. district courts to appoint counsel to represent financially eligible individuals in habeas corpus actions brought pursuant to 28 U.S.C. § 2241. *See* 18 U.S.C. § 3006A. The courts have discretion to appoint counsel when the interests of justice so require. *Id.* The relevant section of the CJA states:

(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who –

...

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

18 U.S.C. § 3006A(a)(2)(B).

### WHO IS “FINANCIALLY ELIGIBLE”?

The CJA states that financially eligible individuals are “financially unable to obtain adequate representation.” This does not mean that a person must be found indigent in order to qualify under the CJA. *See Green v. United States*, 262 F.3d 715, 716 (8th Cir. 2001) (“indigence connotes a greater financial need than is necessary to qualify for appointed counsel”).

### HAVE COURTS APPOINTED COUNSEL IN IMMIGRATION CASES?

Yes. Numerous U.S. district courts have appointed counsel to represent individuals in immigration-related habeas actions brought under 28 U.S.C. § 2241. *See Duran v. Reno*, 193 F.3d 82 (2d Cir.) *vacated as moot*, 197 F.3d 63 (2d Cir. 1999); *Ponnapula v.*

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*Ashcroft*, 02-3546, 2002 U.S. Dist. LEXIS 9975, \*2 n.1 (S.D.N.Y. June 3, 2002); *Lawrence v. INS*, No. 00-2154, 2000 U.S. Dist. LEXIS 18429 (S.D.N.Y. Dec. 21, 2000); *Chamblin v. INS*, 176 F. Supp. 2d 99 (D.N.H. 2000); *Saldina v. Thornburgh*, 775 F. Supp. 507 (D. Conn. 1991).

Only the Eleventh Circuit has held that the CJA does not apply to immigration-related habeas actions. *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986). Several courts, however, have rejected the Eleventh Circuit’s reasoning. *See, e.g., Lawrence v. INS*, No. 00-2154, 2000 U.S. Dist. LEXIS 18429 (S.D.N.Y. Dec. 21, 2000); *Chamblin v. INS*, 176 F. Supp. 2d 99 (D.N.H. 2000); *Saldina v. Thornburgh*, 775 F. Supp. 507 (D. Conn. 1991). In addition, subsequent to the Eleventh Circuit’s decision, Congress amended the CJA, and arguably *Perez-Perez* is no longer good law.

### **WHAT FACTORS DO COURTS CONSIDER IN DETERMINING WHETHER TO APPOINT COUNSEL “IN THE INTERESTS OF JUSTICE”?**

Once the court determines that the petitioner is eligible for appointment of counsel under the CJA, the court must determine whether the interests of justice require such an appointment. In general, the court will consider the extent to which appointed counsel will benefit both the petitioner and the court. The courts have taken into account the following factors:

- Likelihood of success on the merits of the petition
- Complexity of the factual or legal issues raised
- Need for an evidentiary hearing vs. resolution of case based on the record
- Petitioner’s ability to present forcefully and coherently his or her contentions
- Petitioner’s ability to investigate facts

*See, e.g., Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994); *Reese v. Fulcomer*, 946 F.2d 247, 264 (3d Cir. 1991); *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990); *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987).

### **HOW DO COURTS SELECT COUNSEL FOR APPOINTMENT?**

Each district court must establish a “plan” for implementing the CJA. 8 U.S.C. § 3006A(a). The plan must ensure that private attorneys are appointed in a “substantial portion” of cases. 18 U.S.C. § 3006A(a)(3). In addition, courts may appoint attorneys from a bar association, legal aid, and public defender organizations. *Id.*

Each court’s plan includes specific rules about how private attorneys are selected for appointment. Generally, each court has a CJA panel of private attorneys. Private attorneys must apply to be on the panel, and each court has its own application procedures and requirements for applicants.

Typically, neither the court nor the soon-to-be client may request the appointment of a specific attorney. However, some courts allow for the appointment of a specific attorney,

and even a non-panel attorney, when required by the interests of justice and there is an exceptional circumstance. Some immigration lawyers have successfully requested that they be appointed in specific cases. Once an attorney is appointed, the attorney usually is obligated to represent the client through the appeal, including any ancillary matters appropriate to the appeal.

#### **WHAT OTHER SERVICES ARE COVERED BY THE CJA?**

The CJA provides for “investigative, expert, or other services necessary for adequate representation.” 18 U.S.C. § 3006A(e). Often, counsel must gain the court’s approval before obtaining the services. *Id.*