

A SYSTEM UNDER STRESS

The impact of the COVID-19 pandemic on
non-detained cases in Immigration Courts

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The Tahirih Justice Center is the largest multi-city direct service and policy advocacy organization focused on assisting immigrant survivors of gender-based violence in the United States. Over the last 20 years, Tahirih has provided free legal and case management assistance to more than 30,000 immigrant women, children, and other survivors fleeing human trafficking, domestic abuse, rape, and other gender-based violence.

In September 2020, the Tahirih Justice Center began looking into the effects of the COVID-19 pandemic on immigrants' ability to seek status and justice through the immigration court system. The research and subsequent reports are divided to concentrate on non-detained and detained cases respectively as each of these circumstances have been uniquely affected by the pandemic. The following report focuses on immigrants who are non-detained.

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Introduction

The COVID-19 pandemic has caused more than 2.88 million deaths globally; forced millions of people into poverty, homelessness, and hunger; strained health systems; and toppled industries. Within this greater context, the United States has become the world leader in the most COVID-19 cases to date at over 30 million and most deaths from COVID-19 at more than half a million.ⁱ

Among those most vulnerable to the immediate and long-term impacts of the pandemic in the United States are immigrants. In the past, unequal access to health care, housing, employment, emergency response, and long-term social and economic support have left immigrant communities ravaged in the wake of natural disasters and other crises of significant scale and proportion.ⁱⁱ Early data suggests that the COVID-19 pandemic is no different.ⁱⁱⁱ

Prior to the pandemic, the path to legal status for immigrants was already long and exceedingly complicated. Among the problems were difficulty in ascertaining eligibility, delays and backlogs, and a multiplicity of adjudicating bodies applying differing standards and rules. The system has been built through a chaotic web of policies and procedures that ultimately limit or obscure relief for those who need it the most. When the COVID-19 virus struck the United States in early 2020, it became a magnifier of these problems in the immigration field, emphasizing issues that already existed while simultaneously creating new challenges for those who need clarity and access to relief more quickly than ever.

This report focuses on the impact of the COVID-19 pandemic on immigrants who are currently not detained seeking justice through immigration courts. Immigrants who are detained in the custody of Immigration and Customs Enforcement (ICE) while they await

adjudication of their claims face different challenges during the pandemic, and an upcoming report will address those specific concerns. In particular, this report focuses on the environment of insecurity faced by immigrants who are not detained because of increasingly limited access to immigration relief, immigrant community safety concerns arising as a result of the COVID-19 pandemic, ever-changing policies and procedures of the Executive Office for Immigration Review (EOIR), and other challenges that make access to much-needed representation and rights harder than ever for immigrants to obtain.

This report drew predominately from existing literature as well as interviews with direct service providers and experts in the field. A total of 15 interviews were conducted with respondents from Texas, New York, Pennsylvania, and Washington, D.C.^{iv}

Context

Pre-Pandemic Concerns

Existing problems with the immigration court system laid the groundwork for the pandemic to further wreak havoc on immigrant access to relief through the immigration courts. As many immigration experts, organizations, and advocates observed, the immigration court system was broken long before the pandemic reached the United States. Apparent from publicly available statistics and analysis were wildly disparate application grant-rates across jurisdictions, excessive wait times for hearings, and the chaotic application of rules.^vThe laws, policies, and enforcement mechanisms developed over decades led to inequity and injustice, with negative impacts on immigrant communities.^{vi}

Beginning in 2017, a heavy influx of immigration policy changes further restricted avenues of relief for immigrants in an already restrictive system. This began with the implementation of two executive orders in January 2017. The first set new, more aggressive border enforcement policies. The second focused on interior enforcement. Including changes that doubled the amount of ICE officers carrying out deportations, increased joint operations between local law enforcement and federal immigration enforcement (known as 287g partnerships), issued detention orders on all removable non-citizens in state and local custody, expanded the use of expedited removal to detain and deport more individuals, and issued new priorities for removal of non-citizens.^{vii} These executive orders set the tone for more than 400 immigration policy changes over the next four years.^{viii}

For example, ICE was instructed to end the practice of prosecutorial discretion and instead pursue all cases through to deportation. In accordance with this new policy, ICE only administratively closed

100 cases per month during the first five months of 2017; compared to 2400 cases per month in the same five months the previous year. This represented a precipitous increase in the number of cases ICE prosecuted to completion, regardless of the merits of the case. This in turn increased the burden on the courts and worsened backlogs and wait times facing immigrants seeking asylum and other forms of relief.^{ix} ICE also reopened 9400 previously closed cases in 2017, a 74% increase in the number of cases reopened compared to 2016.^x This meant that 9400 immigrants were now once again vulnerable to deportation. On top of that, in the first eight months of 2017,

9400 immigrants were now once again vulnerable to deportation

interior ICE removals increased by 37 percent.^{xi} Ultimately, all of these policies reflect a shift towards a greater emphasis on immigration enforcement and removals.

The vast number of policies issued over the last four years decimated access to a fair and timely hearing in court and created layers of problems for immigrants that must be untangled and undone. When coupled with the measures taken by EOIR to respond to the pandemic, the negative impact on the system – and therefore on immigrant communities – is tremendous.

Immigrant Communities During a Pandemic

The pandemic resulted in unprecedented economic challenges across the country, with immigrant communities disproportionately impacted. Pre-pandemic, 26 percent of immigrants who are undocumented had family incomes below the federal poverty line, and the poverty rate for non-citizens in 2019 was at 16% compared to 10% for those born in the U.S.^{xii} Entering into the economic difficulties of the pandemic with already higher instances of poverty made immigrant communities even more vulnerable to the strife that the pandemic caused.

Furthermore, the overrepresentation of immigrants in labor markets most impacted by the COVID-19 pandemic indicates that immigrants are even more likely to struggle economically.^{xiii} Initial numbers suggest that unemployment is increasing more in immigrant communities than among U.S. citizens.^{xiv} Compounding unemployment is the lack of access to federal economic aid, for which the majority of non-citizens do not qualify.^{xv}

Regarding health and wellness, immigrant communities are already at higher risk for contracting COVID-19 due to higher instances of poverty, at times overcrowded housing conditions, and a higher concentration in essential work positions where social distancing is difficult or impossible.^{xvi} On top of the increased risk, the majority of people who are undocumented do not have health insurance, do not qualify for federally subsidized health benefits, and do not

Adequate healthcare is dependent on accessibility of health insurance, leaving immigrants at greater risk of negative health outcomes if they do fall ill

have access to other affordable options to meet their needs. In Texas alone, 63 percent of all immigrants who are undocumented lack health insurance.^{xvii} Studies show that adequate healthcare is dependent on accessibility of health insurance, leaving immigrants at greater risk of negative health outcomes if they do fall ill.^{xviii} The only access to healthcare that

people who are undocumented are guaranteed is emergency medical care through the Emergency Medical Treatment and Active Labor Act, making it nearly impossible for immigrants to access preventative care and treatment.^{xix} This second one would be a bit long so if you do go with that one maybe an ellipses to cut out “through the Emergency Medical Treatment an Active labor Act”

In addition, there is pervasive mistrust of government assistance throughout immigrant communities. Historically, immigrants have feared participation in government assistance programs for fear of deportation.^{xx} This fear was amplified by the highly publicized “public charge rule” that was first proposed by the United States Citizenship and Immigration Services (USCIS) in October 2018. Because the rule would make it impossible for some immigrants to receive legal permanent status if they made use of certain public benefits, it had profound chilling effect on all immigrants’ use of the benefits for which they were eligible, whether or not the rule would even apply to them.^{xxi} Demonstrating the impact of the public charge rule, the number of immigrants using public services dropped dramatically from 2016 to 2019 as shown in this graphic from the Migration Policy Institute:

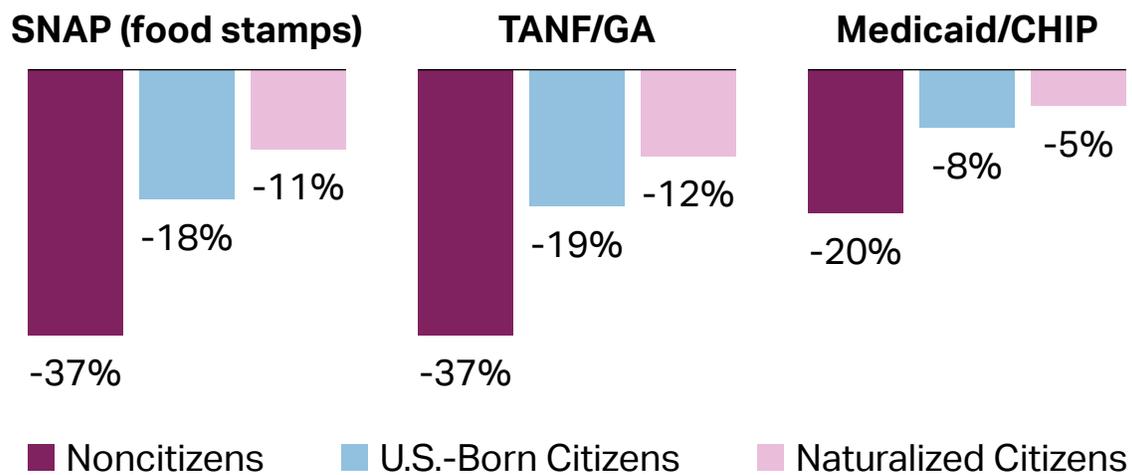


Figure 1: This graph from the Migration Policy Institute shows a decrease in use of SNAP, TANF/GA and Medicaid of 37 percent, 37 percent and 20 percent respectively by noncitizens from 2016 to 2019 compared to a decrease of approximately 20 percent across the board for citizens born in the U.S. and 5-12 percent for citizens who are naturalized.^{xxii}

These are programs that could mitigate impacts of the pandemic on immigrant communities, and yet the number of non-citizens utilizing this aid is decreasing. A decline in use of well-known public services like SNAP (food stamps) could also indicate a hesitancy to use other forms of aid that are more directly tied to pandemic relief. Therefore, the climate of mistrust in combination with a lack of access due to policies that explicitly punish immigrants for the use of public support exacerbates existing issues and makes immigrant communities more vulnerable to the health and economic impacts of the pandemic.^{xxii}

Lastly, the rapidly changing immigration policy landscape coupled with the new health, social, and economic crises brought on by the pandemic made it all the more urgent that immigrants can access high-quality, free or affordable legal information, advice, and representation. However, lack of access to immigration legal information and representation has been a significant problem for decades. In the three states that hold the overwhelming majority of pending immigration court cases, California, New York, and Texas; 26.3%, 18.2%, and 46.6% of pending cases respectively remain unrepresented.^{xxiv} This, combined with consistent reports of legal service providers operating at and above capacity, suggests that immigrants are largely unable to find legal help.^{xxv} Lack of legal information and representation have been exacerbated during the pandemic as organizations have lost funding, lost staff, and closed intake. This has left out in the cold thousands of immigrants who are desperate to understand whether they can count on health care, food assistance, or housing while they struggle through the pandemic.

Pandemic Response

Government Policies and Practices

In response to the onset of the pandemic and the requirement that all individuals socially distance to avoid spreading COVID-19, most local, state, and federal government agencies began unrolling new policies and guidance for employees and the public. EOIR – the federal agency that houses the Board of Immigration Appeals and the immigration courts – did the same. As an agency that interfaces with hundreds of thousands of individuals across the country each year, clarity and consistency were critical to ensuring predictability, equity, and fairness for immigrants. Unfortunately, while initial changes seemed to bring some relief, by mid-2020, confusion set in.

The following is a timeline of EOIR decisions surrounding pandemic protocols:

● March 15

National Association of Immigration Judges, The American Immigration Lawyers Association, and the American Federation of Government Employees Local 511 (a union representing ICE prosecutors) called for a nationwide closure of all immigration courts in response to the pandemic^{xxvi}

● March 18

EOIR released a memorandum outlining policies and practices during the pandemic including postponing non-detained hearings effective March 18.^{xxvii}

● March 31

EOIR and the Board of Immigration Appeals (BIA) established practices allowing non-citizens to submit court filings by email. This included setting up email accounts for each court to receive filing.^{xxviii}

● April 3

EOIR made a permanent change allowing for electronic signatures on filings as well as copies of original documents.^{xxix}

● June

EOIR resumed hearings of non-detained immigrants and updated pandemic policies, reopening courts in some areas while others remain closed. As courts began to reopen, the Justice Department also began shutting down the email accounts set up to receive court filings in accordance with which courts were opening up. Some emails remained active until the end of 2020.^{xxx}

As of April 2021, one year after the pandemic began impacting U.S. operations, 16 out of 69 immigration courts remain closed for non-detained hearings. Eleven of the 16 courts are in California, Texas, and New York, the three states that account for approximately 43 percent of pending immigration cases in the United States.^{xxxi} Among the courts that remain closed for non-detained hearings are courts in Houston, San Antonio, and New York City, which hear the majority of cases in Texas and New York.^{xxxii} Therefore, though 52 immigration courts are open, many of the major hubs that account for the current backlog in immigration cases remain closed.

A lack of universal, extended closure has caused a number of issues for immigrants and their legal representatives. First, in areas where courts are not reopened, some have been locked in a cycle of constant rescheduling. For example, Houston immigration courts have been pushing back hearing dates for non-detained cases every few weeks since June.^{xxxiii} Practitioners spend excess time on court preparation, especially in preparing clients, for dates that are continually rescheduled but never actually occur.^{xxxiv} Before the

pandemic, it would take days of meetings with clients to prepare them for hearings, much of which was spent going over sensitive information that could potentially re-traumatize clients.^{xxxv} During the pandemic, with the inability to meet in person, this process has been even lengthier. Thus, many practitioners experience a decrease in capacity as they spend excess time on preparing their clients to appear in court, unsure whether the hearings will happen, and then find that they and their clients must wait for yet another date to go through the same thing again.^{xxxvi}

Additionally, in areas where courts remain closed, practitioners report concern surrounding how reopening the courts will impact capacity. As more cases are added to the backlog, some practitioners fear that once the court resumes activity, cases will be scheduled immediately and very close together.^{xxxvii} This would significantly stretch the capacity of already overextended resources and disadvantage clients who may have inadequate time to prepare. The uncertainty of future work distribution contributes to service providers' reluctance to take on new clients. Unrepresented individuals would be heavily disadvantaged by this rapid scheduling of backlogged cases if they cannot find counsel, prepare their cases, and prepare themselves mentally for the hearing with such short notice and with the possibility of deportation hanging in the balance. The EOIR response to the pandemic is therefore adding stress to the system by reducing legal capacity while the need in immigrant communities continues to grow.

Adding to this, continued policy changes relevant to EOIR practice intensify confusion and hinder immigrants from accessing fair and timely hearings. Many of the recent policies threaten the ability of immigrants to obtain legal status and their well-being while their cases are pending.

The chart below shows some of the EOIR rule changes during the pandemic and their current status:

Rule	Description	Status
EOIR Fee Review ^{xxxviii}	The rule established a new EOIR asylum fee and increases existing EOIR fees	<p>The rule is in litigation and is not in effect as the preliminary injunction was granted.</p> <p>*Except: The Office of Chief Immigration Judge Motions to Reopen and Practitioner Disciplinary Appeal fees are still in place.</p>
Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure ^{xl}	The rule changes EOIR policies surrounding BIA appeals including and not limited to ending administrative closure, removes <i>sua sponte</i> reopening of cases, removes BIA's authority to review cases by self-certification, and prohibits BIA consideration of new evidence	The rule is in litigation and is not in effect as the preliminary injunction was granted. ^{xli}
Procedures for Asylum and Withholding of Removal ^{xlii}	The rule establishes, among other new regulations, a 15-day filing deadline for asylum in asylum-and-withholding-only-proceedings and a 180-day asylum adjudication clock	The rule is in litigation and is not in effect as the preliminary injunction was granted. ^{xliii}
Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review ^{xliv}	The rule substantively changes asylum/CAT law, restricting and limiting access to relief.	The rule is in litigation and is not in effect as the preliminary injunction was granted. ^{xlv}

As the chart shows, many policy changes remain in litigation and therefore varying stages of implementation. Even if the policies are not in effect, immigrants and their representatives must prepare for them to go into effect at any moment.

One new policy increased the fees associated with a range of EOIR forms, causing confusion among immigrants and representatives. When filing fees increase, applicants encounter errors in filing, missed deadlines, and other issues that make it harder to access protections for which immigrants are otherwise legally eligible. During a pandemic, not only does this keep those in need from life-saving assistance programs as immigrants are facing new and worsening conditions of poverty, joblessness, and homelessness, but the layers of confusion make an already inscrutable system much more complicated to access. This is just one example of how pandemic-related immigration court policy changes have been especially harmful given the impact of the pandemic on the economic and social well-being of immigrant communities.

On top of this, substantive immigration law changes lead to confusion among government attorneys and judges which impact immigrants' ability to access protection through the courts as this confusion can affect the outcome of cases. A number of substantive legal changes issued in the last year have been especially harmful. One example is "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review", which directly changes who can receive immigration relief and creates a more restrictive process for evaluating the merits of cases. Among many other things, the rule severely narrows the definitions of "persecution" and "particular social group", eliminates gender-based asylum, restricts the type of evidence that asylum seekers can present, and sets higher bars for passing "credible fear" screenings.^{xlvii}

In addition to the direct harm that this rule could cause by limiting access to relief for immigrants, many of whom are trauma survivors, it also serves as an example of further complications caused by rapid policy changes. After its publication, the rule was heavily publicized and condemned by advocates, adding to the confusion about immigration laws and policies. Then the rule was litigated, so its status remained unclear as advocates, immigrants, judges, and government attorneys waited to see how the rule would impact specific cases. Though it has become common for immigration policies to go through litigation, there is no clear process for communicating to government employees and direct service providers – let alone unrepresented immigrants – the status of these policies. This confusion further draws attorneys' time and capacity away from their clients as they must investigate the status of new policies to best represent their clients. This ultimately leads to attorneys spending more time and resources sorting out confusions rather than taking on new cases and drags our current cases, leaving immigrants in limbo for longer.

Communication Difficulties

In addition to government policies and procedures, communication among legal representatives and their clients poses another barrier for non-detained immigrants seeking relief from deportation through immigration courts. The COVID-19 pandemic has drastically changed the way that attorneys interact with clients. In the past, face-to-face interactions allowed lawyers to gather information, get signatures, and build rapport all in fewer sessions. To adapt, most client contact is over the phone or through video calls if available. However, most clients do not have access to reliable technology to accommodate virtual work for their cases, like stable internet access, computers, video conferencing capabilities, scanners, or printers.^{xlviii} Also, clients do not have access to free resources they have historically relied on, like public libraries.^{xlix} This means that most work with clients has to be done

All direct service providers consulted reported that utilizing mail to receive client signatures and documents stretched out work that used to be done in days to weeks

over the phone and through the mail. All direct service providers consulted reported that utilizing mail to receive client signatures and documents stretched out work that used to be done in days to weeks.¹ This, again, decreases attorney capacity as more time is spent on individual cases than pre-pandemic.

Client Safety and Wellbeing

Lastly, a significant barrier to immigrants' pursuit of status

through immigration courts is the effect that the pandemic has on their well-being and the repercussions of this on their cases. Many immigrants seeking status are survivors of gender-based violence. For them, economic and health insecurity related to the pandemic may have forced them to stay with or return to an abuser or someone who has exploited them. Isolation and ongoing abuse are detrimental to the individual's immediate safety and cause short- and long-term mental health consequences. The ability of an individual in this type of situation to access legal help, prepare and file an immigration case, and appear before a tribunal such as immigration court is severely compromised. Fear inspired by policy changes such as the public charge rule or the rules that could eliminate gender-based violence further intensify the isolation, risk to safety, and emotional and mental stress experienced by survivors.

Ultimately, immigrants are suffering during this pandemic: physically, mentally, and economically, and each of these crises exacerbates the other creating a serious threat to the overall wellbeing of immigrant communities in the United States.

Conclusions

The COVID-19 pandemic's widespread effects have pushed established systems to their breaking point and continue to put pressure on populations already under stress. The pandemic is exacerbating barriers to relief that already existed and further limiting the ways in which people can realistically expect to seek status in immigration court while also extending their timelines even further in a court system with over 1.2 million backlogged cases.^{li}

In particular, for immigrants who are not detained and facing deportation, the rapid, confusing policy changes, uncertain and varied court closures, and strained communication channels with representatives, are significantly limiting the capacity of direct service providers. As a result, we will likely see a further decrease in the percentage of populations served, leading to many people who otherwise might qualify for relief from deportation losing their cases for status and protection.

Not only will there likely be a decrease in legal help provided to those in need, but also without comprehensive support, we will continue to see immigrant communities suffering economically, physically, and mentally under the weight of this pandemic. All of these issues lead to fewer people who will receive the help that they need and fewer people who have a meaningful path to justice in the U.S. immigration system.

Recommendations

- Congress must pass pandemic relief inclusive of immigrant communities' needs to help mitigate the health and economic crisis that is pressing down upon immigrant communities and include clear messaging that the access of this relief will not impact attempts to gain legal status.
- Policies that make it harder for immigrants to access fair and timely hearings in immigration court must be eliminated. Prosecutorial discretion must be reinstated to reduce backlogs, and immigrants with pending applications before other agencies such as USCIS should have their cases for deportation closed.
- In the coming months, EOIR must invite robust stakeholder engagement to plan for the reopening of all courts. It must install safeguards to prevent a wave of rescheduled cases that further overwhelm immigrants in removal proceedings and their representatives, improve procedures for communicating with immigrants and other stakeholders, and ensure clarity and consistency in the application of emergency procedures going forward.

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- ii. "Immigration Court," chart.